COMMENTARY
SUBTITLE II. OFFENSES AGAINST PERSONS

RCC § 22E-1101. Murder.

Explanatory Note. *This section establishes the first degree and second degree murder offenses for the Revised Criminal Code (RCC). The revised first degree murder offense criminalizes purposely, with premeditation and deliberation, causing the death of another person. The RCC's murder statute replaces the current first degree and second degree murder statutes,[1] the special form of first degree murder by obstruction of a railroad, D.C. Code § 22-2102, and the special form of first degree murder of a law enforcement officer, D.C. Code § 22-2106. The revised first degree murder statute also replaces penalty provisions and penalty enhancements authorized under §§ 21-2104, 22-2104.01 and 24-403.01(b-2). An actor who knowingly causes the death of another under aggravating circumstances is subject to the enhanced penalty provision under subsection (c). In addition, insofar as they are applicable to current first degree murder offense, the revised first degree murder statute also partly replaces the protection of District public officials statute[2] and six penalty enhancements: the enhancement for committing an offense while armed;[3] the enhancement for senior citizens;[4] the enhancement for citizen patrols;[5] the enhancement for minors;[6] the enhancement for taxicab drivers;[7] and the enhancement for transit operators and Metrorail station managers.[8]*

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

[1] D.C. Code § 22-2101, 2103. Under current law, first degree murder criminalizes three types of murder: (1) purposely causing the death of another with premeditation and deliberation; (2) purposely causing the death of another while committing or attempting to commit any felony; or (3) causing the death of another, with or without purpose, while committing or attempting to commit first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, kidnaping, burglary while armed with or using a dangerous weapon, or any felony involving a controlled substance. Currently, second degree murder criminalizes three different versions of murder: (1) knowingly causing the death of another without premeditation and deliberation; (2) causing the death of another with intent to cause serious bodily injury; and (3) causing the death of another with extreme recklessness, also known as acting with a "depraved heart." The RCC first degree murder offense replaces: purposely causing the death of another with premeditation and deliberation form of murder.

[2] D.C. Code § 22-851.

[3] D.C. Code § 22-4502.

[4] D.C. Code § 22-3601.

[5] D.C. Code § 22-3602.

[6] D.C. Code § 22-3611.

[7] D.C. Code §§ 22-3751; 22-3752.

[8] D.C. Code §§ 22-3751.01; 22-3752.

[9] The specified felonies are: First or second degree arson as defined in RCC § 22E-2501; First degree sexual assault as defined in RCC § 22E-1301; First degree sexual abuse of a minor as defined in RCC § 22E-1302; First degree burglary as defined in RCC § 22E-2701, when committed while possessing a dangerous weapon on his or her person; First and second degree robbery as defined in RCC § 22E-1201; or First or second degree kidnapping as defined in RCC § 22E-1401.

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

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

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

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

[11] D.C. Code § 22-851.

[12] D.C. Code § 22-4502.

[13] D.C. Code § 22-3601.

[14] D.C. Code § 22-3602.

[15] D.C. Code § 22-3611.

[16] D.C. Code §§ 22-3751; 22-3752.

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

[18] D.C. Code § 22-2102.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[28] See Commentary to RCC § 22E-206.

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

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

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

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

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

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

homicide and the underlying felony."[35] The death must have been caused by an act "in furtherance" of the underlying felony.[36] The revised statute codifies this case law by requiring that the death be "in the course of and in furtherance of committing, or attempting to commit" an enumerated offense.[37]

Subsection (c) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[38] However, as discussed above, extreme indifference to human life in paragraph (b)(1) of the RCC murder statute requires that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been sober. The terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.[39]

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and weighs against finding that the person acted with extreme indifference to human life.[40] In these cases, although the

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

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

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

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

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

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

awareness of risk may be imputed, the person could still be acquitted of second degree murder. However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for involuntary manslaughter[41], provided that his or her conduct was clearly blameworthy.

Subsection (d) establishes the penalties for first and second degree murder. [*See* Fourth Draft of Report #41.]

Paragraph (d)(3) provides enhanced penalties for both first and second degree murder. If the government proves the presence of at least one aggravating factor listed under paragraph (d)(3), the penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class. These penalty enhancements may be applied in addition to any penalty enhancements authorized by RCC Chapter 6.

Subparagraph (d)(3)(A) specifies that recklessness as to whether the decedent is a protected person is an aggravating circumstance. Recklessness is defined at RCC § 22E-206, and requires that the actor was aware of a substantial risk that the deceased was a protected person, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. The term "protected person" is defined in RCC § 22E-701.[42]

Subparagraph (d)(3)(B) specifies that causing the death of another "with the purpose" of harming the decedent because of his or her status as a law enforcement officer, public safety employee, or district official is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that

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for depraved heart murder under the RCC if X's conduct manifested an extreme indifference to human life.

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

[41] RCC § 22E-1102.

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

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

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

(C) A vulnerable adult;

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

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

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

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

person because of his or her status as a law enforcement officer, public safety employee, or District official.[43] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[44] "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant was a law enforcement officer, public safety employee, or District official, only that the actor consciously desired to cause the death of a person of such a status.

Subparagraph (d)(3)(C) specifies that murder committed with intent to avoid or prevent a lawful arrest or effect an escape from custody is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose" a term defined at RCC § 22E-206, which means that the actor must consciously desire or be practically certain that the actor will avoid or prevent a lawful arrest, or escape from custody. Per RCC § 22E-205, the object of the phrase "with intent" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the actor actually avoided or prevented a lawful arrest or effected an escape from custody, only that the actor consciously desired or was practically certain the actor would avoid or prevent lawful arrest, or effect an escape from custody.

Subparagraph (d)(3)(D) specifies that murder committed for hire is an aggravating circumstance. This aggravating circumstance is satisfied if the actor received anything of pecuniary value from another person in exchange for causing the death. This subparagraph also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must have been practically certain that he or she would receive anything of value in exchange for causing the death of another.

Subparagraph (d)(3)(E) specifies that the infliction of extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death is an aggravating circumstance.[45] This subparagraph also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must have been practically certain that his or her conduct would cause extreme physical pain or mental suffering for a prolonged period of time prior to the decedent's death.

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

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

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

Subparagraph (d)(3)(F) specifies that mutilating or desecrating the decedent's body is an aggravating circumstance.[46] This subsection also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must be practically certain that he or she mutilated or desecrated the body after death.

Subparagraph (d)(3)(G) specifies that substantial planning is an aggravating circumstance. Substantial planning requires more than mere premeditation and deliberation. The term "substantial planning" is intended to have the same meaning as under current law.[47] Although substantial planning does not require an intricate plot, the accused must have formed the intent to kill a substantial amount of time before committing the murder.[48] This subparagraph uses the term "in fact," which specifies that no culpable mental state applies to this aggravating circumstance.

Subparagraph (d)(3)(H) specifies that committing a murder by shooting from a vehicle that is being driven at the time of the shooting is an aggravating circumstance. This aggravating factor requires that the murder was committed by shooting from a car that is being driven, either by the shooter or a third party. This aggravating factor does not include shootings committed from a vehicle that is not being operated or driven at the time of the shooting. This subparagraph also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must be practically certain that he or she committed the murder by shooting from a vehicle being drive at the time.

Subparagraph (d)(3)(I) specifies that committing a murder with the purpose of harming the decedent because he was or had been a witness in any criminal investigation or judicial proceeding, or the decedent was capable of providing or had provided assistance in any criminal investigation or judicial proceeding is an aggravating circumstance. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant had actually been a witness or provided assistance in a criminal investigation or judicial proceeding, only that the actor consciously desired to harm a person who was or had been a witness, or who was capable of providing, or had provided, information in any criminal investigation or judicial proceeding.

Subsection (e) provides for a bifurcated proceeding when a person is charged with penalty enhancements under subparagraphs (c)(3)(E) or (c)(3)(F). In the first stage of the proceeding, the fact finder shall only consider evidence relevant to determining whether the accused committed either first or second degree murder. Evidence that is relevant to determining whether aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F) are not admissible at this stage, unless it is relevant to determining whether the accused committed either first or second degree murder. In the second stage of the proceeding,

[46] For example, a defendant who cuts off body parts, disfigures body parts, or who uses the deceased's body for sexual gratification may satisfy this aggravating circumstance.
[47] D.C. Code §§ 22-2104.01, 22-2403.01(b-2).
[48] For example, if days before a murder, the defendant plans out how he will ambush the victim, and chooses a weapon for the purpose of carrying out the murder, the substantial planning circumstance would be satisfied.

the fact finder may consider evidence relevant to determining whether aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F). This bifurcated procedure limits the admissibility of unfairly prejudicial evidence during the first stage. This subsection also specifies that the same jury or fact finder will serve at both stages of the proceeding.

Subsection (f) defines defenses applicable to first and second degree murder. Paragraph (f)(1) provides that in addition to any other defenses otherwise applicable to the accused's conduct, the presence of mitigating circumstances is a defense to prosecution for first degree murder, or second degree depraved heart murder. This paragraph provides a non-exhaustive definition of mitigating circumstances.[49]

Subparagraph (f)(1)(A) first defines mitigating circumstances as acting under the influence of extreme emotional disturbance for which there was a reasonable cause. "Extreme emotional disturbance" refers to emotions such as "rage," "fear or any violent and intense emotion sufficient to dethrone reason."[50] Subparagraph (e)(1)(A) further specifies that the reasonableness of the cause of the disturbance shall be determined from the viewpoint of a reasonable person in the actor's situation under the circumstances as the actor believed them to be. The "actor's situation" includes some of the actor's personal traits, such as physical disabilities[51], or temporary emotional states,[52] which should be taken into account in determining reasonableness. However, the actor's idiosyncratic values or moral judgments are irrelevant.[53] Subparagraph (e)(1)(A) also specifies that reasonableness shall be determined from the accused's situation "as the actor believed them to be." This language clarifies that the actor's *factual* beliefs, even if inaccurate, must be taken into account in determining whether the cause of the extreme emotional disturbance was reasonable.[54] The fact finder must determine in each case whether the provoking circumstance was a reasonable cause of the extreme emotional disturbance, such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[55]

Subparagraph (f)(1)(B) defines mitigating circumstances to include acting under an unreasonable belief that the use of deadly force was necessary to prevent imminent death or serious bodily injury under the circumstances. This form of mitigation may arise

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

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

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

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

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

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

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

in the context of imperfect self-defense or the defense of others.[56] A person is justified in using deadly force if he reasonably believes he, or another person, is in imminent danger of serious bodily harm or death, and that the use of deadly force was necessary to prevent the infliction of that harm.[57] Use of deadly force with such a reasonable belief is a complete defense to liability.[58] If the actor genuinely believes these circumstances exist, but that belief in either circumstance is unreasonable¸ subparagraph (e)(1)(B) clarifies that the actor is not guilty of murder, but is guilty of voluntary manslaughter.[59]

Subparagraph (f)(1)(C) further defines mitigating circumstances to broadly include any other legally-recognized partial defense to murder. For example, an unreasonable belief in any circumstance that would provide a legal justification for the use of lethal force, apart from self-defense or defense of others, may constitute a mitigating circumstance.[60]

Paragraph (f)(2) specifies the effect of the mitigation defense in a murder prosecution. If evidence of mitigation has been presented at trial and the government fails to meet its burden of proving that mitigating circumstance were absent, but proves all other elements of murder, then the accused is not guilty of murder but is guilty of voluntary manslaughter.[61]

Paragraph (f)(3) specifies defense to prosecution for felony murder under paragraph (b)(2). First, the defense requires that the actor does not commit the lethal act. This element may be satisfied when someone other than the actor, either a fellow participant in a predicate felony, the person who is the target of the predicate felony, or a third party, commits the lethal act.[62] Second, the defense requires one of two additional elements described in subparagraphs (f)(3)(A) and (f)(3)(B). Subparagraph (f)(3)(A) requires that the actor believes that no participant in the felony intends to cause death or

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

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

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

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

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

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

[62] For example, if in the course of a robbery of a store, the clerk fires a shot in self-defense and hits and kills a bystander, this element of the defense would be satisfied.

serious bodily injury. This element may be satisfied when the actor is an accomplice and believes that the principal does not intend to cause death or serious bodily injury, or if the actor commits the predicate offense alone and the actor does not intend to cause death or serious bodily injury. "Intent" is a defined term that here requires that the actor believes that no participant in the predicate felony consciously desires or is practically certain that he or she will cause death or serious bodily injury in the course of the felony. This element may be satisfied even if the actor believes that a participant in the predicate felony intends to engage in conduct that creates a *risk* of causing death or serious injury.[63] Although the actor must genuinely hold this belief, the belief need not be objectively reasonable.[64] Alternatively, subparagraph (f)(3)(b) requires that the actor made reasonable efforts to prevent another participant in the predicate felony from causing death or serious bodily injury. This element of the defense may be satisfied even if the actor believed a co-felon intended to cause death or serious bodily injury.[65]

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

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

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

First, under the revised murder statute, felony murder is graded as second degree murder. Under the current first degree murder statute, a person may be convicted if he or she unintentionally causes the death of another while committing or attempting to commit a specified felony.[66] Such an unintentional felony murder is currently punished more severely than an intentional, but non-premeditated killing (which currently constitutes second degree murder), subjecting the defendant to a life sentence if the government can prove that at least one aggravating circumstance was present.[67] Moreover, one of the possible aggravating circumstances that enhances penalties for first degree felony murder

[63] For example, if a getaway driver for a robbery knows that the robber intends to brandish a gun to threaten a store clerk, but believes that the robber will only frighten but not harm the clerk, the defense would apply even if the robber kills the clerk. This element of the defense is satisfied even though brandishing a gun creates a risk of death or serious bodily injury.

[64] Requiring that the belief be reasonable would extend felony murder liability to actors who were merely *negligent* as to whether an accomplice or another person intended to cause death or serious bodily injury. When a person does not actually cause the death of another, mere negligence is an insufficient degree of culpability to warrant felony murder liability. Other homicide charges may be brought for a negligent killing.

[65] For example, A and B kidnap C and hold him for ransom. When C's family refuses to pay the ransom, A decides to kill C. B does not want C to be killed, and alerts the police and physically attempts to prevent B from harming C. If B still manages to kill C, the defense would apply to A, even though he was aware that B intended to kill C.

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

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

is that the killing occurred while the accused was committing or attempting to commit "kidnapping,"[68] "robbery, arson, rape, or a sexual offense,"[69] and the DCCA has held that the predicate felony for felony murder can also serve as an aggravating circumstance.[70] Consequently, under current law, an unintentional murder that occurs during a robbery, arson, sexual offense, or kidnapping is subject to a more severe maximum sentence than even a premeditated, intentional killing (which currently constitutes first degree murder absent aggravating circumstances). By contrast, under the RCC, unintentionally causing the death of another while committing an enumerated felony constitutes second degree murder. This change improves the proportionality of penalties under the RCC by treating killings committed with a lower culpable mental state less severely.

Second, the revised murder statute eliminates as a distinct form of first degree murder purposely causing the death of another while "perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary."[71] The DCCA has held that an "offense punishable by imprisonment in the penitentiary refers to any felony.[72] Under the RCC, the grading with respect to general felony conduct is simplified, such that purposely causing the death of another person with premeditation and deliberation is first degree murder, while purposeful killing without premeditation or deliberation will still be covered by the second degree murder offense. This change improves the clarity and proportionality of the revised criminal code.

Third, the revised first degree murder statute eliminates as a distinct form of murder D.C. Code § 22-2102, which requires that the accused "maliciously places an obstruction upon a railroad or street railroad . . . and thereby occasions the death of another."[73] In contrast, the RCC treats killings caused by obstructing railroads the same as any other killings, with charges dependent on the accused's culpable mental state, and the presence of aggravating or mitigating circumstances. The fact that a killing occurs by means of obstructing a railroad no longer, by itself, renders the killing first degree murder. This change improves the proportionality of the revised homicide statutes by ensuring that the accused's culpable mental state remains the primary grading factor, instead of the specific means of placing obstructions upon a railroad or street railroad.

Fourth, the revised second degree murder statute changes the specified felonies that may serve as a predicate offense for "felony murder" in five ways.[74] The current felony murder predicates include: (1) all conduct constituting "robbery," currently an

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[68] There is only one grade of kidnapping under current law. The CRCC recommends dividing the kidnapping offense into two penalty grades. RCC § 22E-1401.

[69] D.C. Code § 22-2104.01 (b)(8).

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

[71] D.C. Code § 22-2101.

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

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

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

ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[75] (4) mayhem; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[76] By contrast, the RCC clarifies, and in several respects reduces, the conduct that is a predicate for felony murder. First, the revised statute states that first and second degree robbery are predicates for felony murder, but does not include the RCC's third degree robbery as a predicate offense, or pickpocketing-type conduct that is treated as theft from a person[77] in the RCC. Eliminating such conduct as predicates for felony murder improves the statute's proportionality because such conduct does not involve infliction of significant bodily injury or the use of a weapon, and lacks the inherent dangerousness of first and second degree robbery.[78] Second, the revised second degree murder offense does not include the RCC's criminal abuse of a minor offense. Under the current D.C. Code, first degree child cruelty is included as predicate offense for felony murder. Omitting criminal abuse of a minor as a predicate for felony murder improves the proportionality of the statute, as the offense criminalizes recklessly causing serious or significant bodily injury. If this offense is included as a predicate, recklessly causing the death of another, which is typically criminalized under the RCC's involuntary manslaughter offense, is elevated to second degree murder. The other predicate offenses for felony murder under the RCC all require knowing or intentional conduct. Third, the revised second degree murder offense does not include felonies involving a controlled substance as predicates for felony murder. Omitting controlled substance offenses from the enumerated offenses improves the proportionality of the felony murder rule, as controlled substance offenses do not present the same inherent, direct risk of physical harm to others as compared to the other enumerated felonies.[79] Fourth, the revised second degree murder offense no longer includes "mayhem" as a predicate for felony murder. Mayhem is a common law offense that is replaced under the RCC by the revised

[75] D.C. Code §22-2101.

[76] Under current law, burglary is divided into two grades, both of which appear to be included in the felony murder statutory reference to "housebreaking." The original 1901 Code codified the offense now known as burglary, but called it "housebreaking." The original "housebreaking" offense only had one grade, and criminalized entry of *any building* with intent to commit a crime therein. In 1940, Congress amended the first degree murder statute and included an enumerated list of felonies, which included housebreaking, for felony murder. See H.R. Rep. Doc. No. 76-1821, at 1 (1940) (Conf. Rep). In 1967, Congress relabeled "housebreaking" as "second degree burglary," and created first degree burglary, which required that the burglar entered an occupied dwelling. However, the DCCA has held that only the current first degree burglary offense may serve as a predicate to non-purposeful felony murder. *Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014).

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

[78] Third degree robbery requires that the defendant took property from the immediate actual possession of another by means of either: 1) causing bodily injury to any one present; 2) communicating that any person will immediately cause bodily injury, a sexual act, a sexual contact, confinement, or death; 3) applying physical force that moves or immobilizes another; or 4) by removing property from the arms or hands of the complainant.

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

first degree and second degree assault offenses.[80] The revised statute does not include these offenses as enumerated predicate offenses as unnecessary. In most cases, a person who causes the death of another while committing or attempting to commit first or second degree assault can be convicted of second degree murder under a depraved heart theory.[81] Omitting these offenses from the enumerated predicate offenses improves the clarity of the code. Lastly, the revised second degree murder offense replaces the phrase "any housebreaking while possessing a dangerous weapon" with "first degree burglary while possessing a dangerous weapon on his or her person." Under current law, only first degree burglary while armed may serve as a predicate offense,[82] and the current first degree burglary offense requires that the accused entered an occupied dwelling. This largely corresponds to the RCC's first degree burglary offense, with only minor changes to current law.[83]

Fifth, the revised second degree murder offense requires that, for felony murder, the accused must have caused the death of another while acting "in furtherance" of the predicate felony. The current statute does not specify that the accused cause the death of another "in furtherance" of the underlying felony, and the DCCA has held that "[t]here is no requirement in the law . . . that the government prove the killing was done in furtherance of the felony in order to convict the actual killer of felony murder."[84]

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

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

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

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

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

However, while there is no "in furtherance" requirement under current law,[85] the DCCA has held that "[m]ere temporal and locational coincidence"[86] between the underlying felony and the death are not enough. There must have been an "actual legal relation between the killing and the crime . . . [such] that the killing can be said to have occurred *as a part of the perpetration of the crime*."[87] By contrast, the revised statute, through use of the "in furtherance" phrase, requires that the accused's conduct that caused the death of another in some way facilitated the commission or attempted commission of the offense, including avoiding apprehension or detection of the offense or attempted offense.[88] Practically, this change in law may have little impact, as most cases in which the accused causes the death of another as "part of perpetration of the crime," he or she would also have been acting in furtherance of the crime. However, this change improves the proportionality of the offense insofar as a person whose risk-creating behavior is not in furtherance of the felony is not as culpable as a person who otherwise negligently kills someone in the course of committing a specified felony.[89]

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

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

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

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

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

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

with extreme indifference to human life, it is possible, however unlikely, that self-induced intoxication reduces the blameworthiness, and negates finding that the person acted with extreme indifference to human life.[90]

The current murder statutes are silent as to the effect of voluntary intoxication, but the DCCA has held that, although evidence of self-induced intoxication may negate a finding that the defendant acted with premeditation as required for first degree murder, it "may not reduce murder to voluntary manslaughter, nor permit an acquittal of [second degree] murder."[91] The DCCA further clarified that evidence of voluntary intoxication "is not admissible to disprove [the element of] malice' integral to the crime of murder."[92] By contrast, although subsection (c) allows for imputation of the awareness of risk, in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for second degree murder. This change improves the proportionality of the revised offense.

In addition, to the extent that the voluntary intoxication provision changes current law with respect to any of the predicate offenses for felony murder, the provision also changes current law as to felony murder.[93] If voluntary intoxication negates the requisite culpable mental state required for a predicate offense, there can be no felony murder liability based on that offense.[94] These changes improve the clarity, completeness, and proportionality of the revised offense.

Seventh, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that the murder was committed in the course of kidnapping or abduction, or attempt to kidnap or abduct. The current first degree murder statute is subject to a penalty enhancement where it is proven that the murder was committed in the course of a kidnapping, abduction, or attempted kidnapping or abduction.[95] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. In any case in which a person recklessly, with extreme indifference to human life, kills another while committing or attempting to commit kidnapping, the person may be convicted and separately sentenced for kidnapping or attempted kidnapping, which substantially increases the maximum allowable punishment beyond a murder not committed in the course of a kidnapping or attempted kidnapping. Eliminating this aggravating circumstance reduces unnecessary overlap between offenses[96], and improves

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[90] *Infra*, at 41.

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

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

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

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

[95] D.C. Code § 22-2104.1(b)(1).

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

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

Eighth, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that the murder was committed while committing or attempting to commit a robbery, arson, rape, or sexual offense. The current first degree murder statute is subject to a penalty enhancement where it is proven that the murder was committed "while committing or attempting to commit a robbery, arson, rape, or sexual offense."[97] The terms "rape" and "sexual offense" are undefined by the current statute, and there is no case law on point.[98] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. Even with the omission of this aggravating circumstance, the accused may still be separately convicted and sentenced for the robbery, arson, rape, or other sexual offense, which substantially increases the maximum allowable punishment beyond a murder not committed in the course of robbery, arson, rape, or another sexual offense. Eliminating this aggravating circumstance reduces unnecessary overlap between offenses,[99] and improves the clarity and proportionality of the revised statute by preventing both an enhanced penalty for the murder and a separate conviction and sentence for the other felony offense.

Ninth, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that there was more than one first degree murder arising out of one incident. The current first degree murder statute is subject to a penalty enhancement when there was more than one offense of murder in the first degree arising out of one "incident."[100] The term "incident" is not defined by the statute, and there is no case law on point. By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. In any case in which the accused commits more than one murder, that person may be convicted and sentenced for multiple counts of murder, which allows for punishment proportionate to the conduct.[101] Eliminating this

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

[97] D.C. Code § 22-2104.01(b)(8).

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

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

[100] D.C. Code § 22-2104.1(b)(6).

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

aggravating circumstance reduces unnecessary overlap between offenses,[102] and improves the clarity and proportionality of the revised statute by preventing both enhanced penalty for each murder and a separate conviction and sentence for the additional murders.

Tenth, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that the murder was a drive-by or random shooting. The current first degree murder statute is subject to a penalty enhancement when the murder "involved a drive-by or random shooting."[103] There is no District case law on the meaning of "random." By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance because the circumstance is vague and drive-by or random shootings are not sufficiently distinguishable from other murders to justify a more severe sentence. It is unclear both what connection would suffice to establish that a murder "involved" a drive-by or random shooting, and what the meaning of "random" is in this context[104]. In addition, murders committing by random or drive-by shootings do not categorically inflict greater suffering on the victim, nor are they significantly more culpable than murders committed by other means.[105] Eliminating this aggravating circumstance improves the clarity and proportionality of the revised statute by preventing enhanced penalties for murders that are not categorically more heinous or culpable than other types of murder.

Eleventh, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that the murder was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression. The current first degree murder statute is subject to a penalty enhancement when the murder was "committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression[.]"[106] A separate bias-related crime penalty enhancement in current D.C. Code § 22-3703 increases the maximum punishment for any murder by one and a half times when the murder "demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, …sexual

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

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

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

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

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

orientation, gender identity or expression…."[107] By contrast, the penalty enhancements under subsection (d) omit this aggravating circumstance as unnecessary because bias motivated murders will be subject to a general penalty enhancement under RCC § 22E-607. Omitting this aggravating circumstance reduces unnecessary overlap between statutes[108] and improves the proportionality of the offense by precluding bias motivations from enhancing penalties twice, both as an aggravating circumstance and under the separate bias enhancement.

Twelfth, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that the accused had previously been convicted of murder, manslaughter, or other enumerated violent offenses. The current first degree murder statute is subject to a penalty enhancement when the accused had previously been convicted of certain violent offenses.[109] Separate repeat offender penalty enhancements in current D.C. Code §§ 22-1804 and 22-1804a potentially increases the maximum punishment for any murder committed by a person with one or two prior convictions for certain offenses (including those currently as aggravating circumstances for first degree murder.)[110] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. The general penalty enhancement for recidivist conduct under RCC § 22E-606 provides for enhanced penalties. Omitting this aggravating circumstance reduces unnecessary overlap between criminal statutes[111] and improves the proportionality of the offense by precluding prior convictions from enhancing penalties twice, both as an aggravating circumstance and under the separate recidivist enhancement.

Thirteenth, the penalty enhancements under paragraph (d)(3) include as an aggravating circumstance that the murder was committed for the purpose of harming the victim because of the victim's status as a law enforcement officer or public safety employee, or District official. Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[112] Under current law, an accused who knowingly causes the death of a law enforcement officer or public safety employee, with knowledge or reason to know that the victim was an on-duty law enforcement officer or public safety employee, or "on

[107] D.C. Code §§ 22-3701, 22-3703.

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

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

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

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

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

account of performance"[113] of the officer's or employee's official duties is guilty of a separate murder of a law enforcement officer offense. A separate penalty enhancement in current D.C. Code § 22-3602 increases the maximum punishment for any murder by one and a half times when the murder is of "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol."[114] A separate offense criminalizes harming District officials or employees and their family members.[115] By contrast, penalty enhancements under subsection (d) include as an aggravating circumstance that the murder was committed with the purpose of harming the victim because of the victim's status as a law enforcement officer, public safety employee, or District official. Inclusion of this this aggravating circumstance replaces the murder of a law enforcement officer offense that exists under current law.[116] Use of the RCC's "law enforcement officer" definition also changes current law by including certain types of officers that are not included under the current murder of a law enforcement officer statute.[117] This aggravating circumstance covers only a subset of District employees—District officials—and does not include citizen patrol members, consistent with other provisions in the RCC.[118] Including this aggravating circumstance, and eliminating the separate murder of a law enforcement officer, reduces unnecessary overlap between criminal statutes and improves the clarity and consistency of the revised code.

Fourteenth, the penalty enhancements under paragraph (d)(3) include as an aggravating circumstance that the accused was reckless as to the victim's status as a "protected person," a term defined under RCC § 22E-701, which includes "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of official duties," or a "District official, while in the course of official duties." Under current law, the aggravating circumstances that authorize a life sentence for murder do not include the victim's status as an on duty law enforcement officer, public safety employee, transportation worker, District official or employee, or citizen patrol member. However, separate statutes authorize enhanced penalties based on the victim's status as a specified transportation worker,[119] or status as a citizen patrol member.[120] Separate statutes also criminalize murder of a law enforcement officer engaged in official

[113] D.C. Code § 22-2106.
[114] D.C. Code § 22-3602(b).
[115] D.C. Code §22-851.
[116] D.C. Code § 22-2106.
[117] The RCC's "law enforcement officer" definition includes; "any…reserve officer, or designated civilian employee of the Metropolitan Police Department;" "any licensed special police officer"; and "any officer or employee…of the Social Services Division of the Superior Court…charged with intake, assessment, or community supervision." These types of officers are not included in the definition of "law enforcement officer" in the current murder of a law enforcement officer statute.
[118] For more information on the RCC definition of "District official," see commentary to RCC § 22E-701.
[119] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22- 3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).
[120] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).

duties,[121] and harming District officials or employees and their family members as separate offenses.[122] By contrast, the penalty enhancements under subsection (d) include as an aggravating circumstance that the victim was a "protected person."[123] This term is defined to include persons vulnerable due to youth or old age, a specified transportation worker, or a law enforcement officer engaged in official duties, and replaces the current D.C. Code's separate penalty enhancements, and the murder of a law enforcement officer offense. Under the revised term, a victim's status as a member of a "citizen patrol" no longer is sufficient for an enhanced murder penalty. Including recklessness as to victim being a protected person as an aggravating circumstance, and eliminating the separate penalty enhancements, and the separate murder of a law enforcement officer improves the clarity and consistency of the revised code.

Fifteenth, the penalty enhancements under paragraph (d)(3), through use of the term "protected person," change the range of victims' ages that qualify as an aggravating circumstance. Under current law, three separate statutory provisions authorize heightened penalties for murder based on the age of the victim. Both first and second degree murder are punishable by a lifetime sentence if the victim was less than 12 years old or more than 60 years old.[124] Separate statutes allow for penalty enhancements of one and one half times the maximum authorized punishment for murder if the victim was 65 years of age or older[125], or less than 18 years of age if the perpetrator was at least 18 years of age and at least two years older than the victim.[126] By contrast, the penalty enhancements under subsection (d), through use of the term "protected person," include as aggravating circumstances that the victim was less than 18 years old—if the actor is at least 18 years old and at least 4 years older than the complainant—or the victim was 65 years or older—when the actor is under the age of 65 and at least 10 years younger than the complainant.[127] This aggravating circumstance replaces both the age based aggravating circumstances under current law, and the separate statutory penalty enhancements based on the victim's age, insofar as they apply to murder. This change in law improves the consistency of the current and revised code.[128]

Sixteenth, the revised murder statute does not provide enhanced penalties for committing murder while armed with a dangerous weapon. Under current law, murder is subject to heightened penalties if the accused committed the offense "while armed" or

[121] The current murder of a law enforcement officer offense criminalizes causing the death of an on-duty law enforcement officer or public safety employee "with knowledge or reason to know the victim is a law enforcement officer or public safety employee." D.C Code § 22-2106.
[122] D.C. Code §22-851.
[123] For more information on the RCC definition of "protected person," see commentary to RCC § 22E-701.
[124] D.C. Code § 24-403.01 (b-2)(2)(G).
[125] D.C. Code §22-3601.
[126] D.C. Code § 22-3611.
[127] RCC § 22E-701.
[128] This aggravating circumstance may also change current law in another way. It is unclear whether under current law, a felony murder predicated on first degree child cruelty is subject to penalty enhancement due to the victim's status as a minor. Under the revised second degree murder offense, first degree child abuse and second degree child abuse are predicate offenses for felony murder. Under the RCC, a second degree felony murder predicated on child abuse is, in addition, subject to a penalty enhancement based on the victim's status as a minor.

"having readily available" a dangerous weapon.[129] In contrast, under the revised statute, committing murder while armed does not increase the severity of penalties. As a practical matter, nearly all murders involve a dangerous weapon, and raising the gradation of murder in all instances using a dangerous weapon would increase liability significantly compared to the current murder statute. Moreover, as a practical matter, it is unclear whether the current code's separate weapon enhancement significantly affect sentences for murder. This change improves the proportionality of the revised code, as murder while armed does not inflict greater harm than unarmed murder, and therefore does not warrant heightened penalty.

Seventeenth, the penalty enhancements under paragraph (d)(3) do not require separate written notice and a separate hearing as is required under D.C. Code § 22-2104.01(a), or a separate written notice prior as is required under § 22-403.01(b-2)(A). Under current law, § 22-2104(a) requires that the government notify the accused in writing at least 30 days prior to trial if intends to seek a sentence of life imprisonment without release.[130] When the government alleges that aggravating circumstances enumerated under § 22-2104.01 were present, a separate sentencing proceeding must be held "as soon as practicable after the trial has been completed to determine whether to impose a sentence of more than 60 years[.]"[131] Following the hearing, if the sentencing court wishes to impose a sentence greater than 60 years, a finding in writing must state whether, beyond a reasonable doubt, one or more aggravating circumstances exist.[132] In addition, if the government intends to rely on the aggravating circumstances listed under § 24-403.01(b-2) it must file an indictment or information at least thirty days prior to trial or a guilty plea that states in "writing one or more aggravating circumstances to be relied upon."[133] D.C. Code §24-403.01(b-2) does not specify whether a separate sentencing hearing must be held. By contrast, the revised murder statute eliminates the special requirements under D.C. Code § 22-2104.01(a), (c) and § 24-403.01(b-2)(A) that relate to sentences for murder.[134] Under the revised murder statute, proof of at least one aggravating circumstance is still an element which must be alleged in the indictment[135] and proven beyond a reasonable doubt at trial.[136] The factfinder is not required to separately produce a written finding that at least one aggravating circumstance was proven beyond a reasonable doubt, however, nor is the hearing described in current law required.[137] However, eliminating the statutory notice and hearing requirements applicable to the current District murder statutes does not change applicable Sixth Amendment law which, since the District adopted its statutory notice requirements, has

[129] D.C. Code § 22-4502.
[130] D.C. Code § 22-2104.
[131] D.C. Code § 22-2104.01.
[132] D.C. Code § 22-2104.01(c).
[133] D.C. Code § 22-403.01 (b-2)(1)(A).
[134] D.C. Code § 24.403.01 includes sentencing procedures for other offenses. The statutory language of § 24.403.01 will only change insofar as it is relevant to sentencing for murder.
[135] D.C. Super. Ct. R. Crim. P. 7.
[136] *In re Winship*, 397 U.S. 358 (1970).
[137] However, as set forth in subsection (e), a separate proceeding will be used to determine if aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F) were present.

expanded to require proof beyond a reasonable doubt of facts that subject a person to a higher statutory penalty.[138] This change improves the clarity of the criminal code.

The revised murder statute does not specifically address the effect of an appellate determination that the burden of proof was not met with respect to an aggravating circumstance that was the basis for the conviction. Current D.C. Code § 22-2104.01(d) provides that if a trial court is reversed on appeal due to "an error only in the separate sentencing procedure, any new proceeding before the trial court shall only pertain to the issue of sentencing."[139] However, this provision is unnecessary as the revised murder statute does not require any separate sentencing proceeding. If a conviction for murder with a sentencing enhancement is reversed on appeal on grounds that only relate to one of the aggravating circumstances, the appellate court may order entry of judgment as to first degree or second degree murder.[140]

Eighteenth, the revised degree murder statute provides a defense to felony murder when the actor does not commit the lethal act, and either believes that no participant intends to cause death or serious bodily injury, or makes reasonable efforts to prevent a fellow participant from causing death or serious bodily injury. The current D.C. Code murder statute does not include any defense for felony murder where another person committed the lethal act. The DCCA has held that when a person causes the death of another in the course of an enumerated felony, "[a]ll accomplices are culpable for the resulting death, because the intent requirement for murder, in the case against an aider and abettor, is satisfied solely by the aider and abettor's participation in the felony that resulted in the killing."[141] In addition, the DCCA has held that "the accomplice is guilty even though there was an express agreement not to kill, and even if he actually attempts to prevent the homicide."[142] In contrast, the revised murder statute includes a defense that bars liability for actors who did not commit the lethal act resulting in death of another, and who was less blameworthy, either because they believe that no participant in the predicate felony intends to cause death or serious bodily injury, or because they made reasonable effort to prevent death or serious bodily injury. Applying murder liability to these actors would be disproportionately severe, although other homicide charges may be brought against the actor. This change improves the proportionality of the revised statutes.

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

[139] D.C. Code § 22-2104.01 (d).

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

[141] *Lee v. United States*, 699 A.2d 373, 385 (D.C. 1997) (quoting *Prophet v. United States*, 602 A.2d 1087, 1095 (D.C.1992)).

[142] *Id.*

Beyond these eighteen changes to current District law, nine other aspects of the revised murder statute may constitute substantive changes to current District law.

First, the revised murder statute recognizes that acting under an "extreme emotional disturbance for which there is a reasonable cause" constitutes a mitigating circumstance, and serves as a partial defense to murder. Although current District murder statutes make no mention of mitigating circumstances, the DCCA has held that a person commits voluntary manslaughter when he or she causes the death of another with a mental state that would constitute murder, except for the presence of mitigating circumstances.[143] The DCCA has not clearly defined what constitutes a "mitigating circumstance," but has held that mitigating circumstances include an accused "act[ing] in the heat of passion caused by adequate provocation."[144] Under common law, cases interpreting what constituted adequate provocation came to recognize "fixed categories of conduct"[145] that "the law recognized as sufficiently provocative to mitigate"[146] murder to the lesser offense of manslaughter.[147]

In contrast, the RCC's murder statute states that acting under "extreme emotional disturbance" is a mitigating circumstance, thereby adopting the modern approach to provocation, which is more flexible in determining which circumstances are sufficient to mitigate murder to manslaughter.[148] This modern approach "does not provide specific categories of acceptable or unacceptable provocatory conduct."[149] Instead of being limited to the "fixed categories" that have been previously recognized by courts, the modern approach more generally inquires whether the "provocation is that which would cause . . . a reasonable man . . . to become so aroused as to kill another"[150] such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the

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

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

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

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

[147] *See*, Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 Wm. & Mary L. Rev. 1027, 1036 (2011) ("The law came to recognize four distinct-and exhaustive-categories of provocative conduct considered "sufficiently grave to warrant the reduction from murder to manslaughter of a hot-blooded intentional killing." The categories were: (1) a grossly insultive assault; (2) witnessing an attack upon a friend or relative; (3) seeing an Englishman unlawfully deprived of his liberty; and (4) witnessing one's wife in the act of adultery."); Lafave, Wayne. 2 Subst. Crim. L. § 15.2 (3d ed.) ("There has been a tendency for the law to jell concerning what conduct does or does not constitute a reasonable provocation for purposes of voluntary manslaughter.").

[148] Commentary to MPC § 210.3 at 49.

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

[150] *Id*. at 542.

ordinary citizen."[151] Consistent with this modern approach, under subsection (f) of the revised murder statute, it is possible to mitigate homicides from murder to manslaughter even under circumstances that have not been traditionally recognized at common law.[152]

One notable change from the common law of provocation is that an "extreme emotional disturbance" need not have been caused wholly or in part by the decedent in order to be adequate.[153] For example, consider a case in which the accused discovers that his neighbor has killed the accused's spouse, and in a fit of rage, the accused kills a third person who attempted to protect the neighbor. Under the traditional common law approach, since the third party was not responsible for provoking the accused, mitigation would be unavailable. Under the "extreme emotional disturbance" rule however, it is at least possible that the homicide could be mitigated downwards to manslaughter. Despite its differences, the modern approach in many ways is similar to the common law approach. Under both approaches, the accused must have acted with an emotional state that would cause a person to become so "aroused as to kill another"[154] or that would "naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection."[155] Further, under both approaches, the reasonableness of the accused's reaction to the provoking circumstance is determined from the accused's view of the facts.[156]

It is unclear whether adopting the modern "extreme emotional disturbance" approach changes current District law.[157] Although the DCCA has long used the traditional "adequate provocation" formulation[158], the Court has also noted that while under the common law, "there grew up a process of pigeon-holing provocative conduct . . . [o]ur own law of provocation in the District of Columbia began with a general formulation similar to the modern view[.]"[159] Instead of being bound by common law precedent defining specific fact patterns that constitute adequate provocation, the District may already embrace the more flexible modern approach that "does not provide specific

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[151] Commentary to MPC § 210.3 at 63.

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

[153] Commentary to MPC § 210.3 at 49.

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

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

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

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

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

[159] *Brown*, 584 A.2d at 542.

categories of acceptable or unacceptable provocatory conduct."[160] Ultimately the DCCA has not fully reconciled its "recognition (or non-recognition) of the Model Penal Code"[161] approach to provocation, and so it is unclear how adopting the modern approach changes current law.[162]

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

Second, the revised murder statute recognizes that "acting with an unreasonable belief that the use of deadly force was necessary to prevent a *person* from unlawfully causing death or serious bodily injury" constitutes a mitigating circumstance. Under this language, the actor need not have believed that the *decedent* would unlawfully cause death or serious bodily injury.[163] There is no DCCA case law on point as to whether mitigation applies if the actor believed that the use of lethal force was necessary to prevent someone other than the decedent from causing death or serious bodily injury.[164] The revised statute clarifies that mitigation applies in these circumstances.

Third, the revised murder offense may change current District law by explicitly including any other legally-recognized partial defenses, apart from imperfect self-defense, or defense of others, as a mitigating circumstance.[165] While the District's murder statutes are silent as to the relevance or definition of mitigating circumstances, DCCA case law has recognized that mitigating circumstances may be found in situations besides imperfect self-defense or defense of others.[166] However, the DCCA has not specified when the use of deadly force is justified in other circumstances,[167] and whether mitigation would be available for mistakes as to those justifications. By contrast, the

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[160] *Id*.

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

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

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

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

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

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

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

RCC specifically recognizes that any other legally-recognized partial defense which substantially diminishes either the accused's culpability or the wrongfulness of the accused's conduct constitute mitigating circumstances. For example, if lethal force may be justified under certain circumstances, even absent the fear of death or serious bodily harm, then an unreasonable belief that those circumstances existed could constitute a mitigating circumstance.[168] The RCC's recognition of mitigation in situations besides imperfect self-defense or defense of others clarifies the revised murder statutes while leaving to courts the precise contours of such mitigating circumstances. Explicitly recognizing these partial defenses as mitigating circumstances improves the proportionality of the offense, by allowing courts to recognize mitigation when appropriate to reflect the accused's reduced culpability.

Fourth, in the revised second degree murder offense, felony murder requires that the accused negligently caused the death of another. While the current statute is clear that intent to cause death is not required, DCCA case law has not clearly stated whether strict liability as to death is sufficient. Some case law suggests no culpable mental state is necessary,[169] while at least one *en banc* decision suggests that a mental state of negligence is required.[170] The RCC second degree murder statute clarifies this ambiguity by requiring negligence as to causing death of another. To the extent that requiring negligence may change current District case law, this change would improve the proportionality of the statute by ensuring a person who was not even negligent as to the death of another could not be punished for murder.[171] A person who was not even negligent as to death does not share the relatively high culpability that justifies murder liability for unintentionally causing the death of another while committing a specified felony.

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

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

[170] The *en banc* court in *Wilson-Bey* stated that the felony murder doctrine applies "in the case of a *reasonably foreseeable* killing, without a showing that the defendant intended to kill the decedent, if the homicide was committed in the course of one of several enumerated felonies." *Wilson-Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006). Other statements in the *Wilson-Bey* decision strongly suggest that "reasonably foreseeable" is the practical equivalent of criminal negligence. The opinion quotes the Model Penal Code, "To say that the accomplice is liable if the offense . . . is 'reasonably foreseeable' or the 'probable consequence' of another crime is to make him liable for negligence, even though more is required in order to convict the principal actor. This is both incongruous and unjust."

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

Fifth, under the revised second degree murder offense, felony murder liability does not exist if the person killed was an accomplice to the predicate felony.[172] Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder when the decedent was an accomplice to the predicate felony.[173] The RCC second degree murder statute resolves this ambiguity under current law, and, to the extent it may change law, improves the proportionality of the offense. Under the revised offense, felony murder would provide greater punishment only for victims of the predicate offense or other innocent bystanders who are killed during the commission or attempted commission of an enumerated felony. When the decedent was an accomplice to the underlying offense, he or she assumed the risk in taking part in an inherently dangerous felony, and the negligent death of such a person does not warrant as severe a punishment.

Sixth, the revised second degree murder offense does not criminalize unintentionally causing the death of another while committing or attempting to commit a felony that is not specified in the statute. Although the current first degree murder statute's felony murder provisions do not specifically provide for such liability, the DCCA has stated that it is unclear if second degree murder liability applies to a non-purposeful killing that occurs during the commission of a non-enumerated felony.[174] The revised second degree murder statute resolves this ambiguity by clarifying that unintentionally causing the death of another person while committing or attempting to commit any unspecified felony is not criminalized as murder under the RCC.[175] To the extent that it may change current law, eliminating second degree murder liability for non-purposeful felony murder predicated on any felony offense also improves the proportionality of the RCC. Punishing as murder unintentionally causing death of another while committing or attempting to commit any felony, regardless of the inherent dangerousness of the felony would be disproportionately severe.[176]

Seventh, the enhanced penalty provisions recognize as aggravating circumstances that that the accused knowingly subjected the decedent to extreme physical pain or mental suffering prior to the victim's death, or mutilated or desecrated the decedent's body. Under current law, first degree murder is subject to enhanced penalties if the murder "was especially heinous, atrocious, or cruel."[177] The phrase "especially heinous, atrocious, or cruel" (EHAC) is not statutorily defined and case law is unclear as to its

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

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

[174] In *Comber v. United States*, the DCCA noted that "[w]hat remains unclear in the District of Columbia is the status of one who commits a non-purposeful killing in the course of a [felony not enumerated in the first degree murder statute]."[174]

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

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

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

meaning.[178] The DCCA has held that a murder may be EHAC if it involves inflicting substantial physical pain or mental anguish prior to death,[179] but substantial physical or mental suffering may not be necessary. The Court has recognized that EHAC does "not focus exclusively upon the sensations of the victim before death."[180] For example, the DCCA has recognized that a murder involving mutilation of body parts, regardless of whether this inflicted additional suffering on the victim, can render a murder EHAC.[181] The DCCA also has stated that a murder may be EHAC if the killing is unprovoked,[182] if the accused did not deny his role in the killing,[183] if the murder involved a violation of trust,[184] if the accused's motive for the murder was to avoid returning to prison,[185] or if the murder was committed "for the fun of it."[186] However, although the DCCA has recognized these circumstances as relevant to determining whether a murder is EHAC, the DCCA has never held that these circumstances alone render a murder EHAC. In these cases, the murder also involved infliction of substantial physical or mental suffering, or both.[187]

The RCC enhanced penalty provision more clearly identifies murders involving extreme and prolonged physical or mental suffering prior to death, or mutilation or desecration of the body, as subject to heightened penalties. Other circumstances referenced in DCCA descriptions of EHAC that do not involve substantial physical or mental suffering, or mutilation or desecration of the body do not increase penalties for murder unless they satisfy another enumerated aggravating circumstance. Specifying that inflicting extreme physical pain or mental suffering, or mutilating or desecrating the body are aggravating circumstances improves the clarity of the code, and, to the extent it may change current law, helps to ensure proportionate penalties. The current EHAC formulation is vague, and creates the possibility of arbitrariness in sentencing. As the

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

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

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

[181] *Id*, at 1355 (affirming finding that murder was EHAC when defendant slashed victim's testicles and ankles despite evidence indicating that at the time victim was unconscious and unable to feel pain).

[182] *Parker*, 692 A.2d at 917 n.6.

[183] *Id.*

[184] *Henderson v. United States*, 678 A.2d 20, 24 (D.C. 1996).

[185] *Id. at* 24.

[186] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014) (noting that the legislative history of D.C. Code § 22-2104.01 indicates that murders committed "just for the fun of it" may be deemed especially heinous, atrocious, or cruel). Committee Report on the "First Degree Murder Amendment Act of 1992", Bill 9-118, at 2.

[187] *Parker*, 692 A.2d 913 (D.C. 1996) (victim experienced prolonged and excruciating pain, including mental suffering, and was stalked prior to the killing making her aware of the possibility of violence); *Henderson*, 678 A.2d 20 (D.C. 1996) (victim was alive when defendant stabbed her, severed her windpipe, and then strangled her, and her death was "a form of torture").

DCCA has noted, all murders "are to some degree heinous, atrocious, and cruel"[188] and the difficulty in distinguishing those murders that are especially heinous, atrocious, or cruel can lead to arbitrary and disproportionate results.[189] By omitting the vague EHAC formulation, the enhanced penalty provision improves penalty proportionality by more clearly defining the class of murders that warrant heightened punishment.

Eighth, through reference to the term "protected person," the RCC enhanced penalty provision applies recklessness as to whether the decedent is a law enforcement officer or public safety employee engaged in the course of his or her official duties. The current murder of a law enforcement statute[190] criminalizes intentionally causing the death of another "with knowledge or reason to know that the victim is a law enforcement officer or public safety employee" while that officer or employee is "engaged in . . . performance of such officer's or employee's official duties[.]"[191] Although the DCCA has clearly held that actual knowledge that the victim was a law enforcement officer or public safety employee is not required[192], the DCCA has not further specified the mental state as to whether the officer or employee was engaged in performance of official duties. RCC subparagraph (c)(3)(A) of the revised murder statute resolves this ambiguity and requires that the accused caused the death of another with recklessness as to whether the decedent was a law enforcement officer or public safety employee in the course of his or her official duties. Specifying a recklessness mental state improves the clarity of the criminal code by resolving this ambiguity under current District law, and is consistent with the culpable mental state requirement for other offenses in the RCC based on the decedent being a protected person.[193]

Ninth, through the definition of "protected person" the revised statute recognizes as an aggravating circumstance that the accused was reckless as to the victim being a "vulnerable adult." Under current law, it is an aggravating circumstance to first degree murder (but not second degree) that the victim is a "especially vulnerable due to age or a mental or physical infirmity."[194] Similarly, it is an aggravating circumstance to second degree murder (but not first degree) that the victim is "vulnerable because of mental or physical infirmity."[195] No current statute, nor DCCA case law, however, clarifies what types of mental or physical infirmities are required to be proven per this language. The relevant statutes are silent and there is no case law on what, if any, culpable mental state is required as to these circumstances under current District law. However, in the RCC murder statutes the penalty enhancements under subsection (c) include as an aggravating circumstance to both first and second degree murder that the victim a "vulnerable

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[188] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014); see also *State v. Salazar*, 844 P.2d 566, 585–86 (Ariz. 1992) ("If there is some 'real science' to separating 'especially' heinous, cruel, or depraved killers from 'ordinary' heinous, cruel, or depraved killers, it escapes me. It also has escaped the court.").

[189] *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (noting that the words "outrageously or wantonly vile, horrible and inhuman" in the Georgia criminal code do not create "any inherent restraint on the arbitrary and capricious infliction of the death sentence.").

[190] D.C. Code § 22-2106.

[191] D.C. Code § 22-2106 (emphasis added).

[192] *Dean v. United States*, 938 A.2d 751, 762 (D.C. 2007).

[193] *E.g.*, RCC § 22E-1202.

[194] D.C. Code § 22-2104.01

[195] D.C. Code § 24-403.01 (b-2)(2)(G).

adult."[196] This change improves the consistency and proportionality of the RCC, by reflecting the special status these individuals have elsewhere in current District law,[197] and by making enhancement for murder consistent with enhancements for RCC offenses.[198]

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

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

Second, the revised statute eliminates any statutory reference to the accused being "of sound memory and discretion." Current District statutory language states that "[w]hoever, being of sound memory and discretion" kills another with the requisite mens rea is "guilty of murder in the first degree."[199] Yet, under current law, it is not an element of first degree murder that the accused was "of sound memory and discretion."[200] Rather, the words "of sound memory and discretion" only refers to the basic requirement of legal sanity.[201] Under the RCC this statutory language is superfluous. The accused's sanity remains a general defense to all crimes, not just first degree murder. This change improves the clarity of the revised murder statute.

Third, the revised second degree murder offense explicitly codifies causing the death of another recklessly with extreme indifference to human life (commonly called

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[196] RCC § 22E-701 ("'Vulnerable adult' means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests.").

[197] Current D.C. Code §§ 22-933 and 22-936 make it a separate offense to assault a "vulnerable adult," with penalties depending on the severity of the injury.

[198] See, e.g., RCC § 22E-1202.

[199] D.C. Code § 22-2101.

[200] *Hill v. United States*, 22 App. D.C. 395, 409-10 (D.C. Cir. 1903); *Shanahan v. United States*, 354 A.2d 524, 526 (D.C. 1976) (in prosecuting first degree murder, government was not required to affirmatively prove that defendant was of sound memory and discretion).
The formulation of murder requiring that the defendant be of "sound memory and discretion" dates at least as far back as 17th century England. Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi: Unintentional Killings*, 71 MISS. L.J. 35, 39 (2001) (noting that William Blackstone defined murder in the 18th relying on Sir Edward Coke's 17th century formulation, which required that the defendant be "a man of sound memory, and of the age of discretion[.]"). American courts dating back to the 19th century have interpreted the words "sound memory and discretion" as referring to the basic requirement of legal sanity. *E.g., Davis v. United States*, 160 U.S. 469, 484 (1895) ("All this is implied in the accepted definition of murder, for it is of the very essence of that heinous crime that it be committed by a person of 'sound memory and discretion[.]' . . . Such was the view of the court below, which took care in its charge to say that the crime of murder could only be committed by a sane being[.]"

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

"depraved heart murder") in paragraph (b)(1). The current second degree murder statute only defines the offense as killing another person "with malice aforethought."[202] However, the DCCA has recognized that "malice aforethought" is a common law term of art that encompasses multiple distinct mental states, including depraved heart malice.[203] The revised statute abandons this archaic legal term of art and instead specifies that causing the death of another recklessly with extreme indifference to human life constitutes second degree murder. This language is not intended to change any current DCCA case law with respect to "depraved heart murder."

Fourth, the revised second degree murder offense does not specifically criminalize acting with intent to cause serious bodily harm, and thereby causing the death of another. Under current District case law, a person commits second degree murder if he causes the death of another without intent to cause death, but with intent to cause "serious bodily harm."[204] However, under the revised second degree murder offense, causing death by engaging in conduct with intent to commit serious bodily injury is still criminalized as second degree murder because it constitutes depraved heart murder under paragraph (b)(1). The current second degree murder statute's reference to acting with intent to cause serious bodily harm and thereby killing a person is superfluous to the revised second degree murder offense and its elimination clarifies the statute.

[202] D.C. Code § 22-2103.
[203] *Comber v. United States*, 584 A.2d 26, 38–39 (D.C. 1990).
[204] *Comber v. United States*, 584 A.2d 26, 38–39 (D.C. 1990).

RCC § 22E-1102. Manslaughter.

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

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

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

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

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

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

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

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

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

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

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

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

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

[16] See Commentary to RCC § 22E-206.

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

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

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

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

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

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

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

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

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

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

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

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

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

requiring that the death be "in the course of and in furtherance of committing, or attempting to commit" an enumerated offense.[26]

Subsection (b) specifies that a person commits involuntary manslaughter if he or she recklessly causes the death of another. The culpable mental state of recklessness, a term defined at RCC § 22E-206, requires that the accused was consciously aware of a substantial risk of causing death, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy.[27]

Subsection (c) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[28] However, as discussed above, extreme indifference to human life in paragraph (a)(1) of the RCC murder statute requires that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been sober. The terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.[29]

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and weighs against finding that the person acted with extreme indifference to human life.[30] In these cases, although the

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

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

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

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

[30] This is perhaps clearest where a person's self-induced intoxication is pathological—i.e. "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." Model Penal Code § 2.08(5)(c). The following hypothetical is illustrative. X consumes a single alcoholic beverage at an office holiday party, and immediately thereafter departs to the metro. While waiting for the train, X begins to experience an extremely high level of intoxication—unbeknownst to X, the drink has interacted with an allergy medication she is taking, thereby producing a level of intoxication ten times greater than what X normally experiences from that amount of alcohol. As a result, X has a difficult time standing straight, and ends up stumbling in another train-goer, V, who X fatally knocks onto the tracks just as the train is approaching. If X is subsequently charged with voluntary manslaughter on

awareness of risk may be imputed, the person could still be acquitted of voluntary manslaughter. However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for involuntary manslaughter[31], provided that his or her conduct was clearly blameworthy.

Subsection (d) establishes the penalties for voluntary and involuntary manslaughter. [*See* Fourth Draft of Report #41.]

Paragraph (d)(3) provides enhanced penalties for both voluntary and involuntary manslaughter. If the government proves the presence of at least one aggravating factor listed under paragraph (d)(3), the penalty classification for voluntary and involuntary manslaughter may be increased in severity by one penalty class. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6.

Subparagraph (d)(3)(A) specifies that recklessness as to whether the decedent is a protected person is an aggravating circumstance. Recklessness is defined at RCC § 22E-206, and requires that the accused was aware of a substantial risk that the decedent was a protected person, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. The term "protected person" is defined in RCC § 22E-701.[32]

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these facts, her self-induced state of intoxication—when viewed in light of the surrounding circumstances— may weigh against finding that she manifested extreme indifference to human life. It may be true that X, but for her intoxicated state, would have been more careful/aware of V's proximity. Nevertheless, X is only liable for voluntary manslaughter under the RCC if X's conduct manifested an extreme indifference to human life.

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

[31] RCC § 22E-1102.

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

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

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

(C) A vulnerable adult;

Subparagraph (d)(3)(B) specifies that causing the death of another with the purpose of harming the decedent because of his or her status as a law enforcement officer, public safety employee, or district official is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose" a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[33] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[34] "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor consciously desired to harm a person of such a status.

Subsection (e) provides a defense to prosecution under paragraph (a)(2). RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, if there is any evidence of the defense presented at trial, the government bears the burden of disproving all elements of the defense beyond a reasonable doubt. The defense under subsection (e) includes two components. First, the defense requires that the actor does not commit the lethal act. This element may be satisfied when someone other than the actor, either a fellow participant in a predicate felony, the person who is the target of the predicate felony, or a third party, commits the lethal act.[35] Second, the defense requires one of two additional elements described in paragraphs (e)(1) and (e)(2). Paragraph (e)(1) requires that the actor believes that no participant in the felony intends to cause death or serious bodily injury. This element may be satisfied when the actor is an accomplice and believes that the principal does not intend to cause death or serious bodily injury, or if the actor commits the predicate offense alone and the actor does not intend to cause death or serious bodily injury. "Intent" is a defined term that here requires that the actor believes that no participant in the predicate felony consciously desires or is practically certain that he or she will cause death or serious bodily injury in the course of the felony. This element may be satisfied even if the actor believes that a participant in the predicate felony intends to engage in

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(D)A law enforcement officer, while in the course of official duties;
(E) A public safety employee while in the course of official duties;
(F) A transportation worker, while in the course of official duties; or
(G)A District official, while in the course of official duties.

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

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

[35] For example, if in the course of a robbery of a store, the clerk fires a shot in self defense and hits and kills a bystander, this element of the defense would be satisfied.

conduct that creates a *risk* of causing death or serious injury.[36] Although the actor must genuinely hold this belief, the belief need not be objectively reasonable.[37] Alternatively, paragraph (e)(2) requires that the actor made reasonable efforts to prevent another participant in the predicate felony from causing death or serious bodily injury. This element of the defense may be satisfied even if the actor believed a co-felon intended to cause death or serious bodily injury.[38]

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

Relation to Current District Law. *The revised manslaughter statute changes current law in six main ways, three of which track changes in the RCC murder statutes.*[39]

First, the revised involuntary manslaughter offense replaces the "misdemeanor manslaughter" type of manslaughter liability with a requirement that requires that the accused recklessly caused the death of another. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense, including the culpable mental state required. However, the DCCA has held that one way a person commits involuntary manslaughter is if he or she causes the death of another person while committing or attempting to commit any offense that is "dangerous in and of itself,"[40] which requires that the offense creates "an inherent danger of physical injury[.]"[41] The DCCA has further required that the offense be committed "in a way which is dangerous under the particular circumstances of the case,"[42] meaning "the manner of its commission entails a reasonably foreseeable risk of

[36] For example, if a getaway driver for a robbery knows that the robber intends to brandish a gun to threaten a store clerk, but believes that the robber will only frighten but not harm the clerk, the defense would apply even if the robber kills the clerk. This element of the defense is satisfied even though brandishing a gun creates a risk of death or serious bodily injury.

[37] Requiring that the belief be reasonable would extend felony murder liability to actors who were merely *negligent* as to whether an accomplice or another person intended to cause death or serious bodily injury. When a person does not actually cause the death of another, mere negligence is an insufficient degree of culpability to warrant felony murder liability. Other homicide charges may be brought for a negligent killing.

[38] For example, A and B kidnap C and hold him for ransom. When C's family refuses to pay the ransom, A decides to kill C. B does not want C to be killed, and alerts the police and physically attempts to prevent B from harming C. If B still manages to kill C, the defense would apply to A, even though he was aware that B intended to kill C.

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

[40] *Walker*, 380 A.2d at 1391.

[41] *Comber*, 584 A.2d at 50.

[42] *Id.* at 51. This additional restriction was adopted to avoid injustice in cases where the underlying offense is inherently dangerous in the abstract, but can be committed in non-violent ways. For example, simple assault may generally be deemed "dangerous in and of itself," but under current law a person can commit simple assault by making non-violent but unwanted physical contact with another person. Such a non-violent assault would not be committed "in a way which is dangerous under the particular circumstances of the case," and death resulting from a non-violent simple assault would not constitute misdemeanor manslaughter.

appreciable injury."[43] In practice, this form of involuntary manslaughter in the current D.C. Code is called "misdemeanor manslaughter." By contrast, under the revised manslaughter statute there is no requirement that the accused committed or attempted to commit any other "dangerous" offense, only that the accused recklessly caused the death of another. Recklessness is defined under RCC § 22E-206, and requires that the accused consciously disregarded a substantial risk of death, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. This change improves the clarity and consistency of the criminal code by codifying a culpable mental state requirement using defined terms, and improves the proportionality of the homicide statutes by creating an intermediate offense between negligent and depraved heart killings.

Second, the revised involuntary manslaughter offense eliminates the "criminal negligence" type of involuntary manslaughter liability. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense, including the culpable mental state required. However, the DCCA, relying on common law precedent, has held that a second way a person commits involuntary manslaughter is if that person causes the death of another by engaging in conduct that creates an "extreme risk of death . . . under circumstances in which the actor should have been aware of the risk."[44] The DCCA has explained that "the only difference between risk-creating activity sufficient to sustain a 'depraved heart' murder conviction and [an involuntary manslaughter] conviction 'lies in the quality of [the actor's] awareness of the risk.'"[45] Whereas depraved heart murder requires that the accused consciously disregard the risk, negligent manslaughter only requires that the accused should have been aware of the risk.[46] By contrast, the revised manslaughter statute requires that the accused consciously disregarded a substantial, though not necessarily extreme, risk of death. In addition, the risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. However, it is not required that the accused acted with extreme indifference to human life. Negligently causing the death of another continues to be criminalized as negligent homicide, per RCC § 22E-1103. This change improves the proportionality of the revised homicide statutes by more finely grading the offense. Actors who are genuinely unaware of the risk they create, even extreme risks, are less culpable than those who are consciously aware of the risk they create.

Third, applying the general culpability principles for self-induced intoxication in RCC § 22E-209 allows a defendant to claim that due to intoxication, he or she did not form the awareness of risk required to act "recklessly, with extreme indifference to human life." However, subsection (c) allows a fact finder to impute awareness of the risk

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[43] *Donaldson v. United States*, 856 A.2d 1068, 1076 (D.C. 2004) (citing *Comber*, 584 A.2d at 49 n. 33). This requirement is intended to prevent injustice when "death freakishly results" from conduct that constitutes an inherently dangerous offense, such as simple assault, that can be committed in ways that do not create a foreseeable risk of appreciably injury. *Comber*, A.2d at 50.

[44] *Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996).

[45] *Comber*, 584 A.2d at 49 (quoting *Dixon v. United States*, 419 F.2d 288, 293 (D.C. Cir. 1969)).

[46] *Id.* at 48-49.

required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. Although self-induced intoxication is generally culpable, and weighs in favor of finding that the person acted with extreme indifference to human life, it is possible, however unlikely, that self-induced intoxication reduces the blameworthiness, and negates finding that the person acted with extreme indifference to human life.[47]

Although the current manslaughter statute is silent as to the effect of voluntary intoxication, the DCCA has held that voluntary intoxication "is not a defense to voluntary manslaughter."[48] By contrast, although subsection (c) allows for imputation of the awareness of risk, in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for voluntary manslaughter. This change improves the proportionality of the revised offense.

Fourth, the revised manslaughter statute includes multiple penalty enhancements based on the status of the decedent. The current District manslaughter statute, D.C. Code § 22-2105, does not itself provide for any enhanced penalties. However, various separate statutes in the current D.C. Code authorize enhanced penalties for manslaughter based on the victim's status, as a minor,[49] as an elderly adult[50], as a specified transportation worker,[51] or as a citizen patrol member.[52] A separate protection of District public officials offense also criminalizes harming a District official, or family member, while official is engaged in official duties, or on account of those duties.[53] By contrast, the RCC manslaughter offense incorporates penalty enhancements based on the status of the decedent. If a person commits voluntary or involuntary manslaughter, and was either reckless as to the victim being a "protected person," or had purpose to harm the victim because of the victim's status as a public safety employee or District official, the penalty classification for either offense may be increased by one penalty class. The term "protected person" is defined under RCC § 22E-701,[54] and differs in scope in various

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[47] *Infra*, at 241.

[48] *Davidson v. United States*, 137 A.3d 973, 975 (D.C. 2016).

[49] 22-3611 (enhancement for specified crimes committed against minors).

[50] D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens);

[51] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22- 3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).

[52] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).

[53] D.C. Code §22-851. Specifically, the offense criminalizes intimidating, impeding, interfering with, retaliating against, stalking, assaulting, kidnapping, injuring a District official or employee or family member of an official or employee, or damages or vandalizes the property of a District official or employee or family member of an official or employee.

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

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

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

(C) A vulnerable adult;

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

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

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

respects from current law.[55] For example, a victim's status as a member of a "citizen patrol" no longer is sufficient for an enhanced manslaughter penalty. Because the various types of victim-specific enhancements applicable to manslaughter are all included in the penalty enhancement provision, it is not possible to "stack" enhancements based on the status of the victim. This improves the revised penalty's proportionality by ensuring the main offense elements and gradations are the primary determinants of penalties rather than stacked enhancements. Incorporating these various enhancements, and the offense for harming a District employee or official, into a single penalty enhancement provision also reduces unnecessary overlap and improves the clarity of the code.

Fifth, through the definition of "protected person," the revised manslaughter statute provides heightened penalties if the accused was reckless as to the decedent being a law enforcement officer or public safety employee engaged in the course of official duties,[56] or had purpose to harm the decedent because of the decedent's status as a law enforcement officer or public safety employee. Currently, there is no separate manslaughter of a law enforcement officer offense, or any separate statute that provides for enhanced penalties for manslaughter of a law enforcement officer or public safety employee. By contrast, the revised manslaughter statute provides for more severe penalties than first degree manslaughter when the victim was a law enforcement officer or public safety employee. This change improves the proportionality and consistency of the criminal code by ensuring that punishment is proportionate when manslaughter is committed against a law enforcement officer or public safety employee in a manner consistent with aggravating factors applied to other offenses against persons in the RCC.

Sixth, the revised manslaughter statute does not provide enhanced penalties for committing manslaughter while armed with a dangerous weapon. Under current law, manslaughter is subject to heightened penalties if the accused committed the offense "while armed" or "having readily available" a dangerous weapon.[57] In contrast, under the revised statute, committing manslaughter while armed does not increase the severity of penalties. This change improves the proportionality of the revised code, as manslaughter while armed does not inflict greater harm than unarmed manslaughter, and therefore does not warrant heightened penalty.

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

First, the revised manslaughter statute specifically includes felony murder as a form of voluntary manslaughter. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense, including the culpable mental state required. Moreover, the DCCA has not clarified whether the current manslaughter offense includes felony murder. In *Comber v. United States*, the DCCA stated that "in all voluntary manslaughters, the

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

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

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

[57] D.C. Code § 22-4502.

perpetrator acts with the state of mind which, but for the presence of legally recognized mitigating circumstances, would constitute malice aforethought, *as the phrase has been defined for the purposes of second-degree murder*."[58] In defining malice-aforethought for the purposes of second degree murder, the DCCA noted that *first degree* murder liability attaches when the defendant accidentally kills another while committing a specified felony, but does not further clarify whether felony murder malice is included within the voluntary manslaughter offense.[59] In a later case, the DCCA noted that "this court has never explicitly recognized voluntary manslaughter to be a lesser-included-offense of first-degree felony murder" and declined to decide the issue in that case.[60] The RCC resolves this ambiguity by defining voluntary manslaughter to include felony murder. In doing so, the manslaughter statute also incorporates all changes to felony murder included in the revised second degree murder statute.

Second, the revised manslaughter statute incorporates the revised second degree murder statute's changes to felony murder liability by requiring that the accused cause the death of another while acting "in furtherance" of the predicate felony.[61] Under current law felony murder does not require that the killing be "in furtherance" of the predicate felony, and the DCCA has held that "[t]here is no requirement in the law . . . that the government prove the killing was done in furtherance of the felony in order to convict the actual killer of felony murder."[62] However, while there is no "in furtherance" requirement under current law,[63] the DCCA has held that "[m]ere temporal and locational coincidence"[64] between the underlying felony and the death are not enough. There must have been an "actual legal relation between the killing and the crime . . . [such] that the killing can be said to have occurred *as a part of the perpetration of the crime*."[65] By contrast, the revised manslaughter statute, through use of the "in furtherance" phrase, requires that the accused's conduct that caused the death of another in some way facilitated the commission or attempted commission of the offense, including avoiding apprehension or detection of the offense or attempted offense.[66] Practically, this change

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[58] *Comber*, 584 A.2d at 37 (emphasis added).

[59] The *Comber* court explicitly declined to decide whether accidentally causing the death of another while committing or attempting to commit any *non-enumerated* felony constitutes second degree murder.

[60] *West v. United States*, 499 A.2d 860, 864 (D.C. 1985).

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

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

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

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

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

[66] Courts in other states have disagreed about the meaning of "in furtherance" language that is common in felony murder statutes. Some courts have held that "in furtherance" requires that the act that caused the death must have advanced or facilitated commission of the underlying crime. *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982); *Auman v. People*, 109 P.3d 647, 656 (Colo. 2005) (the death must occur either "in the course of" or "in furtherance of" immediate flight, so that a defendant commits felony murder only if a death is caused during a participant's immediate flight or while a person is acting to promote immediate flight from the predicate"). However, other states have interpreted "in furtherance" to only require a "logical nexus" between the underlying crime and death, to "exclude those deaths which are so far outside the ambit of the plan of the felony and its execution as to be unrelated to them." *State v. Young*, 469

in law may have little impact, as most cases in which the accused causes the death of another as "part of perpetration of the crime," he or she would also have been acting in furtherance of the crime. However, this change improves the proportionality of the offense insofar as a person whose risk-creating behavior is not in furtherance of the felony is not as culpable as a person who otherwise negligently kills someone in the course of committing a specified felony.[67] This change to the revised statute also maintains the revised manslaughter offense as a lesser-included offense of the revised murder offenses.

Third, the revised manslaughter statute incorporates the revised second degree murder statute's five changes to the specified felonies that can serve as a predicate to felony murder.[68] The current felony murder predicates include: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[69] (4) mayhem; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[70] By contrast, the revised manslaughter statute changes current law by clarifying or limiting these predicate crimes to match liability as described in the revised second degree murder statute.[71] This change to the manslaughter offense improves the proportionality and consistency of the criminal code, by ensuring that the punishment is proportionate to the accused's culpability, and maintaining manslaughter as a lesser-included offense of murder offenses.

Three other changes to felony murder liability provided in the revised second degree murder offense may constitute substantive changes to the current law of

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A.2d 1189, 1192–93 (Conn. 1983); see also, *Noble v. State*, 516 S.W.3d 727, 731 (Ark. 2017) (rejecting appellant's argument that "in furtherance" requires that lethal act facilitated the underlying crime, but noting that a burglary committed with intent to kill cannot serve as a predicate offense to felony murder when the defendant completes the murder, because the murder was not committed in furtherance of the burglary); *People v. Henderson*, 35 N.E.3d 840, 845 (N.Y. 2015) ("[Appellant] asserts that the statutory language "in furtherance of" requires that the death be caused in order to advance or promote the underlying felony. We have not interpreted "in furtherance of" so narrowly."). The RCC tracks the former approach, requiring the death to have advanced or facilitated the commission of the underlying crime.

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

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

[69] D.C. Code §22-2101.

[70] Under current law, burglary is divided into two grades, both of which appear to be included in the felony murder statutory reference to "housebreaking." The original 1901 Code codified the offense now known as burglary, but called it "housebreaking." The original "housebreaking" offense only had one grade, and criminalized entry of *any building* with intent to commit a crime therein. In 1940, Congress amended the first degree murder statute and included an enumerated list of felonies, which included housebreaking, for felony murder. See H.R. Rep. Doc. No. 76-1821, at 1 (1940) (Conf. Rep). In 1967, Congress relabeled "housebreaking" as "second degree burglary," and created first degree burglary, which required that the burglar entered an occupied dwelling. However, the DCCA has held that only the current first degree burglary offense may serve as a predicate to non-purposeful felony murder. *Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014).

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

manslaughter: 1) requiring a negligence mental state as to causing death for felony murder; 2) barring felony murder liability when the decedent was an accomplice to the underlying felony; 3) codifying an affirmative defense when the actor did not commit the lethal act. These three changes limit the scope of felony murder to ensure that the doctrine is only applied when warranted by the accused's culpability, and when innocent bystanders are killed.[72] To the extent that these revisions change the scope of felony murder, they also change the scope of voluntary manslaughter. These possible changes to current law improve the proportionality and consistency of the criminal code. They ensure that the punishment is proportionate to the accused's culpability and maintaining manslaughter as a lesser-included offense of murder offenses.

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

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

RCC § 22E-1103. Negligent Homicide.

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

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

Subsection (b) specifies the penalties for negligent homicide. [*See* Fourth Draft of Report #41.]

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

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

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

[1] See Commentary to RCC § 22E-206.

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

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

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

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

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

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

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

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

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

[8] Commentary to RCC § 22E-206.

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

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

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

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

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

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

RCC § 22E-1201. Robbery.

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

Subsection (a) specifies the elements of first degree robbery. Paragraph (a)(1) specifies that the defendant must take, or exercise control over property of another.[12] The term "property of another" is defined under RCC § 22E-701 as property that a person has an interest in that the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property.[13] Paragraph (a)(1) also specifies that the

[1] D.C. Code § 22-2801, and 22-2802.
[2] D.C. Code § 22-2803.
[3] D.C. Code § 24-403.01(e) (statutory minimum of 2 year imprisonment sentence for adults committing armed robbery in violation of D.C. Code § 22-4502 if a prior conviction for crime of violence); D.C. Code 22-2802 Attempt to commit robbery.
[4] D.C. Code § 22-851.
[5] D.C. Code § 22-4502.
[6] D.C. Code § 22-3601.
[7] D.C. Code § 22-3602.
[8] D.C. Code § 22-3611.
[9] D.C. Code §§ 22-3751; 22-3752.
[10] D.C. Code §§ 22-3751.01; 22-3752.
[11] D.C. Code § 24-403.01(b-2).
[12] The conduct described by the phrase "takes, or exercises control over" is the same as the conduct described by identical language in the RCC § 22E-2102 theft and other property offenses.
[13] Generally, this element bars robbery liability if a person uses force or threats to take his or her own property. A person who uses force to take his own property could potentially be found guilty of criminal threats or assault, though a defense of property could be available depending on the facts of the case. *See, Gatlin v. United States*, 833 A.2d 995, 1008 (D.C. 2003) ("It is well settled that a person may use as much force as is reasonably necessary to eject a trespasser from his property, and that if he uses more force than

culpable mental state for (a)(1) is knowledge, a term defined at RCC § 22E-206 to mean that the accused must have been aware to a practical certainty that he would take or exercise control over property. Paragraph (a)(1) specifies that a "knowingly" mental state applies to the "property of another" element, requiring that the actor was practically certain that the actor was taking or exercising control over property, and that the property is "property of another."

Paragraph (a)(1) also specifies that the actor must take or exercise control over property within the complainant's "immediate physical control[.]" The phrase "immediate physical control" is intended to follow current District case law defining "immediate actual" possession. Property is within a person's "immediate physical control" when the property is in an "area within which the victim can reasonably be expected to exercise some physical control over the property."[14] Property also is in a person's immediate physical control when that person is able to exercise control over it at the time of the alleged crime, even it is located far enough from that person that he or she cannot exercise physical control over it,[15] or if the property is intangible and is therefore not located in any specific place.[16] Paragraph (a)(1) specifies that a "knowingly" mental state applies to this element, requiring that the actor was aware to a practical certainty that the property was within the complainant's immediate physical control.

Paragraph (a)(2) requires that the actor takes property by one of the means specified in subparagraphs (a)(2)(A)-(D). The alternatives listed under (a)(2)(A)-(D) must play a causal role in the taking, or exercise of control over the property. Temporally, it is not required that when the defendant caused bodily injury, made threats, or used force, he or she had already formed an intent to take or exercise control over property.[17] The causal relationship is satisfied if the use of force or threats to repel an immediate attempt by the owner to re-obtain property taken by the accused,[18] or to keep

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

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

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

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

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

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

property permanently after the other person consented to an initial temporary taking.[19] Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that the means listed in subparagraphs (a)(2)(A)-(D) play a causal role in taking or exercising control over property.[20]

Subparagraph (a)(2)(A) specifies that robbery includes taking property by causing bodily injury to the complainant or anyone else physically present. "Bodily injury" is a term defined under RCC § 22E-701, and requires "physical pain, illness, or any impairment of physical condition." Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that the actor is causing bodily injury.

Subparagraph (a)(2)(B) specifies that robbery includes taking property by communicating, explicitly or implicitly, that the actor immediately will cause another person to suffer a bodily injury, sexual act, sexual contact, confinement, or death. The communication may be verbal or non-verbal.[21] The communication must be about immediate harm; communication of harm that will occur farther into the future do not constitute robbery.[22] No precise words are necessary to convey a threat; it may be bluntly spoken, or done by innuendo or suggestion.[23] The verb "communicates" is intended to be broadly construed, encompassing all speech[24] and other messages,[25] that are received and understood by another person. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that he or she is explicitly or implicitly communicating a threat that the complainant will suffer bodily injury, a sexual contact, confinement, or death.

Subparagraph (a)(2)(C) specifies that robbery includes taking property by applying physical force that moves or immobilizes another person present. This form of robbery does not require that the force cause bodily injury, but includes shoves or grasps that move or immobilize the complainant. Incidental touching or jostling is insufficient

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

[20] *See*, *Gray v. United States*, 155 A.3d 377 (D.C. 2017) (robbery requires a "conscious of the connection between his assaultive conduct and theft").

[21] For example, a raised fist may implicitly communicate that the actor will punch the complainant unless the complainant hands over property.

[22] Obtaining property by threats of non-immediate harm may constitute extortion under RCC § 22E-2301.

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

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

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

to satisfy this element.[26] Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that he or she is applying force that moves or immobilizes another person.

Subparagraph (a)(2)(D) specifies that robbery includes removing property from the hands or arms of the complainant. Under this form of robbery, no bodily injury, physical force, or threats are required. However, this element is not satisfied if the property is taken from the complainant's immediate possession, but not from the complainant's hands or arms.[27] Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that he or she is taking property from the complainant's hands or arms.

Paragraph (a)(3) requires that the actor acted "with intent to" deprive the owner of property.[28] "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (a)(4) requires that in the course of committing the robbery, the actor recklessly causes serious bodily injury to another person, other than an accomplice. "Reckless" is a defined term in RCC § 22E-206, which here means that the actor consciously disregarded a substantial risk of causing serious bodily injury. The term "serious bodily injury" is defined in RCC § 22-701 as an injury "that involves: a substantial risk of death; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member or organ." Although the defendant must knowingly use physical force, cause bodily injury, or make threats, recklessness as to causing serious bodily injury suffices.[29]

Subsection (b) specifies three alternate means of committing second degree robbery. First, the actor must satisfy the elements under paragraphs (b)(1), (b)(2), and (b)(3). The elements under paragraphs (b)(1)-(b)(3) are identical to those under (a)(1), (a)(2), and (a)(3) discussed above. In addition to the elements under paragraphs (b)(1)-(b)(3), the actor must satisfy the elements under paragraph (b)(4). Under subparagraph (b)(4)(A) a person commits second degree robbery when, in the course of committing the

[26] For example, if a pickpocket takes another person's wallet, and incidentally jostles the person, this element is not satisfied.

[27] For example, taking a person's wallet from his pocket does not satisfy this element.

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

[29] For example, if a defendant commits robbery by intentionally shoving a person, which inadvertently causes the person to fall down a flight of stairs and suffer serious bodily injury, the defendant may be convicted of first degree robbery even if the defendant did not intend to cause serious bodily injury.

robbery, the actor recklessly causes significant bodily injury to someone physically present, other than an accomplice. "Significant bodily injury" is a term defined under RCC § 22E-701, as an injury that "to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer."[30] The actor must have *knowingly* using physical force, causing bodily injury, or communicated harm. However, it is sufficient if the actor was merely *reckless* as to causing *significant* bodily injury.[31] This requires that the actor consciously disregarded a substantial risk of causing significant bodily injury.

Subparagraph (b)(4)(B) specifies two additional means of committing second degree robbery, based on the nature and value of the property. Under sub-subparagraph (b)(4)(B)(i), a person commits second degree robbery when the property taken is a motor vehicle. The term "motor vehicle" is defined in RCC § 22E-701. Under sub-subparagraph (b)(4)(B)(ii), a person commits second degree robbery if the property has a value of $5,000 or more. Subparagraph (b)(3)(B) uses the term "in fact," which specifies that strict liability applies to sub-subparagraphs (b)(3)(B)(i) and (ii); there is no culpable mental state as to whether the property is a motor vehicle, or the property's value.

Subsection (c) specifies the elements of third degree robbery. The elements of third degree robbery, which are specified in paragraphs (c)(1), (c)(2), and (c)(3) are identical to paragraphs (a)(1)-(a)(3) discussed above.

Subsection (d) provides an affirmative defense to robbery if the defendant reasonably believes that the owner of the property, which may not necessarily be the person from whom the property was taken, gives effective consent to the actor taking or exercising control over the property. RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. Even if the defense applies and there is no liability under this section, depending on the facts of the case a defendant may still be liable for assault,[32] offensive physical contact[33], or criminal threats.[34]

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

Paragraph (e)(4) provides two penalty enhancements. If the government proves the presence of at least one element listed under paragraph (e)(4), the penalty classification for first, second, or third degree robbery may be increased in severity by one penalty class. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6.

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

[31] For example, the culpable mental state requirements as to subparagraph (b)(3)(A) may be satisfied when the actor knowingly causes bodily injury by shoving a person to the ground, and in doing so accidentally breaks the person's arm. Although the actor did not intend to break the person's arm, the actor was reckless as to that degree of injury, second degree robbery liability may apply.

[32] RCC § 22E-1202.

[33] RCC § 22E-1205.

[34] RCC § 22E-1204.

Subparagraph (e)(4)(A) specifies as a penalty enhancement that the actor was reckless as to whether the complainant is a protected person. Reckless is defined at RCC § 22E-206, and requires that the actor was aware of a substantial risk that the complainant was a protected person, and that the risk is of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard is clearly blameworthy. The term "protected person" is defined in RCC § 22E-701.[35]

Subparagraph (e)(4)(B) specifies as a penalty enhancement that the actor committed robbery by using or displaying a dangerous weapon or imitation dangerous weapon. This requires that the actor consciously disregarded a substantial risk of displaying or using a dangerous weapon or imitation weapon.[36] The terms "dangerous weapon" and "imitation dangerous weapon" are defined under RCC § 22E-701. The word "by" requires that the weapon or imitation weapon must have facilitated the robbery. This enhancement does not apply if the actor merely possessed a weapon or imitation weapon in manner that did not facilitate the robbery. Subparagraph (e)(4)(B) uses the term "in fact," which specifies that strict liability applies, and there is no culpable mental state as to whether the item used in the robbery was a dangerous weapon or imitation dangerous weapon. This penalty enhancement requires that the actor used or displayed the weapon or imitation weapon, but does not require that the weapon actually caused injury to the complainant.[37]

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

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

First, the revised robbery offense does not criminalize non-violent pickpocketing or taking or exercising control over property without the use of bodily injury, overpowering physical force, or threats to cause bodily injury or to engage in a sexual act or sexual contact, or by taking property from a person's hands or arms. The current robbery and carjacking statutes criminalize all pickpocketing and other takings of property from the person or from the immediate physical control of another by sudden or

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

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

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

(C) A vulnerable adult;

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

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

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

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

[36] In many cases, the actor may knowingly or purposely use or display a dangerous weapon or imitation dangerous weapon. Under RCC § 22E-206, either of these culpable mental states satisfies the recklessness requirement for this element.

[37] For example, if a defendant displays a gun during a robbery and the gun's display causes a complainant to step back, trip, fall, and suffer an injury from the fall, the weapon penalty enhancement would be satisfied even though there was no gunshot.

stealthy seizure, or snatching, even when the complainant did not know the property was taken (and so was not menaced, let alone injured).[38] By contrast, under the RCC, such non-violent pickpocketing from the person are criminalized as theft[39] instead of robbery, unless the property is taken from the person's hands or arms. Taking an object from the person or from the immediate physical control of another person without his or her knowledge,[40] or with only minor touching that does not cause bodily injury or physical force merits less severe punishment than takings that involve physical harm. This change improves the proportionality of the robbery statute.

Second, the revised robbery statute divides the offense into three penalty grades based on the severity of injury caused during the robbery, and on the value and type of property taken. The current robbery statute consists of a single grade that does not distinguish between crimes in which the defendant went entirely unnoticed by the complainant (e.g., pickpocketing) and those where the defendant inflicted serious bodily injury. By contrast, the revised statute provides three penalty grades, chiefly determined

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

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

[39] *See* D.C. Code § 22E-2101.

[40] The DCCA has defined "immediate actual possession" under the robbery statute "refers to the area within which the victim can reasonably be expected to exercise some physical control over the property." *Sutton v. United States*, 988 A.2d 478, 485 (D.C. 2010). *See also*, *Beaner v. United States*, 845 A.2d 525, 532-33 (D.C. 2004) (holding that the term "immediate actual possession," as used in the carjacking statute was borrowed from the robbery statute, includes a car that was several feet from the owner when it was taken).

by the severity of injury caused during the robbery. The revised robbery statute largely follows existing District law in conceptualizing robbery as a composite offense involving a theft from a person and an assault. All grades of the revised robbery statute require that the defendant took or exercised control over property from the person or from the immediate physical control of another by causing bodily injury, threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act, or using overpowering physical force. The chief variation in the three grades of robbery correspond to the main distinctions under the current and revised assault statute — threats, movement, confinement, and bodily injury; significant bodily injury; and serious bodily injury. The taking of a motor vehicle, accounting for the current carjacking offense, or property value is also integrated into the revised robbery gradations. The revised robbery offense's new grading scheme creates consistency with the revised assault offenses, and improves the proportionality of punishment by matching more severe penalties to those robberies that inflict greater harms.

Third, the revised robbery statute includes a penalty enhancement for using or displaying a dangerous weapon or imitation dangerous weapon, and replaces the enhanced penalties authorized under current D.C. Code § 22-4502, when committing robbery "while armed" or "having readily available" a dangerous weapon or imitation dangerous weapon. Replacing D.C. Code § 22-4502 with the weapon penalty enhancement in the revised robbery offense changes current District law. Existing District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the defendant either had "actual physical possession of [a weapon]";[41] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[42] provided that the defendant also constructively possessed the weapon.[43] There is no further requirement under current law that the defendant actually used the weapon or caused any injury.[44] By contrast, in the RCC robbery offense the defendant must actually "use or display" a dangerous weapon or imitation dangerous weapon. Merely being armed with or having readily available, a dangerous weapon or imitation dangerous weapon would not be sufficient for the penalty enhancement under the revised statute.[45] Including an enhancement for using or displaying a dangerous weapon or imitation dangerous weapon improves the proportionality of punishment both

[41] *Johnson v. United States*, 686 A.2d 200, 205 (D.C. 1996).
[42] *Clyburn v. United States*, 48 A.3d 147, 154 (D.C. 2012) (reversing sentencing enhancement under D.C. Code § 22-4502 when rifle was located in a different room from where defendant committed the underlying offense); *cf. Guishard v. United States*, 669 A.2d 1306, 1310 (D.C. 1995) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was in a dresser drawer in the same room as the underlying offense).
[43] *Cox v. United States*, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").
[44] *See*, *Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was within arm's length, but no evidence that the firearm was ever used to further any crime).
[45] Note that per the revised possession of a dangerous weapon during a crime offense, RCC § 22E-4104, the revised criminal code will still provide for additional punishments when committing a robbery while possessing, but not using or displaying, a dangerous weapon.

by matching more severe penalties to those robberies in which a weapon is actually displayed or used, and tailoring the effects of the weapon enhancement instead of relying on a separate statute that generally enhances multiple offenses and levels of robbery with the same penalty.

Fourth, the revised robbery statute's penalty enhancement based on the complainant's status as a "protected person," creates new penalty enhancements for harms to several groups of persons, reduces penalty enhancements for some persons, and creates more proportionate penalties for harms to other groups of persons. Current District statutes provide additional liability for robbery committed against certain groups of persons. The District's protection of District public officials statute penalizes various actions, including robberies, against a District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee.[46] The District also has penalty enhancements for robbery or carjacking of: minors;[47] senior citizens;[48] taxicab drivers;[49] and transit operators and Metrorail station managers.[50] Robbery and assault with intent to rob a member of a citizen patrol[51] are also subject to enhanced penalties.

In contrast with current law, the RCC robbery statute, through its reference "protected person," extends a new penalty enhancement to groups recognized elsewhere in the current D.C. Code as meriting special treatment: non-District government law enforcement and public safety employees in the course of their duties;[52] operators of private-vehicles-for hire in the course of their duties;[53] vulnerable adults.[54] Unlike current law, the RCC robbery statute, however, does not provide a penalty enhancement for: persons robbed because of their participation in a citizen patrol (but not while on duty);[55] persons robbed because of their status as District employees who do not qualify as District officials (but not while on duty);[56] and persons robbed because of their familial relationship to a District official or employee;[57] persons under the age of 18 (unless the

[46] D.C. Code § 22-851. A defendant who commits robbery under the revised statute necessarily commits an assault, and would be subject to the provisions of D.C. Code § 22-851(c) and (d). Where a robbery "intimidates, impedes, interferes" or has other statutorily specified results on a District official or employee, the defendant may be subject to D.C. Code § 22-851(b). In addition, since robbery requires taking property, any person who commits a robbery of a District official, employee, or family member of a District official or employee, may be subject to D.C. Code § 22-851 (c) or (d).
[47] D.C. Code § 22-3611.
[48] D.C. Code § 22-3601.
[49] D.C. Code §§ 22-3751; 22-3752.
[50] D.C. Code §§ 22-3751.01; 22-3752.
[51] D.C. Code § 22-3602.
[52] See commentary to RCC § 22E-701 regarding the definition of a law enforcement officer.
[53] While taxicab drivers are currently the subject of a separate enhancement in § 22-3751, the enhancement was enacted in 2001, well before the ubiquity of private vehicles-for-hire. The Council recently amended certain laws applicable to taxicabs and taxicab drivers to include private vehicles-for-hire. Vehicle-for-Hire Accessibility Amendment Act of 2016.
[54] Current D.C. Code §§ 22-933 and 22-936 make it a separate offense to assault a "vulnerable adult," with penalties depending on the severity of the injury.
[55] D.C. Code § 22-3602(b).
[56] D.C. Code § 22-851.
[57] D.C. Code § 22-851.

defendant is 18 years of age or older, and at least 4 years older than the complainant);[58] or persons more than 65 years of age when the defendant is less than 10 years younger than the complainant.[59] The RCC robbery statute also applies the penalty enhancements across multiple gradations, rather than the one robbery and one carjacking gradation in current law, creating a more proportionate application of all these penalty enhancements.[60] The RCC robbery statute also limits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the display or use of a weapon.[61]

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

Fifth, the revised robbery offense provides distinct liability for carjacking in its gradations, and requires a person to act knowingly with respect to taking or exercising control over a motor vehicle. Under current law carjacking is a legally distinct offense and only requires that the person acts "recklessly" with respect to the taking or exercise of control over the motor vehicle. However, there is no clear basis for requiring a lower culpable mental state for carjacking as compared to robbery generally, and it is not clear from legislative history that the Council intended such a difference.[62] By contrast, requiring a knowing culpable mental state is consistent with the current D.C. Court of Appeal's (DCCA) requirement of knowledge as to the lack of effective consent in the District's unauthorized use of a motor vehicle (UUV) statute[63] and in the revised UUV

[58] D.C. Code § 22-3611 authorizes heightened penalties for robbery when the complainant is under the age of 18, and the actor is at least 2 years older than the complainant.

[59] D.C. Code § 22-3601 authorizes heightened penalties for robbery when the complainant is 65 years of age or older, but does not require that the defendant be at least 10 years younger than the complainant.

[60] The District's current penalty enhancements for minors, senior citizens, taxicab drivers, transit operators, and citizen patrol members increase the maximum term of imprisonment by 1 ½ times the amount otherwise authorized. Robbery currently has a 2-15 year imprisonment penalty (3-22.5 years with one enhancement) and carjacking has a 7-21 year imprisonment penalty (10.5-31.5 years with one enhancement).

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

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

[63] *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.")

statute. Requiring a knowing culpable mental state also makes the revised robbery offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[64] Including carjacking as a form of robbery also improves the proportionality of punishment by prohibiting convictions for both robbery and carjacking based on a single act or course of conduct.[65] In addition, including carjacking by using or displaying a dangerous weapon or imitation dangerous weapon as a gradation of robbery also replaces the portion of current D.C. Code § 24-403.01(b-2) that authorizes heightened penalties for committing carjacking while armed.[66] Replacing this portion of the current statute improves the clarity and proportionality of the revised offense.

Sixth, the revised robbery statute punishes attempted robbery the same as most other criminal attempts.[67] Current District law provides a specific penalty for attempted robbery, apart from the general penalty for attempted crimes.[68] There is no clear rationale for such special attempt penalties in robbery as compared to other offenses. In contrast, under the revised robbery statute, the general part's attempt provisions[69] will establish penalties for attempted robbery (including robbery of a motor vehicle) consistent with other offenses. This change improves the consistency of the revised robbery statute with other offenses.

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

First, the revised robbery statute requires that the defendant knowingly takes or exercises control over property. The current robbery statute does not specify a culpable mental state for this element and no case law exists directly on point. However, the DCCA has stated that robbery requires a "felonious taking,"[70] suggesting that a culpable mental state similar to that of theft should be applied. As a "knowing" culpable mental state applies to the revised theft statute,[71] an identical culpable mental state is provided for robbery. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in

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(citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

[64] *See, e.g.*, RCC § 22E-2101.

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

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

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

[68] D.C. Code § 22-2802.

[69] RCC § 22E-301.

[70] *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996).

[71] RCC § 22E-2101.

American jurisprudence.[72] Requiring a knowing culpable mental state also makes the revised robbery statute consistent with offenses like theft, which generally require that the defendant act knowingly with respect to the elements of the offense.[73]

Second, the revised robbery statute requires that the property be "of another." The current statute does not explicitly require that the property taken be "of another." However, as noted above, the DCCA has held that the current robbery statute incorporates the elements of "larceny,"[74] which requires that property be of another.[75] Moreover, DCCA case law and current District practice suggests that carjacking liability similarly requires the property to be of another.[76] Requiring that the property be "of another" would codify this element suggested in District case law, and would bar a robbery conviction in cases in which the defendant took his or her own property.[77] This change clarifies existing law and improves penalty proportionality by limiting the more severe robbery penalties to conduct that involves an illegal taking, exercise of control, or attempted taking or exercise of control over another's property.

Third, the revised robbery statute's penalty enhancements incorporate statutory provisions that increase penalties based on the complainant's age, the status of the complainant as a vulnerable adult, a law enforcement officer, public safety employee, District official or transportation worker acting in the course of his or her duties, requiring recklessness as to the complainant's status. The current robbery statute does not itself provide for any additional penalties based on the status of the victim. However, multiple separate statutory provisions apply to robbery in existing law, and are captured by the language in the revised robbery statute.[78] The language of these statutes is silent as to the culpable mental state, and there is virtually no case law construing these

[72] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[73] *See, e.g.*, RCC § 22E-2101.
[74] *Lattimore*, 684 A.2d at 359 ("In the District of Columbia, robbery retains its common law elements.").
[75] At common law larceny required an intent to deprive the owner of the property, which is not possible if the property belongs to the person who takes it. Wayne, Lafave. § 20.3.Robbery, 3 Subst. Crim. L. § 20.3 ("Robbery consists of all six elements of larceny—a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it—plus two additional requirements: (7) that the property be taken from the person or presence of the other and (8) that the taking be accomplished b means of force or putting in fear.").
[76] Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership. *See Allen v. United States*, 697 A.2d 1 (D.C. 1997) (listing as one of the elements of carjacking as the taking "of a person's vehicle," implying the taking of a vehicle owned by someone other than the defendant); *see also Pixley v. United States*, 692 A.2d 438 (D.C. 1997) (making no distinction between robbery and carjacking on the issue of actual ownership; thus, implying that a defendant could not be guilty of carjacking if he was the lawful owner of the motor vehicle).").
[77] Depending on the facts, prosecutions for criminal menace or assault nonetheless may be warranted where a person takes back one's own property by criminal menace, overpowering physical force, or bodily injury.
[78] D.C. Code § 22-3601, Enhanced penalty for crimes against senior citizens; D.C. Code § 22-3611, Enhanced penalty for committing crime of violence against minors; D.C. Code § 22-3751.01, Enhanced penalties for offenses committed against transit operators and Metrorail station managers; and D.C. Code § 22-851, Protection of District public officials.

statutory enhancements.[79] However, while none of the statutes specify a culpable mental state, it is notable that D.C. Code § 22-3601 and D.C. Code § 22-3602 have affirmative defenses that exculpate where the defendant "reasonably believed" the victim was not a senior or minor. Such affirmative defenses suggest that strict liability does not apply, at least to those penalty enhancements, and suggest that some subjective awareness is necessary. Accordingly, the revised robbery statute requires a reckless culpable mental state as to the relevant circumstances of age, occupation, etc. This change clarifies the requisite culpable mental state requirements.

Fourth, the revised robbery statute can be satisfied if the defendant "takes or exercises control over" property. In contrast, the current robbery statute requires that the defendant "takes" property, but does not use the words "exercise control over" property. However, it is not clear that these words substantively alter the scope of the offense. The DCCA has held that robbery incorporates the elements of larceny, and both the revised and current theft statutes include "taking" and "exercising control over" property.[80] Including "exercises control over" in the revised robbery statute would ensure that various means of conduct constituting theft would suffice for robbery even if there was no "taking."[81] Including "exercises control over" also is consistent with current law with respect to carjacking. The DCCA has stated that a person may be convicted of carjacking "by burning the vehicle (or, perhaps stripping it) without taking, using, operating or removing it from its location."[82] The revised robbery statute more clearly and consistently tracks the theft-type conduct recognized in current law.

Fifth, the revised robbery statute requires that the defendant knowingly caused bodily injury; communicated that the actor will immediately cause a person to suffer bodily injury, a sexual act, sexual contact, confinement, or death; moved or immobilized another pesron; or took property from the hands or arms of the complainant. If a defendant is only reckless as to these elements, he or she cannot be convicted of robbery, even if he or she recklessly caused force or injury that facilitates taking property. The current District robbery and carjacking statutes are silent as to what, if any culpable mental state applies to such conduct, and District case law has not clarified the issue.[83] The lack of clarity on this issue is perhaps not surprising, given that the current robbery offense only requires that the defendant took property from the from the person or from the immediate physical control of a person, and provides that the force requirement can be satisfied by moving the property to the slightest degree. Under current law, a defendant who injures another, and then intentionally takes property from that person's immediate possession would be guilty of robbery, regardless of whether he caused the

[79] There is no case law regarding the mental state as to the status of the victim under D.C. Code §§ 22-3601; 22-3611; 22-3751.01; 22-851.
[80] D.C. Code § 22E-2101; D.C. Code §22-3211(a)(1).
[81] For example, if a defendant used threat of force to compel a person to relinquish property and give it to a third person, the defendant could still be convicted of robbery even though he himself did not take the property.
[82] *Allen v. United States*, 697 A.2d 1, 2 (D.C. 1997).
[83] *See*, *Gray*, 155 A.3d at 396 (J. McCleese dissenting) ("Our cases leave me uncertain as to whether a defendant must laws have intentionally deployed force or violence in order to be guilty of robbery").

injury knowingly or recklessly.[84] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[85] Requiring a knowing culpable mental state also makes the revised robbery statute consistent with offenses like theft, which generally require that the defendant act knowingly with respect to the elements of the offense.[86]

Sixth, under the revised robbery statute the defendant not only must have taken or exercised control over property, by causing bodily injury, communicating threats, or by applying physical force—the defendant also must know that the bodily injury, communication, or physical force in some way facilitated taking or exercising control over the property. The current robbery and carjacking statutes are silent as to what culpability may be required as to whether the use of force, etc. facilitated taking or exercising control over the property. Current District case law holds that a person can commit robbery if he or she "takes advantage of a situation which he created by use of force," and that "it is hard to see how that is done without some *awareness* of the opportunity being exploited."[87] The DCCA does not specify, however, what degree of awareness is required under the current robbery statute. The revised statute requires knowledge, which is consistent with the DCCA's current holding, and reflects longstanding recognition that the conduct constituting a case generally must be known by the defendant.[88]

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

[84] *But see, Gray*, 155 A.3d at 386 ("We are not persuaded by the dissent's argument that *Leak* stands for the proposition that 'any taking' from the 'immediate actual possession' of the victim 'is a robbery—not simple larceny.'").
[85] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[86] *See, e.g.*, RCC § 22E-2101.
[87] *Gray*, 155 A.3d at 383 (emphasis added).
[88] *See Elonis*, 135 S. Ct. at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)"). The causal relationship between the use of overpowering force, bodily injury, or menace and the taking or exercising control over property is at the heart of robbery as a composite offense comprised of assault and theft-type conduct.

RCC § 22E-1202. Assault.

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

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[1] As is discussed in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. Numerous other RCC offenses, such as the RCC offensive physical contact offense (RCC § 22E-1205) criminalize this conduct and should also be considered to replace many of these current D.C. Code "assault" offenses although they are generally not discussed in this commentary.

[2] D.C. Code § 22-401.

[3] D.C. Code § 22-401.

[4] D.C. Code § 22-401.

[5] D.C. Code § 22-401.

[6] D.C. Code § 22-401.

[7] D.C. Code § 22-401.

[8] D.C. Code § 22-401.

[9] D.C. Code § 22-402.

[10] D.C. Code § 22-403.

[11] D.C. Code § 22-404(a)(1).

[12] D.C. Code § 22-401(a)(2).

[13] D.C. Code § 22-404.01.

[14] D.C. Code § 22-404.02.

[15] D.C. Code § 22-404.03.

[16] D.C. Code § 22-405.

[17] D.C. Code § 22-405.

[18] D.C. Code § 22-406.

[19] D.C. Code § 22-406.

[20] D.C. Code § 22-851.

[21] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f)(1) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been

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

Subsection (a) specifies the two types of prohibited conduct for first degree assault, the highest grade of the revised assault offense. Paragraph (a)(1) specifies one type of prohibited conduct—causing serious and permanent disfigurement to the complainant. Paragraph (a)(2) specifies the second type of prohibited conduct—destroying, amputating, or permanently disabling a member or organ of the complainant's body. Subsection (a) specifies a culpable mental state of "purposely." Per the rules of construction in RCC § 22E-207, the "purposely" culpable mental state in subsection (a) applies to the elements in paragraph (a)(1) and paragraph (a)(2). "Purposely" is a defined term in RCC § 22E-206 that here means that the accused must consciously desire that he or she causes serious and permanent disfigurement to the complainant or destroys, amputates, or permanently disables a member or organ of the complainant's body.

Subsection (b) specifies the prohibited conduct for second degree assault—causing "serious bodily injury" to the complainant. "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted unconsciousness, or protracted loss or impairment of the function of a bodily member or organ. Subsection (b) specifies a culpable mental state of "recklessly, with extreme indifference to human life." A "recklessly" culpable mental state is a defined term in RCC § 22E-206 that here means that the accused consciously disregarded a substantial risk of causing serious bodily injury to the complainant, and the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. However, recklessness alone is insufficient for the culpable mental state of "recklessly, with extreme difference to human life," that is required in subsection (b). The accused must also act "with extreme indifference to human life." This language is intended to codify the same standard used in current D.C. Court of Appeals (DCCA) case law defining what is commonly known as "depraved heart murder."[28] In contrast to the "substantial" risks required for ordinary recklessness,

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convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[22] D.C. Code § 22-4502.

[23] D.C. Code § 22-3601.

[24] D.C. Code § 22-3602.

[25] D.C. Code § 22-3611.

[26] D.C. Code §§ 22-3751; 22-3752.

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

[28] *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011) (Farrell, J. concurring). *See also Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (en banc) (noting that examples of depraved heart murder include firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into . . . a moving automobile, necessarily occupied by human beings . . . .; playing a game of 'Russian roulette' with another person [.]"); *Jennings v. United States*, 993 A.2d 1077, 1078 (D.C. 2010) (depraved heart murder when defendant fired a gun at across a street towards a group of people, hitting and killing one of them); *Powell v. United States*, 485 A.2d 596 (D.C. 1984)

the depraved heart murder standard requires that the accused consciously disregarded an "*extreme* risk of causing serious bodily injury."[29] For example, the DCCA has recognized extreme indifference to human life when a person caused the death of another by driving at speeds in excess of 90 miles per hour, and turning onto a crowded onramp in an effort to escape police[30]; firing ten bullets towards an area where people were gathered[31]; and providing a weapon to another person, knowing that person would use it to injure a third person.[32] Although it is not possible to specifically define the degree and nature of risk that is "extreme," the "extreme indifference" language codifies all DCCA case law regarding "depraved heart" murder, which is also applicable to the current aggravated assault statute.

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

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

Subsection (e) codifies an exclusion from liability for the offense. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all exclusions from liability in the RCC. An actor does not commit an offense under the revised assault statute when, in fact, the actor's conduct is specifically permitted by a District statute or regulation. Subsection (e) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[33]

(defendant guilty of depraved heart murder when he led police on a high speed chase, drove at speeds of up to 90 miles per hour, turned onto a congested ramp and caused a fatal car crash).

[29] *Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (en banc) (emphasis added).

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

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

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

[33] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

Subsection (f) codifies two defenses for the assault statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all defenses in the RCC.

Paragraph (f)(1) codifies a defense for first degree (subsection (a)) and second degree (subsection (b)) of the revised assault statute—causing serious and permanent disfigurement to the complainant, destroying, amputating, or permanently disabling the complainant, and causing "serious bodily injury" to the complainant, as that term is defined in RCC § 22E-701.

Paragraph (f)(1) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (f)(1) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements for the defense. First, per subparagraph (f)(1)(A), the injury must be caused by a "lawful cosmetic or medical procedure." The "lawful" requirement applies both to a cosmetic procedure and a medical procedure. As specified by use of "in fact" in paragraph (f)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the injury is part of a lawful cosmetic or medical procedure. A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they are otherwise legal under District or federal law. Cosmetic procedures that are legal[34] also are within the scope of the defense. Unlike the effective consent defense to third degree and fourth degree of the revised assault statute under paragraph (f)(2), the defense under paragraph (f)(1) applies to serious injuries, such as permanent disfigurement, and injuries that entail a substantial risk of death or otherwise satisfy the RCC definition of "serious bodily injury" in RCC § 22E-701,[35] as long as they are part of a lawful cosmetic or medical procedure.

Subparagraph (f)(1)(B) requires that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in paragraph (f)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is under 18 years of age, RCC § 22E-701 defines a "person with legal authority over the complainant" as "the parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the complainant, or someone acting with the effective consent of such a parent or such a person." "Person acting in the place of a parent per civil law" and "effective consent" also are defined terms in RCC § 22E-701. When the complainant is an "incapacitated individual," RCC § 22E-701 defines a "person with legal authority over the complainant" as "the court-appointed guardian to the complainant, or someone acting

[34] *See,* e.g., D.C. Code § 47–2853.81. Scope of practice for cosmetologists.

[35] RCC § 22E-701 defines "serious bodily injury" as "a bodily injury or significant bodily injury that involves: (A) A substantial risk of death; (B) Protracted and obvious disfigurement; (C) Protracted loss or impairment of the function of a bodily member or organ; or (D) Protracted loss of consciousness."

with the effective consent of such a guardian." RCC § 22E-701 further defines "incapacitated individual."

The effect of subparagraph (f)(1)(B) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense[36] to first degree or second degree assault. However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[37]

Subparagraph (f)(1)(C) and its sub-subparagraphs specify the individuals from whom an actor must receive "effective consent" in order for the defense to apply. Each sub-subparagraph will be discussed separately, but general principles that apply to each sub-subparagraph will be discussed first.

Subparagraph (f)(1)(C) requires that the actor "reasonably believes" that the specified individuals in the following sub-subparagraphs—either the complainant or a "person with legal authority over the complainant" acting consistent with that authority—give "effective consent" to the actor to cause the injury. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires some indication (by word or action) of agreement given by a person generally competent to do so. In addition, the RCC definition of "consent" excludes consent from a person that "[b]ecause of youth, mental illness or disorder, or intoxication, is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." Thus, although subparagraph (f)(1)(C) and its sub-subparagraphs permit complainants under the age of 18 years to give effective consent in certain situations, the RCC definition of "consent" may preclude a very young person from giving consent and, in such a case, if the actor believes it, the defense does not apply.

The "in fact" specified in paragraph (f)(1) applies to subparagraph (f)(1)(C) and the requirements in the following sub-subparagraphs. No culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(1)(C) or the following sub-subparagraphs. It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[38] There is no effective

[36] The defense under paragraph (f)(1) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[37] These defenses have different requirements than the effective consent defense in paragraph (f)(1). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

[38] *See, e.g.*, Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these

consent defense under subparagraph (f)(1)(C) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (f)(1)(C) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Subparagraph (f)(1)(C) further requires that the actor "reasonably believes" that the complainant and the actor meet various age requirements in the following sub-subparagraphs. As is discussed above, due to the "in fact" specified in paragraph (f)(1), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(1)(C) or the following sub-subparagraphs. However, the actor must subjectively believe, and that belief must be reasonable,[39] that the actor and the complainant satisfy the age requirements in the sub-subparagraphs under subparagraph (f)(1)(C). There is no effective consent defense under subparagraph (f)(1)(C) when the actor makes an unreasonable mistake as to the required age of the complainant or required age of the actor.

Finally, subparagraph (f)(1)(C) requires that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to cause the injury. As is discussed above, due to the "in fact" specified in paragraph (f)(1), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(1)(C) or the following sub-subparagraphs. However, the actor must subjectively believe, and that belief must be reasonable,[40] that there is effective consent to cause the injury. There is no effective consent defense under

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would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[39] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[40] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

subparagraph (f)(1)(C) when the actor makes an unreasonable mistake as to the type of injury to which effective consent is given.[41]

Having discussed the general principles that apply to the defense requirements in subparagraph (f)(1)(C) and its sub-subparagraphs, each sub-subparagraph will now be discussed.

Under subparagraph (f)(1)(C) and sub-subparagraph (f)(1)(C)(i), the actor must reasonably believe that the complainant is 18 years of age or older and that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority, gives "effective consent" to the actor to cause the injury. As is discussed above, "effective consent" and "person with legal authority over the complainant" are defined terms in RCC § 22E-701. The provision in sub-subparagraph (f)(1)(C)(i) for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of incompetent adults giving effective consent to the actor.

Second, and in the alternative, under subparagraph (f)(1)(C) and sub-subparagraph (f)(1)(C)(ii), the actor must reasonably believe that the complainant is under 18 years of age, the actor is 18 years of age or older, and that a "person with legal authority over the complainant" gives "effective consent" to the actor to cause the injury. Given the seriousness of the injury under subsections (a) and (b) of the revised assault statute, an actor over the age of 18 years must have the consent of a parent or other "person with legal authority over the complainant" before causing the injury to a minor complainant.

Finally, and in the alternative, under subparagraph (f)(1)(C) and sub-subparagraph (f)(1)(C)(iii), the actor must reasonably believe that the complainant is under 18 years of age, the actor is under 18 years of age, and the complainant gives "effective consent" to the actor to cause the injury. An actor that is under the age of 18 years will generally not perform any lawful cosmetic or medical procedures on another minor, but there may be extraordinary or unusual situations such as emergency first aid or administration of an over-the-counter skin treatment where the requirements of the defense are met.

Paragraph (f)(2) codifies a defense for third degree (subsection (c)) and fourth degree (subsection (d)) of the revised assault statute—causing "significant bodily injury" or "bodily injury" to the complainant, as those terms are defined in RCC § 22E-701.

Paragraph (f)(2) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (f)(2) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

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[41] For example, if, as part of a lawful medical procedure, the complainant gives effective consent to the actor to cause "bodily injury," and the actor unreasonably believes that the complainant gives effective consent to cause "serious bodily injury," the effective consent defense does not apply, and the actor is still guilty of second degree of the revised assault statute. However, the inverse is also true. If, as part of a lawful medical procedure, the complainant gives effective consent to the actor to cause "bodily injury," and the actor *reasonably* believes that the complainant gives effective consent to "serious bodily injury," the effective consent defense does apply, and the actor is not guilty of second degree of the revised assault statute.

There are several requirements to the defense. The requirement in subparagraph (f)(2)(A) that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, is identical to the requirement in subparagraph (f)(1)(B), discussed above.

Subparagraph (f)(2)(B) and its sub-subparagraphs specify the individuals from whom an actor must receive "effective consent" in order for the defense to apply. Each sub-subparagraph will be discussed separately, but general principles that apply to each sub-subparagraph will be discussed first.

Subparagraph (f)(2)(B) requires that the actor "reasonably believes" that the specified individuals in the following sub-subparagraphs—either the complainant or a "person with legal authority over the complainant" acting consistent with that authority—give "effective consent" to the actor to cause the injury. "Effective consent" is a defined term in RCC § 22E-701 and is defined to incorporate the RCC definition of "consent." These terms, and their applicability to the defense in paragraph (f)(1) for first degree and second degree assault, are discussed above. This discussion also applies to the defense to third degree and fourth degree assault under subparagraph (f)(2)(B).

The "in fact" specified in paragraph (f)(2) applies to subparagraph (f)(2)(B) and the requirements in the following sub-subparagraphs. No culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(2)(B) or the following sub-subparagraphs. It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[42] There is no effective consent defense under subparagraph (f)(2)(B) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (f)(2)(B) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Subparagraph (f)(2)(B) further requires that the actor "reasonably believes" that the complainant and the actor meet various age requirements in the following sub-subparagraphs. As is discussed above, due to the "in fact" specified in paragraph (f)(2), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(2)(B) or the following sub-subparagraphs. However, the actor must subjectively believe, and that belief must be reasonable[43] that the actor and the complainant satisfy the age

[42] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[43] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these

requirements in the sub-subparagraphs under subparagraph (f)(2)(B). There is no effective consent defense under subparagraph (f)(2)(B) when the actor makes an unreasonable mistake as to the required age of the complainant, the required age of the actor, or any required age gap.

Finally, subparagraph (f)(2)(B) requires that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to cause the injury. As is discussed above, due to the "in fact" specified in paragraph (f)(2), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(2)(B) or the following sub-subparagraphs. However the actor must subjectively believe, and that belief must be reasonable[44] that there is effective consent to cause the injury. There is no effective consent defense under subparagraph (f)(2)(B) when the actor makes an unreasonable mistake as to the type of injury to which effective consent is given.

Having discussed the general principles that apply to the defense requirements in subparagraph (f)(2)(B) and its sub-subparagraphs, each sub-subparagraph will now be discussed.

Under subparagraph (f)(2)(B) and sub-subparagraph (f)(2)(B)(i), the actor must reasonably believe that the complainant is 18 years of age or older and that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority, gives "effective consent" to the actor to either cause the injury, or to engage in a lawful sport, occupation, or other concerted activity.[45] As is discussed above, "effective consent" and "person with legal authority over the complainant" are defined terms in RCC § 22E-701. The provision in sub-subparagraph (f)(2)(B)(i) for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of incompetent adults giving effective consent to the actor. Sub-subparagraph (f)(2)(B)(II), in the alternative, requires that, if the injury occurs during a lawful sport, occupation, or other concerted activity, the

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questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[44] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[45] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

defense is applicable when the actor's infliction of the injury is a reasonably foreseeable hazard of that activity. As specified by the "in fact" in paragraph (f)(2), no culpable mental state, as defined in RCC § 22E-205, applies to the requirement that the actor's infliction of the injury is a reasonably foreseeable hazard of a permissible activity. This is an objective determination and the defense does not apply if the infliction of the injury is not a reasonably foreseeable hazard.

Second, and in the alternative, under subparagraph (f)(2)(B) and sub-subparagraph (f)(2)(B)(ii), the actor must reasonably believe that the complainant is under 18 years of age and the actor is 18 years of age or older and more than four years older than the complainant (sub-subparagraph (f)(2)(B)(ii)(I)). In addition, the actor must reasonably believe that a "person with legal authority over the complainant" gives "effective consent" to the actor to either cause the injury, or to engage in a lawful sport, occupation, or other concerted activity,[46] where the actor's infliction of the injury is a reasonably foreseeable hazard of that activity. The above discussion of "engage in a lawful sport, occupation . . ." for sub-subparagraph (f)(2)(B)(i)(II) applies here to sub-subparagraph (f)(2)(B)(ii)(II)(b).

Finally, and in the alternative, under subparagraph (f)(2)(B) and sub-subparagraph (f)(2)(B)(iii), the actor must reasonably believe that the complainant is under 18 years of age, and that the actor is either under years of age or over 18 years of age and not more than four years older (sub-subparagraph (f)(2)(B)(iii)(I)). Subparagraph (f)(2)(B) and sub-subparagraph (f)(2)(B)(iii)(II) further require that the actor must reasonably believe that the complainant gives "effective consent" to the actor to cause the injury, or to engage in a lawful sport, occupation, or other concerted activity,[47] where the actor's infliction of the injury is a reasonably foreseeable hazard of that activity. The above discussion of "engage in a lawful sport, occupation . . ." for sub-subparagraph (f)(2)(B)(i)(II) applies here to sub-subparagraph (f)(2)(B)(iii)(II)(b).

Subsection (g) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[48] However, as discussed above, extreme indifference to human life in subsection (b) requires t120hat the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but

[46] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

[47] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

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

would have been aware of the risk had the person been sober. The term "self-induced intoxication" have the meanings specified in RCC § 22E-209.[49]

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and negates finding that the person acted with extreme indifference to human life.[50] In these cases, although the awareness of risk may be imputed, the person could still be acquitted under subsection (b). However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for other forms of assault, provided that his or her conduct was clearly blameworthy.

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

Paragraph (h)(5) codifies several penalty enhancements for second degree of the revised assault statute. If any of the specified enhancements apply, the penalty classification for second degree assault is increased by one class.

Subparagraph (h)(5)(A) codifies a penalty enhancement for second degree of the revised assault statute if the actor commits the offense and is reckless as to the fact that the complainant is a "protected person." "Protected person" is a defined term in RCC § 22E-701 that includes individuals such as a law enforcement officer in the course of his or her duties. "Reckless," a term defined at RCC § 22E-206, here means the accused must be aware of a substantial risk that the complainant is a "protected person" as that term is defined in RCC § 22E-701.

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

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

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

Subparagraph (h)(5)(B) codifies a penalty enhancement for second degree of the revised assault statute if the actor commits the offense by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (h)(5)(A) applies to the elements in subparagraph (h)(5)(B) until "in fact" is specified. "Recklessly" is a defined term in RCC § 22E-206 that here means being aware of a substantial risk that the accused committed the offense by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the item displayed or used is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Subparagraph (h)(5)(C) codifies a penalty enhancement if the actor commits the offense with the "purpose" of harming the complainant because of his or her status as a "law enforcement officer," "public safety employee," or "District official" as those terms are defined in RCC § 22E-701. "Purpose" is a defined term in RCC § 22E-206 that here means that the actor must consciously desire to harm the complainant because of his or her status as a "law enforcement officer," "public safety employee," or "District official."[51] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes. Per RCC § 22E-205, the object of the phrase "has the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Paragraph (h)(6) codifies several penalty enhancements for third degree of the revised assault statute. Per subparagraph (h)(6)(A), the penalty classification of third degree assault is increased by one class if the penalty enhancements in sub-subparagraphs (h)(6)(A)(i) or (h)(6)(A)(ii) apply. The penalty enhancements in sub-subparagraphs (h)(6)(A)(i) and (h)(6)(A)(ii) are the same as the penalty enhancements in subparagraph (h)(5)(A) and (h)(5)(C) discussed above. Subparagraph (h)(6)(B) specifies that the penalty classification for third degree assault is increased by two classes if the actor commits the offense by recklessly displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon. Other than applying to a gradation that requires "significant bodily injury," the requirements for the penalty enhancement in subparagraph (h)(6)(B) are the same as in the penalty enhancement in subparagraph (h)(5)(B) discussed above.

Paragraph (h)(7) codifies several penalty enhancements for fourth degree of the revised assault statute. Per subparagraph (h)(7)(A), the penalty classification of fourth degree assault is increased by one class if the penalty enhancements in sub-subparagraphs (h)(7)(A)(i) or (h)(7)(A)(ii) apply. The penalty enhancements in sub-subparagraphs (h)(7)(A)(i) and (h)(7)(A)(ii) are the same as the penalty enhancements in subparagraph

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

(h)(5)(A) and (h)(5)(C) discussed above. Subparagraph (h)(7)(B) specifies that the penalty classification for fourth degree assault is increased by three classes if the actor recklessly causes the bodily injury by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon. Other than applying to a gradation that requires "bodily injury," the requirements for the penalty enhancement in subparagraph (h)(7)(B) are the same as in the penalty enhancement in subparagraph (h)(5)(B) discussed above.

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

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

First, the revised assault statute does not criminalize as a completed offense conduct that falls short of inflicting "bodily injury," as that term is defined in RCC § 22E-701. Under current District law, an assault[52] includes: 1) intent-to-frighten assaults that do not result in physical contact with the complainant's body;[53] 2) non-violent sexual touching[54] that causes no pain or impairment to the complainant's body; and 3) any completed battery where the accused inflicts an unwanted touching on the complainant that causes no pain or impairment to the complainant's body.[55] However, a recent DCCA

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

[53] *See, e.g.*, *Joiner-Die v. United States*, 899 A.2d 762, 765 (D.C. 2006) ("To establish intent-to-frighten assault, the government must prove: (1) that the defendant committed a threatening act that reasonably would create in another person the fear of immediate injury; (2) that, when he/she committed the act, the defendant had the apparent present ability to injure that person; and (3) that the defendant committed the act voluntarily, on purpose, and not by accident or mistake."). The DCCA has made it clear that in intent-to frighten assaults, the accused must have the intent to cause fear in the complaining witness. *See, e.g.*, *Sousa v. United States*, 400 A.2d 1036, 1044 (D.C. 1979) ("Our attention is focused "upon the menacing conduct of the accused and his purposeful design either to engender fear in or do violence to his victim."); *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986) ("Intent-to-frighten assault, on the other hand, requires proof that the defendant intended either to cause injury or to create apprehension in the victim by engaging in some threatening conduct; an actual battery need not be attempted.") (citing W. LaFave & A. Scott, Handbook on Criminal Law § 82, at 610–612 (1972)).

[54] "Where the assault involves a nonviolent sexual touching the court has held that there is an assault . . . because 'the sexual nature [of the conduct] suppl[ies] the element of violence or threat of violence.'" *Matter of A.B.*, 556 A.2d 645, 646 (D.C. 1989) (quoting *Goudy v. United States*, 495 A.2d 744, 746 (D.C.1985), *modified*, 505 A.2d 461 (D.C.), *cert. denied*, 479 U.S. 832, 107 S.Ct. 120, 93 L.Ed.2d 66 (1986)). The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)); *see also Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted).

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

case that is in active litigation may ultimately call into question whether an unwanted touching on the complainant that causes no pain or impairment is sufficient.[56] In contrast, the revised assault statute is limited to causing three types of bodily injury—"serious bodily injury," "significant bodily injury," and "bodily injury"—as those terms are defined in RCC § 22E-701—as well as serious and permanent disfigurement and injuries. Depending on the facts of a case, conduct that falls short of inflicting "bodily injury" may be criminalized as attempted assault under the general attempt provision (RCC § 22E-301) or other RCC offenses such as offensive physical contact (RCC § 22E-1205), criminal threats (RCC § 22E-1204), or weapons offenses. In the case of nonconsensual sexual touching, the RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law[57] and there may be liability under other RCC offenses such as the offenses in Chapter 12, weapons offenses, or sex offenses RCC Chapter 13. This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC no longer criminalizes as separate offenses assault with intent to kill, assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, assault with intent to commit child sexual abuse, assault with intent to commit robbery, assault with intent to commit mayhem, and assault with intent to commit any other felony. Current District law criminalizes this conduct as separate offenses[58] collectively referred to as the "assault with intent to" or "AWI" offenses. In contrast, in the RCC, liability for the conduct criminalized by the current AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[59] The *actus reus*[60] and the required culpable mental state[61] of an

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two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Dunn v. United States*, 976 A.2d 217, 218-19, 220, 221 (D.C. 2009) (stating that the injury resulting from an assault "may be extremely slight," requiring "no physical pain, no bruises, no breaking of the skin, no loss of blood, no medical treatment" and finding the evidence sufficient for assault when appellant "shoved" the complainant because the contact was "offensive.").

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

[57] *See, e.g.*, *Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020).

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

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

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

attempt in the RCC provide for liability that is at least as expansive as that afforded by the current AWI offenses. This change improves the clarity of the revised assault statute, eliminates unnecessary overlap between the AWI offenses and general attempt liability for assault-type offenses, and improves the proportionality of the revised statutes by applying a consistent attempt penalty.

Third, the revised assault statute replaces the separate common law offenses of mayhem and malicious disfigurement. The D.C. Code currently specifies penalties for the crimes of mayhem and malicious disfigurement,[62] although the elements of these offenses are established wholly by case law. The DCCA has said that malicious disfigurement requires proof that a person caused a permanent disfigurement[63] and mayhem requires proof that someone caused a permanently disabling injury.[64] Both

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within the scope of an AWI offense also necessarily constitutes an attempt to commit the target of that AWI offense.

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

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

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

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

[64] *Edwards v. United States*, 583 A.2d at 668 & n.12 ("The elements of mayhem are: (1) that the defendant caused permanent disabling injury to another; (2) that he had the general intent to do the injurious act; and (3) that he did so willfully and maliciously.") (citing *Wynn v. United States*, 538 A.2d 1139, 1145 (D.C. 1988)); *see also Peoples v. United States*, 640 A.2d 1047, 1054 (D.C. 1994) ("The court has stated that

offenses require a mental state of malice[65] and proof of the absence of mitigating circumstances,[66] although the DCCA has said that malicious disfigurement requires a specific intent to injure that mayhem does not.[67] Yet, while such requirements are similar to, and for some fact patterns more demanding than, the current aggravated assault statute,[68] mayhem and malicious disfigurement have the same ten-year maximum penalty as the current aggravated assault statute. In contrast, the revised assault statute has two new gradations in paragraph (a)(1) and paragraph (a)(2) that require purposeful, permanent injuries. These new gradations cover conduct currently prohibited by mayhem and malicious disfigurement. The culpable mental state of "malice" no longer applies to conduct currently prohibited by mayhem and maliciously disfiguring, nor does the special mitigating circumstances defense[69] that accompanies malice. Conduct currently prohibited by mayhem and malicious disfigurement that does not satisfy the purposely culpable mental state or required injuries in paragraph (a)(1) or paragraph (a)(2) of the

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'[t]he mayhem statute seeks to protect the preservation of the human body in its normal functioning and the and the integrity of the victim's person from permanent injury or disfigurement.'" (quoting *McFadden v. United States*, 395 A.2d 14, 18 (D.C. 1978)).

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

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

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

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

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

revised assault offense is covered by second degree assault. This change clarifies and reduces unnecessary overlap in the current D.C. Code.

Fourth, the RCC does not codify a separate assault with a dangerous weapon (ADW) offense. Under current D.C. Code § 22-402, ADW is a separate offense with a ten-year maximum penalty.[70] ADW prohibits engaging in any conduct that constitutes a simple assault, including intent-to-frighten assaults and offensive physical contact, "with" a dangerous weapon.[71] In contrast, the revised assault statute has specific penalty enhancements for causing different types of bodily injury "by displaying or using" a "dangerous weapon" or "imitation dangerous weapon," as those terms are defined in RCC § 22E-701. "Displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch." The dangerous weapon or imitation dangerous weapon must, directly[72] or indirectly,[73] cause the resulting bodily injury.[74] The use or display of a dangerous weapon or imitation dangerous weapon that falls short of causing the required types of bodily injury is no longer criminalized as assault. Instead, such

[70] D.C. Code § 22-402 ("Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").
The more stringent 10-year maximum penalty, as opposed to 180 days for simple assault in D.C. Code § 22-404(a)(1), is "imposed as 'a practical recognition of the additional risks posed by use of the weapon.'" *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (*quoting Parker v. United States*, 359 F.2d 1009, 1012 (D.C. Cir. 1966)).

[71] The current ADW statute merely requires "an assault with a dangerous weapon," D.C. Code § 22-402, and DCCA case law establishes that the ADW statute requires "the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon." *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011). Thus, the broad range of conduct included under "assault" is subject to a weapons enhancement under the current ADW statute. *See, e.g.*, *Frye v. United States*, 926 A.2d 1085, 1094 (D.C. 2005) (finding that the evidence was sufficient for ADW when "appellant intended to and did try to injure or frighten [the complaining witness] by using his van as a weapon in a manner likely to cause [the complaining witness] to have a car accident" and listing as an element of ADW that there "was an attempt, with force or violence, to injure another person, or a menacing threat, which may or may not be accompanied by a specific intent to injure.").

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

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

[74] If an individual merely possesses a dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of an assault per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an imitation firearm under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon." A defendant may not, however, be convicted of both a gradation of assault based on the use of a dangerous weapon and RCC § 22E-4104. In addition, depending on the facts of a given case, the display of a dangerous weapon or imitation dangerous weapon may be sufficient to establish liability for an attempt to commit a gradation of the revised assault statute requiring the harm be caused by "displaying or using" a dangerous weapon or imitation dangerous weapon, or possibly another RCC Chapter 12 offense.

threatening acts or offensive physical contact are prohibited by the criminal threats statute and its weapon enhancement (RCC § 22E-1204).[75] In addition, the use or display of objects that the complaining witness incorrectly perceives to be a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701, no longer receives an assault enhanced penalty as they do under current District law.[76] Excluding these objects does not change District case law holding that circumstantial evidence may be sufficient to establish that a deadly or dangerous weapon was used.[77] This change reduces unnecessary overlap in the current D.C. Code between multiple means of enhancing assaults committed with a weapon and improves the proportionality of the revised offense.[78]

Fifth, the revised assault statute is no longer subject to a separate penalty enhancement for committing assault-type crimes "while armed" or "having readily available" a dangerous weapon. Current D.C. Code § 22-4502 provides severe,

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[75] The RCC offensive physical contact statute (RCC § 22E-1205) does not provide a gradation for engaging in offensive physical contact with a dangerous weapon, but likely fact patterns would almost certainly constitute criminal threats.

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

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

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

The RCC removes the overlap between these multiple means of enhancing an armed assault and grades the offense according to the role of the weapon in the offense. In the RCC, the use or display of a dangerous weapon or imitation dangerous weapon, including a "firearm" or "imitation firearm," as those terms are defined in RCC § 22E-701, that causes the required bodily injury receives a single enhancement in the revised assault statute. If an individual merely possesses a dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of an assault per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an "imitation firearm" under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon." A defendant may not, however, be convicted of both a gradation of assault based on the use of a dangerous weapon and RCC § 22E-4104. In addition, depending on the facts of a given case, the display of a dangerous weapon or imitation dangerous weapon may be sufficient to establish liability for an attempt to commit assault, either with an assault weapons enhancement or without, or possibly another RCC Chapter 12 offense.

additional penalties for committing, attempting, soliciting, or conspiring to commit an array of assault-type offenses[79] "while armed" with or "having readily available" a dangerous weapon.[80] In contrast, the revised assault statute requires an individual to cause the injury "by displaying or using" a "dangerous weapon" or "imitation dangerous weapon," as those terms are defined in RCC § 22E-701, resulting in several changes to current District law. First, merely being armed with or having the weapon readily available is not sufficient for an enhanced assault penalty. "Displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch." Second, through the definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701, the use or display of objects that the complaining witness incorrectly perceives to be a dangerous weapon or imitation dangerous weapon, no longer receives an enhanced penalty as they do under current District law.[81] Excluding these objects does not change District case law holding that circumstantial evidence may be sufficient to establish that a dangerous weapon was used.[82] Third, because the revised assault statute has specific penalty enhancements for the display or use of a dangerous weapon, it is no longer possible to enhance an assault with both a weapon enhancement and an enhancement based on the identity of the complainant,[83] or to double-stack

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

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

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

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

[83] There are several penalty enhancements under current District law based upon the age or work status of the complaining witness. *See, e.g.,* D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens); 22-3611 (enhancement for specified crimes committed against minors); 22-3751 (enhancement for specified crimes committed against taxicab drives); 22-3751.01 (enhancement for specified crimes committed against a transit operator or Metrorail station manager). Nothing in current District law appears to prohibit enhancing an assault with one or more of these separate enhancements

different weapon penalties and offenses.[84] Fourth, the revised assault statute caps the maximum penalty for an enhancement based on the display or use of a dangerous weapon or imitation dangerous weapon to never be greater than the most egregious type of physical harm that the revised assault statute prohibits—the purposeful infliction of a permanently disabling injury in paragraphs (a)(1) and (a)(2) of the revised assault statute. This change clarifies and reduces unnecessary overlap between multiple means of enhancing assaults committed with a weapon and improves the proportionality of the revised statute.[85]

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based on age or work status, in addition to the weapon enhancement in current D.C. Code § 22-4502. Indeed, the facts as discussed in several DCCA cases indicate that such stacking does occur with the weapon enhancement and senior citizen enhancement. *See, e.g.*, *McClain v. United States*, 871 A.2d 1185 (D.C. 2005) (determining "whether the trial court committed plain error when it instructed the jury regarding to lesser-included offenses of the crime of armed robbery of a senior citizen," charged under the enhancements in now D.C. Code §§ 22-4502 and 22-3601).

[84] Under current District law, certain crimes are considered "crimes of violence" and are subject to enhanced penalties under several overlapping provisions. First, crimes of violence are subject to enhancement under D.C. Code § 22-4502 if a person commits them "when armed with or having readily available" any dangerous weapon. D.C. Code § 22-402(a). A person so convicted with no prior convictions for certain armed crimes may be subjected to a significantly increased maximum term of imprisonment and "shall" receive a mandatory minimum prison sentence of five years if he or she committed the offense "while armed with any pistol or firearm." D.C. Code § 22-4501(a)(1). If the person has one or more prior convictions for armed offenses, he or she "shall" be subject to an increased maximum prison sentence as well as mandatory minimum sentences. D.C. Code § 22-4501(a)(2). ADW is a crime of violence, but it may not receive the "while armed" enhancement under D.C. Code § 22-4501(a)(1) because "the use of a dangerous weapon is already included as an element" of the offense. *Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000). ADW is subject to enhancement, however, under the recidivist while armed provision in D.C. Code § 22-4501(a)(2). *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982). Second, crimes of violence are subject to the additional, separate offense of possession of a firearm during a crime of violence (PFCOV) if a person possessed a "pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm" while committing the offense. PFCOV is a felony with a maximum term of imprisonment of 15 years and a mandatory minimum term of imprisonment of five years. Despite the substantial overlap in prohibited conduct, offenses enhanced with the "while armed" enhancement and PFCOV do not merge. *See Little v. United States*, 613 A.2d 880, 881 (D.C. 1992) (holding that a conviction for assault with intent to kill while armed does not merge with a conviction for PFCOV due to the holding in *Thomas v. United States*, 602 A2.d 647 (D.C. 1992)). Depending on the weapon at issue and the facts of a given case, additional offenses that may be charged include carrying dangerous weapons (D.C. Code § 22-4504) and possession of prohibited weapons (D.C. Code § 22-4514).

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

The RCC removes the overlap between these multiple means of enhancing an armed assault and grades the offense according to the role of the weapon in the offense. In the RCC, the use or display of a dangerous

Sixth, the revised assault statute's enhanced penalties for causing specified types of "bodily injury" to a law enforcement officer (LEO) partially replace[86] the separate assault on a police officer (APO) offenses. Under current District law, a simple assault against a LEO "on account of, or while that law enforcement officer is engaged in the performance of his or her official duties"[87] is a misdemeanor, with a maximum term of imprisonment of 6 months,[88] and an assault that causes "significant bodily injury" or "a violent act that creates a grave risk of causing significant bodily injury" carries a maximum penalty of ten years imprisonment.[89] In contrast, the revised assault statute provides enhanced penalties for injuries to LEOs for serious bodily injury, significant bodily injury, and bodily injury.

Codifying the LEO enhancement in the revised assault statute results in several changes to current District law. First, the LEO enhancement in the revised assault statute is limited to assaults that cause specified types of "bodily injury."[90] Conduct that fails to satisfy the revised assault statute, as well as "a violent act that creates a grave risk of significant bodily injury," may be criminalized elsewhere in the RCC.[91] Second, the

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weapon or imitation dangerous weapon, including a "firearm" or "imitation firearm," as those terms are defined in RCC § 22E-701, that causes the required bodily injury receives a single enhancement in the revised assault statute. If an individual merely possesses a dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of an assault per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an "imitation firearm" under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon." A defendant may not, however, be convicted of both a gradation of assault based on the use of a dangerous weapon and RCC § 22E-4104. In addition, depending on the facts of a given case, the display of a dangerous weapon or imitation dangerous weapon may be sufficient to establish liability for an attempt to commit assault, either with an assault weapons enhancement or without, or possibly another RCC Chapter 12 offense.

[86] As is discussed earlier in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. Numerous other RCC offenses criminalize this conduct and should also be considered to replace the separate APO offenses even though they are generally not discussed in this entry.

[87] D.C. Code § 22-405(b), (c).

[88] D.C. Code § 22-405(b).

[89] D.C. Code § 22-405(c).

[90] Limiting enhanced penalties for assaulting a LEO to causing specified physical injury is consistent with recent District legislation that amended the APO statute. Prior to June 30, 2016, in addition to an assault, the APO statute prohibited "resist[ing], oppos[ing], imped[ing], intimidate[ingt], or interfer[ing] with a law enforcement officer" in the course of his or her official duties or on account of those duties. D.C. Code § 22-405(b), (c) (repl.). On January 28, 2016, the Office of the District of Columbia Auditor issued a report titled "The Durability of Police Reform: The Metropolitan Police Department and Use of Force, 2008-2015," available at http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf (Office of the District of Columbia Auditor Report). The report recommended that the APO misdemeanor statute "be amended so that the elements of the offense require an actual assault rather than mere resistance or interference with a [Metropolitan Police Department] officer." Office of the District of Columbia Auditor Report at 107.
The Neighborhood Engagement Achieves Results Amendment Act of 2016 ("NEAR Act") amended the current APO statute by limiting it to "assault[s]" and created a new statute for resisting arrest (D.C. Code § 22-405.01). The Committee Report for this legislation cited the Office of the District of Columbia Auditor Report. Committee on the Judiciary, *Report on Bill 21-0360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016)* (January 27, 2016).

[91] As is discussed elsewhere in this commentary, physical contacts that do not meet the revised definition of "bodily injury" in the RCC assault statute may be criminalized under other RCC offenses, such as the RCC

revised assault statute provides substantial penalty enhancements for inflicting "serious bodily injury" on a LEO[92] and for causing "bodily injury" to a LEO,[93] both of which are absent in current District law. Third, the enhanced gradations of the revised assault offense require recklessness as to whether the LEO is a "protected person," rather than negligence.[94] A culpable mental state of recklessness makes the enhanced LEO gradations of the revised assault statute consistent with the other enhancements in the revised offense that are based on the complainant's status. Fourth, the revised definition of "law enforcement officer" in RCC § 22E-701 changes the scope of the enhanced penalties in the revised assault statute as compared to the current APO statute,[95] particularly for certain members of fire departments, investigators, and code inspectors.[96] The commentary to RCC § 22E-701 discusses the revised definition of "law enforcement officer" in detail. Lastly, the revised assault statute does not enhance assaults against family members of LEOs due to their relation to a LEO, which is part of the repeal of the general provision prohibiting targeting family members of District officials and employees in D.C. Code § 22-851.[97] Collectively, these changes replace the APO

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offensive physical contact offense (RCC § 22E-1205), or sex offenses under RCC Chapter 13. Some of these offenses have identical provisions for a "protected person" and harming a complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official.

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

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

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

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

[96] It should be noted that while the RCC definition of "law enforcement officer" no longer includes these categories of complainants, they remain covered by the revised definition of "public safety employee," also defined in RCC § 22E-701. As such, they still receive enhanced protection as a category of "protected person" and as a category of complainant when the assault is committed with the purpose of harming the complainant due to the complainant's status.

[97] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee" on account of the District official or employee's performance of official duties. "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a

offenses in current law with enhanced penalties in the gradations of the revised assault statute, improve the clarity of existing statutes, and generally provide for consistent treatment of LEOs and other specially protected complainants. The changes reduce unnecessary gaps and overlap between offenses, and improve the proportionality of the statutes as well.

Seventh, the revised assault statute's enhanced penalties for causing specified types of "bodily injury" partially replace[98] the current offenses of assault and aggravated assault on a public vehicle inspection officer. Under current District law, "assault[ing]" a "public vehicle inspection officer" or "imped[ing], intimidate[ing], or interfer[ing] with" that officer while that officer "is engaged in or on account of the performance of his or her official duties" is a misdemeanor with a maximum term of imprisonment of 180 days.[99] If the accused causes "serious bodily injury," the offense is a felony with a maximum penalty of ten years imprisonment.[100] In contrast, in the revised assault statute, assaults against a "vehicle inspection officer"[101] receive enhanced penalties, but are no longer separate offenses. A "vehicle inspection" officer is included in the definition of "protected person" in RCC § 22E-701 as a "public safety employee," also defined in

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romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d). Many law enforcement officers, as "LEO" is defined in the current APO statute, are District employees and therefore D.C. Code § 22-851 criminalizes targeting their families because of their relation to a LEO. However, there is no provision in current law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[98] As is discussed earlier in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. Numerous other RCC offenses criminalize this conduct and should also be considered to replace the separate assault and aggravated assault on a public vehicle inspection officer offenses even though they are generally not discussed in this entry.

[99] D.C. Code § 22-404.02.

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

[101] Although the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 state that the term "public vehicle inspection officer shall have the same meaning as provided in § 50-303(19)," the term "public vehicle inspection officer" no longer exists in Title 50 of the D.C. Code. The definition of "public vehicle inspection officer" was repealed with the passage of the Vehicle-For-Hire Innovation Amendment Act of 2014 ("VFHIAA") (Mar. 10, 2015, D.C. Law 20-197, § 2(a), 61 DCR 12430). However, the VFHIAA included a substantially similar, new definition for a "vehicle inspection officer" and that RCC uses that term instead. D.C. Code § 50-301.03(30B) ("'Vehicle inspection officer' means a District employee trained in the laws, rules, and regulations governing public and private vehicle-for-hire service to ensure the proper provision of service and to support safety through street enforcement efforts, including traffic stops of public and private vehicles-for-hire, pursuant to protocol prescribed under this act and by regulation."). The VFHIAA legislative history does not appear to include reference to the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 or discuss how those offenses might be affected by the elimination of the term "public vehicle inspection officer."

RCC § 22E-701. Since they are included in the definition of "public safety employee," vehicle inspection officers are also included in the assault penalty enhancements for having the purpose of harming the complainant due to the complainant's status. However, the conduct that receives an enhanced penalty is narrowed to causing bodily injury, significant bodily injury, or causing serious bodily injury. Conduct that falls short of these requirements may receive an enhanced penalty elsewhere in the RCC,[102] but conduct that consists merely of "imped[ing], intimidat[ing], or interfer[ing] with" a public vehicle inspection officer does not.

Replacing the offenses of assault and aggravated assault on a public vehicle inspection officer with the revised assault statute results in several additional changes to District law. First, under the revised assault statute, unlike current law,[103] there is no longer an automatic civil penalty of loss of a license to operate public vehicles-for-hire upon conviction of assault of a vehicle inspection officer. Second, the revised assault statute does not enhance assaults against family members of vehicle inspection officers because of their relation to the public vehicle inspection officers, which is part of the repeal of the general provision regarding targeting family members of District officials and employees in D.C. Code § 22-851.[104] Third, the revised assault statute does not bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority.[105] This change clarifies the revised assault statute and reduces

[102] As is discussed elsewhere in this commentary, physical contacts that do not meet the revised definition of "bodily injury" in the RCC assault statute may be criminalized under other RCC offenses, such as the RCC offensive physical contact offense (RCC § 22E-1205), or sex offenses under RCC Chapter 13. Some of these offenses have identical provisions for a "protected person" and harming a complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official.

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

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

[105] The current assault on a public vehicle inspection officer statutes bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority. D.C. Code §§ 22-404.02(c), 22-404.03(c) ("It is neither justifiable nor excusable for a person to use force to resist the civil enforcement authority exercised by an individual believed to be a public vehicle inspection officer, whether or not such enforcement action is lawful."). The RCC assault statute deletes this provision and bar to self-defense against a public vehicle inspection officer, and instead relies on the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when "The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct." RCC § 22E-403(b)(3) allows an actor who otherwise meets the requirements for self-defense to use force to oppose a public vehicle inspection officer's use of force that either is not lawful or when the actor is not reckless as

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

Eighth, the RCC definition of "protected person," discussed in the commentary to RCC § 22E-701, results in several changes to the scope of enhanced assault conduct. First, through the definition of "protected person," assaults against complainants under the age of 18 years or against complainants 65 years of age or older receive enhanced penalties in the revised assault offense, but only if certain age requirements are met. Current District law enhances various assault offenses against complainants under the age of 18 years if there is at least a two year age gap between the complainant and an actor that is 18 years of age or older,[106] and against all complainants 65 years of age or older.[107] In contrast, the "protected person" gradations of the revised assault statute require at least a four year age gap between a complainant under 18 years of age and an actor that is 18 years of age or older, and require that the actor be under 65 years of age and at least 10 years younger than a complainant that is 65 years of age or older. With respect to minors, these age requirements are consistent with other offenses in current District law[108] and the age gap for seniors,[109] while new to District law, reserve the enhanced penalties for predatory behavior. Second, assaults against a driver of a private vehicle-for-hire, a "vulnerable adult," and a "public safety employee" receive new enhanced penalties in the revised assault statute through the definition of a "protected person." A driver of a private vehicle-for-hire does not receive any enhanced penalties under current

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to the lawfulness. The RCC continues to bar a claim of self-defense whenever an actor is reckless as to the public vehicle inspection officer's conduct being lawful.

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

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

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

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

District law, and a vulnerable adult[110] or "public safety employee"[111] receives enhanced penalties in a few non-assault offenses. In contrast, the "protected person" gradations of the revised assault statute recognize the prevalence of drivers of private vehicles-for-hire and the special status elsewhere under current District law for vulnerable adults and public safety employees. Third, assault offenses against a "citizen patrol member"[112] or a "District employee" no longer receive enhanced penalties in the revised assault offenses as they do under current District law.[113] The breadth of these current enhancements is inconsistent as compared to other penalty enhancements in current District law.

The RCC definition of "protected person" also makes broader changes to the revised assault statute. First, the "protected person" penalty enhancement applies to each type of "bodily injury" in the revised assault statute, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[114] the "assault with intent to" offenses,[115] and the various felony assault offenses,[116] resulting in disproportionate penalties for similar conduct. Second, the revised assault statute applies a mental state of "recklessness" to whether the complainant is a "protected person." None of the separate penalty enhancements under current District law specify a culpable

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

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

[112] D.C. Code § 22-3602.

[113] D.C. Code § 22-851(d).

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

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

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

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

mental state, but the penalty enhancements for senior citizens[117] and minors[118] have affirmative defenses for a reasonable mistake of age. The "reckless" culpable mental state[119] in the protected person penalty enhancements preserves the substance of these affirmative defenses[120] and establishes a consistent culpable mental state requirement for each category of complainant in the RCC definition of "protected person." Finally, the RCC assault statute prohibits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the use of a weapon.[121]

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

[117] D.C. Code § 22-3601(c) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[118] D.C. Code § 22-3611(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence.").

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

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

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

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

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

Ninth, the revised assault statute enhances the penalty for assaults committed against LEOs, public safety employees, or District officials when the assault is committed with the "purpose of harming the complainant because of the complainant's status" as a LEO, public safety employee, or District official. Current District law has separate penalty enhancements or enhanced penalties for committing assault-type offenses because of the complainant's status as a LEO,[122] a member of a citizen patrol,[123] a District "official or employee,"[124] or a "family member" of a District "official or employee."[125] Current District law also enhances the penalty for the murder of a "public safety employee"[126] on account of the complainant's status. In contrast, the revised assault statute limits this type of enhanced penalty to a "law enforcement officer" and a "District official," and extends it to a "public safety employee," resulting in several changes to current District law. First, as is discussed in the commentary to RCC § 22E-§ 22E-701, the revised definitions of "law enforcement officer," "District official," and "public safety employee" change the scope of the revised enhancements as compared to current District law. Second, assaults committed against a citizen patrol member, a District "employee," or the "family member" of a District "official or employee" because of the complainant's status no longer receive an enhanced penalty. These provisions raise a number of difficult definitional issues[127] and current sentencing practices in the

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

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

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

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

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

[127] For example, the enhancement for District employees in D.C. Code § 22-851(b) states that it applies "while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties." However, District case law has held, in construing other statutes, that a law enforcement officer may be considered always on duty, *Mattis v. United States*, 995 A.2d 223, 225 (D.C.

District indicate that these penalty enhancements rarely, if ever, are necessary to proportionate sentences. Third, the enhancement applies consistently to each type of "bodily injury" in the revised assault statute, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[128] the "assault with intent to" offenses,[129] and the various felony assault offenses,[130] resulting in disproportionate penalties for similar conduct. Codifying enhanced protection for assaulting individuals based on their status as LEOs, public safety employees, or District officials clarifies the law and improves the proportionality of offenses.

Tenth, the revised assault statute eliminates the separate assault offense of "willfully poisoning any well, spring, or cistern of water."[131] Current D.C. Code § 22-401 contains a provision that appears to separately criminalize such poisoning of a water supply, regardless of whether the poisoning results in injury to a person or there was intent to injure a person. No case law exists interpreting this provision. In contrast, the revised assault statute does not criminalize such poisoning except insofar as such conduct may constitute an attempted assault. Another District felony currently criminalizes such

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2010). There follows an ambiguity whether any assault of a law enforcement officer is subject to heightened liability—regardless whether the assault was part of a domestic dispute or the officer was off-duty and not known to the assailant as an officer. The RCC, instead, through a separate reference to law enforcement officers as protected persons, provides heightened penalties where an officer is assaulted while in the performance of his or her duties.

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

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

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

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

[131] D.C. Code § 22-401.

a poisoning,[132] and, depending on the facts of the case such poisoning may constitute attempted murder under RCC § 22E-1101, or an attempted assault. This change improves the proportionality of District offenses by punishing such conduct consistent with other inchoate attempts to harm persons.

Eleventh, under the revised assault statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" due to his or her self-induced intoxication. Under subsection (f), a factfinder may impute awareness of the risk required to prove the defendant acted with extreme indifference to human life. The current assault statute is silent as to the effect of intoxication. However, District case law appears to have established that assault is a general intent offense,[133] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary culpable mental state requirement for the crime.[134] This DCCA case law would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[135]—the claim that, due to his or her self-induced intoxicated state, the defendant did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" as required for more serious forms of assault.[136] By contrast, under the revised assault offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the defendant from forming the culpable mental states of "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" as required to prove some types of assaults. Likewise, where appropriate, the defendant would be entitled to an instruction,

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

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

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

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

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

which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" at issue in assault.[137] However, subsection (h) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. But in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for second degree murder. This change improves the clarity, consistency, and proportionality of the offense.

Twelfth, due to the revised definition of "serious bodily injury" in RCC § 22E-701, second degree assault of the revised assault statute no longer specifically include rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current aggravated assault statute prohibits "serious bodily injury."[138] While there is no statutory definition of the term's meaning, the definition of "serious bodily injury" under DCCA case law for aggravated assault includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[139] As discussed in the commentary to the revised definition in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised second degree assault offenses, are limited to a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ, or protracted loss of consciousness. This change improves the clarity, consistency, and proportionality of the revised offenses.

Thirteenth, the revised assault statute replaces certain minimum statutory penalties for assault with intent to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse[140] and assault with a dangerous weapon on a police officer.[141] These minimum statutory penalties require specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code apply, if at all, to

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

[138] D.C. Code § 22-404.01(a).

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

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

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

these provisions.[142] There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. In contrast, the revised assault statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. This change improves the consistency and proportionality of the revised offense.

Fourteenth, the revised assault statute deletes the limitation on justification and excuse defenses that is in the current D.C. Code assault on a police officer (APO) statute. The current D.C. Code APO statute states "[i]t is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."[143] This provision is a categorical bar to self-defense against the use of force that is not excessive by a law enforcement officer (LEO).[144] In contrast, the RCC assault statute deletes this provision and bar to self-defense against a law enforcement officer, and instead relies on the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when "The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct." RCC § 22E-403(b)(3) allows an actor who otherwise meets the requirements for self-defense to use force to oppose a law enforcement officer's use of force that either is not lawful or when the actor is not reckless as to the lawfulness. The RCC continues to bar a claim of self-defense whenever an actor is reckless as to the law enforcement officer's conduct being lawful. By eliminating the special bar on self-defense against an unlawful arrest, the RCC effectively reverts to the common law rule regarding defense against a law enforcement officer which existed in the District until Congress passed a new statute with a new policy in 1970.[145] This change improves the clarity, consistency, and proportionality of the revised statutes.

Beyond these fourteen changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised assault statute requires a culpable mental state of recklessness for the lower-level gradations of assault, third degree and fourth degree. The current D.C. Code is silent as to the culpable mental states required for simple assault,[146] but the current felony assault with significant bodily injury statute requires recklessness.[147]

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[142] D.C. Code §§ 22-1804; 22-1804a.
[143] D.C. Code § 22-405(d).
[144] Current D.C. Code § 22-405 and § 22-405.01 provide that it is: "neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."
[145] As explained by the DCCA in McDonald v. United States, "The legislative history indicates that Congress intended to adopt 'the modern rule' in recognition that it is no longer necessary for a citizen to resist what he suspects may be an illegal arrest since criminal procedural rights (such as prompt presentment, Fed. R. Crim. Proc. 5(b) & (c)) as well as civil remedies under the Civil Rights Act of 1871, 42 U.S.C. § 1983) are readily available. H.R.Rep. No. 907 at 71–72." McDonald v. United States, 496 A.2d 274, 276 (D.C. 1985).
[146] D.C. Code § 22-404(a)(1).
[147] D.C. Code § 22-404(a)(2).

Current District case law suggests that recklessness may suffice for simple assault,[148] however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient.[149] Resolving this ambiguity, the revised assault statute clearly establishes that recklessness is sufficient for specified gradations. This is consistent with prevailing District case law (including District case law on voluntary intoxication[150]), and is consistent with current District statutes. This change improves the clarity of the law.

Second, through the definition of "bodily injury" in RCC § 22E-701, the revised assault statute clarifies the minimal harm that is required. Current District assault statutes do not address whether they cover any infliction of pain or causing illness or impairment of physical condition. District case law has established that any non-

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

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

[150] Under District law, voluntary intoxication cannot constitute a defense to a "general intent" crime. *Kyle v. United States*, 759 A.2d 192, 199-200 (D.C. 2000). In accordance with this rule, assault appears to be a general intent crime, to which an intoxication defense may not be raised. *Parker v. United States*, 359 F.2d 1009, 1013 n.4 (D.C. Cir. 1966) ("It seems clear that, regardless of the definition, voluntary intoxication is no defense to simple assault.") (citing *McGee v. State*, 4 Ala. App. 54, 58 So. 1008 (1912), and *State v. Truitt*, 21 Del. 466, 62 A. 790 (1904)); *see, e.g., Smith v. United States*, 593 A.2d 205, 206–07 (D.C. 1991) (observing that assault is a general intent crime); *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011) (same); *see also Buchanan v. United States*, 32 A.3d 990, 996-98 (D.C. 2011) (Ruiz, J. concurring) (discussing the relationship between the law of intoxication and assault's status as a general intent crime). The RCC does not recognize the distinction between general and specific intent crimes for purposes of the law of intoxication; instead, it employs an imputation approach under which the culpable mental state of recklessness, as defined under RCC § 22E-206(d), may be imputed—notwithstanding the absence of awareness of a substantial risk—based upon the self-induced intoxication of the actor. *See* RCC § 209(c) ("When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if: (1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and (2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists."). Under this new approach, application of a recklessness (or negligence) culpable mental state to a revised offense roughly approximates District law governing general intent crimes. *See* First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code—Mistake, Deliberate Ignorance, and Intoxication, at 27-31 (March 13, 2017).

consensual touching, even without pain, is simple assault,[151] although a recent DCCA case that is in active litigation may ultimately call into question whether this is sufficient.[152] However, whether recklessly causing illness or impairment of someone's physical condition constitutes simple assault under current law is not established. Resolving this ambiguity, the revised assault statute requires "bodily injury," defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition," to clarify the minimal harm that is required. Use of the defined term "bodily injury" clarifies that not only physical contacts that result in pain are criminal under the RCC assault statute, but also potentially painless harms such as sickness[153] or impaired physical conditions.[154] As is discussed elsewhere in this commentary, physical contacts that do not meet the revised definition of "bodily injury" may be criminalized under other RCC offenses, such as the RCC offensive physical contact offense (RCC § 22E-1205), or sex offenses under RCC Chapter 13. This change improves the clarity of the revised statute and may remove a possible gap in liability.

Third, the revised assault statute codifies an effective consent defense, discussed extensively in the explanatory note to the offense. The District's current assault statutes do not address whether consent of the complainant is a defense to liability, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[155] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place

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

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

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

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

[155] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[156] Another court ruling is pending regarding the elements of assault that may expand upon the requirement of lack of consent.[157] To resolve this ambiguity, the revised assault statute effective consent defense clarifies when the actor's reasonable belief that the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701, has given "effective consent" is a defense. The revised statute's effective consent defenses specifically addresses situations where the person giving effective consent is an adult or under 18 years of age. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised assault statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current assault statutes do not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for assault. The exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[158] This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, the revised assault statute codifies the culpable mental state in the District's current aggravated assault statute as "recklessly, with extreme indifference to human life". The District's current aggravated assault statute lists two different culpable mental states: "knowingly or purposely causes serious bodily injury" in D.C. Code § 22-404(a)(1) and "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury" in D.C. Code § 22-404(a)(2). The DCCA, however, has stated that "[i]n order to give effect to the [aggravated assault] statute as a whole, subsection (a)(2) must be read as requiring a different type of mental element—gross recklessness."[159] The DCCA has also stated that the lower culpable mental state in the current aggravated assault statute "can be proven by evidence of 'conscious disregard of an extreme risk of death or serious bodily

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

[157] *Perez Hernandez v. United States*, 207 A.3d 594, 602–03 (D.C.), *vacated*, 207 A.3d 605 (D.C. 2019)]

[158] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

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

injury'"[160] and that it is "substantively indistinguishable from the minimum state of mind required for conviction of second-degree murder,"[161] in that it, too, requires "'extreme recklessness' regarding risk of death or serious bodily injury.'"[162] In the RCC it is only necessary to specify the latter culpable mental state because the higher culpable mental states "knowingly" or "purposely" satisfy the lower culpable mental state under RCC § 22E-206. This revision clarifies without changing[163] existing law on the "gross recklessness" standard in the current aggravated assault statute.

Second, the revised assault statute, by the use of the phrase, "in fact," clarifies that no culpable mental state is required as to whether the object displayed or used to cause the specified types of bodily injury is a "dangerous weapon" or "imitation dangerous weapon," as those terms are defined in RCC § 22E-701. As is discussed above as a substantive change to current District law, the revised assault statute's weapons penalty enhancements replace the current offense of assault with a dangerous weapon (ADW), as well as the separate penalty enhancement for committing certain assault offenses "when armed with or having readily available" a deadly or dangerous weapon.[164] The current ADW statute is silent as to what culpable mental state applies to whether the object at issue is a dangerous weapon.[165] However, District case law provides that whether an

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

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

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

[163] *See, e.g., Perry v. United States*, 36 A.3d 799, 817, 818 (stating that the required mental state in subsection (a)(2) of the aggravated assault statute (D.C. Code § 22-404.01) was "gross recklessness" and that this mental state was "substantively indistinguishable" from the required mental state for second degree murder); *In re D.P.*, 122 A.3d 903, 908-910 (holding that evidence was insufficient to prove depraved heart malice as required for aggravated assault under D.C. Code § 22-404.01(a)(2) when appellant was unarmed, engaged in assaultive conduct for approximately fourteen seconds on a public bus, and ceased the assault when the complainant was no longer fighting back); *Vaughn v. United States*, 93 A.3d 1237, 1268, 1270 (D.C. 2014) (deeming the enhanced recklessness of aggravated assault to "set [such] a high bar" that a jury instruction which suggested the mens rea of the offense was only was one of normal recklessness—i.e. the "awareness of and disregard [of a risk]" at issue in felony assault—constituted plain error that was prejudicial, "affect[ed] the integrity of th[e] proceeding," and "impugn[ed] the public reputation of judicial proceedings in general.").
It should be noted that the revised second degree murder statute in RCC § 22E-1101(b) also requires the culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life," which will not change DCCA case law interpreting depraved heart murder. *See, e.g., Comber v. United States*, 584 A.2d 26, 39 (D.C.1990) (en banc) (noting that "depraved heart malice exists only where the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury, but engaged in that conduct nonetheless); *Powell v. United States*, 485 A.2d 596 (D.C.1984) (affirming second degree murder conviction on depraved heart malice theory when defendant led police in a high speed chase at speeds of up to ninety miles an hour); *Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (affirming second degree murder conviction on depraved heart malice theory when defendant handed a knife to co-defendant whom he knew wanted to harm the victim, and the co-defendant used the knife to fatally wound the victim).

[164] D.C. Code § 22-4502(a).

[165] D.C. Code § 22-402 ("Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In

object qualifies as a "dangerous weapon" hinges upon a purely objective analysis of the nature of the object rather than on the accused's understanding of the object.[166] District case law for the "while armed" enhancement in D.C. Code § 22-4502 similarly supports applying strict liability to whether the object at issue is a dangerous weapon.[167] Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[168] Notably, however, the revised assault offense requires at least recklessness as to causing specified bodily injury by the display or use of what is, in fact, a dangerous weapon or imitation dangerous weapon.[169] This change clarifies, and potentially fills a gap in, District law.

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addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

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

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

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

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

[169] The revised assault statute requires that the object that a person recklessly displays or uses to cause the specified "bodily injury" be, in fact, a dangerous weapon or imitation dangerous weapon. So, for example, where a person believes that he or she is causing the complainant bodily injury by displaying or using only a heavy bag, the heavy bag must, in fact, be a dangerous weapon or imitation dangerous weapon, and if it is not, there is no enhanced liability in the RCC assault statute. However, if the heavy bag contains a per se "dangerous weapon," such as a firearm (which adds to its weight), this would not suffice for the assault weapons enhancement if the actor did not know and should not have known that the heavy bag contained a firearm. One cannot conceptualize the assault as being by "displaying or using" a heavy bag, then analyze the assault with respect to a firearm which is one of the unknown contents of the bag. The causation requirement in RCC § 22E-204 may also preclude liability in such a situation to the extent that wielding a bag with an unknown firearm in it causes a bodily injury (e.g., by discharge) that is not reasonably foreseeable.

RCC § 22E-1204. Criminal Threats.

Explanatory Note. *This section establishes the criminal threats offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes efforts to inflict fear of criminal harm. The offense is graded according to the type of criminal harm the defendant threatens: an immediate death, serious bodily injury, sexual act, or confinement (first degree); a bodily injury or sexual contact (second degree) or loss or damage to property (third degree). The revised criminal threats offense replaces the misdemeanor and felony threats statutes,*[1] *as well as the intent-to-frighten form of simple assault*[2] *and the intent-to-frighten form of assault with a dangerous weapon*[3] *in the current D.C. Code.*

Paragraphs (a)(1), (b)(1), and (c)(1) state the prohibited conduct—that the defendant communicates to another person,[4] who is not a co-conspirator or an accomplice.[5] Communication requires not only that the defendant take action to convey a message, but also that the message is received and understood by another person.[6] No precise words are necessary to convey a threat; it may be bluntly spoken, or done by innuendo or suggestion.[7] The verb "communicates" is intended to be broadly construed, encompassing all speech[8] and other messages[9] that are received and understood by another person. First degree criminal threats, under paragraph (a)(1), requires the defendant communicate that they will immediately cause[10] a criminal harm[11] involving

[1] D.C. Code §§ 22-407, 22-1810.
[2] D.C. Code § 22-404.
[3] D.C. Code § 22-402.
[4] *See Ruffin v. United States*, 76 A.3d 845, 855 (D.C. 2013) (holding that "the contextual features suggest that 'person' is limited to natural persons" in threats, and therefore, threatening to destroy District of Columbia government property does not constitute an offense).
[5] For example, if Conspirator A says to Conspirator B, "I am going to punch him and you are going to take his keys," the statement does not constitute a criminal threat.
[6] DCCA case law clarifies in *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), and the RCC criminal threats statute recognizes, that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.
[7] *Griffin v. United States*, 861 A.2d 610, 616 (D.C. 2004) (citing *Clark v. United States*, 755 A.2d 1026, 1030 (D.C. 2000)).
[8] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.
[9] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).
[10] "Cause" includes personally engaging in criminal conduct and soliciting or allowing an accomplice or innocent instrumentality to engage in criminal conduct.
[11] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

death, serious bodily injury, a sexual act, or confinement, to any person. Second degree criminal threats, under paragraph (b)(1), requires the defendant indicate that they will, at any time or on any condition,[12] cause[13] a criminal harm[14] involving a bodily injury or sexual contact. Third degree criminal threats, under paragraph (c)(1) requires the defendant indicate that they will, at any time or on any condition,[15] cause[16] a criminal harm[17] involving loss or damage to property. The terms "serious bodily injury," "sexual act," bodily injury," "sexual contact," and "property" are defined in RCC § 22E-701.

Paragraphs (a)(1), (b)(1), and (c)(1) also require a culpable mental state of knowledge, a term defined at RCC § 22E-206. Applied to the elements here, the accused must at least be aware to a practical certainty that their conduct communicates the threat to a complainant.[18] Whether particular words, gestures, symbols, or other conduct communicate such content is a question of fact that will often require judgment by a factfinder.[19]

Paragraphs (a)(2), (b)(2), and (c)(2) require the defendant make the communication "with intent that" it be perceived as a serious expression of an intent to do harm.[20] "Intent" is a defined term in RCC § 22E-206 that here requires that the defendant was practically certain that his or her communication would be perceived as a serious expression of an intent to do harm. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the

[12] The statute punishes both "conditional" and "unconditional" threats. *See Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971).

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

[14] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

[15] The statute punishes both "conditional" and "unconditional" threats. *See Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971).

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

[17] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

[18] For example, a person who writes threatening messages in his or her own personal diary or journal, expecting that no other person will read it, does not commit criminal threats. The term "complainant" is defined in RCC § 22E-701.

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

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

actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the communication was perceived as a serious expression of an intent to do harm, only that the actor believed to a practical certainty that it would be so perceived. Not all insulting, abusive, or violent language is threatening.[21] For example, a statement about what a person believes ought to happen, may not be intended and understood as an expression that the declarant will cause it to happen.[22] Whether a particular communication amounts to a serious expression of intent to inflict harm is a question of fact that will often require judgment by a factfinder. "Intent" is a defined term in RCC § 22E-206 and requires the defendant believe his or her communication is practically certain to be perceived as a serious expression of an intent to do harm.[23]

Paragraphs (a)(3), (b)(3), and (c)(3) require proof that the accused's communication is objectively threatening, under the circumstances.[24] "In fact," a defined term,[25] is used to indicate that there is no culpable mental state requirement for paragraphs (a)(3), (b)(3), and (c)(3). Rather, the only proof required with respect to this element of the offense is that the defendant's message would cause a reasonable person in the complainant's circumstances to believe that the harm would occur.[26] This is an objective standard, but it is evaluated contextually, assuming awareness of the circumstances known to the parties in the case.[27] The relevant facts and circumstances in an individual case may include prior interactions between the declarant and the listener,[28] the power dynamics between the declarant and the target of the threat,[29] and the

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

[22] *Compare State v. Draskovich*, 904 N.W.2d 759, 761 (S.D. 2017) (upholding a threats conviction where a defendant told a court employee, "Well, that deserves 180 pounds of lead between the eyes,") *with People v. Wood*, 127 N.E.3d 1 (Ill. App. Ct. 2017) (reversing a threats conviction where a defendant expressed a "dream for revenge," stating, "There is not a day that goes by since I was sentenced at that courthouse that I have not dreamed about revenge and the utter hate I feel for the judge," and "there's not a day that goes by that I don't pray for the death and destruction upon the judge.")

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

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

[25] RCC § 22E-207.

[26] *Carrell v. United States*, 165 A.3d 314, 320 (D.C. 2017).

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

[28] For example, a complainant who testifies, "I knew that the defendant would not ever actually try to hit me," has not suffered a criminal threat, even if the defendant intended the puffery to be taken seriously.

[29] *See, e.g., High v. United States*, 128 A.3d 1017 (D.C. 2015) (concluding that an ordinary hearer, in the circumstances of an on-duty law enforcement officer, would not reasonably fear imminent or future harm

conditional nature of the threat.[30] Paragraphs (a)(3), (b)(3), and (c)(3) do not require that the defendant actually have the ability or apparent ability to carry out the threatened harm.[31] The offense also does not require proof that the defendant actually intended to eventually carry out the threat.

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

Paragraph (d)(4) establishes three penalty enhancements for the criminal threats offense.

Subparagraph (d)(4)(A) specifies that the classification of the offense is increased by one class when it is proven[32] that the actor was reckless as to the complainant being a protected person. The term "reckless" is defined in RCC § 22E-206 and the terms "actor," "complainant," and "protected person" are defined in RCC § 22E-701.

Subparagraph (d)(4)(B) specifies that the classification of the offense is increased by one class when it is proven[33] that the actor uses or displays a dangerous weapon or imitation dangerous weapon in the course of making the communication. The terms "dangerous weapon" and "imitation dangerous weapon" are defined in RCC § 22E-701. The phrase "uses or displays" should be broadly construed to include making a weapon known by sight, sound, or touch,[34] but does not include displaying an image of a weapon. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "recklessly" from subparagraph (d)(4)(A0 applies to whether the person made the communication by using a weapon. That is, the person must consciously disregard a substantially risk that the communication is being made through such a display or use and the conduct must be clearly blameworthy under the circumstances. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the item displayed or used is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Subparagraph (d)(4)(C) specifies that the classification of the offense is increased by one class when it is proven[35] that the actor had the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official. The terms "law enforcement officer," "public safety employee," and "District official" are defined in RCC § 22E-701. This aggravating circumstance requires that the accused acted with "purpose," a term defined at RCC §

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or injury based on the defendant's expression of exasperation or resignation, "Take that gun and badge off and I'll f*** you up.").

[30] A threat on a condition that victim believes will never occur does not amount to a criminal threat. *Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971). Additionally, a statement that a person will defend themselves or another person from criminal harm does not amount to a criminal threat. Consider, for example, a parent who warns, "If you touch my child, you are going to regret it!"

[31] Consider, for example, Person A sends multiple messages to Person B threatening to "beat him up." Person B is unafraid because he has been specially trained as a fighter. Person A, nevertheless, may have committed criminal threats against Person B.

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

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

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

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

22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant was a law enforcement officer, public safety employee, or District official, only that the actor consciously desired to cause the death of a person of such a status.

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

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

First, the revised criminal threats statute establishes three gradations based on the nature of the threatened harm. Under current District law, a felony threats offense punishes threats to kidnap, injure, or damage property, [36] whereas a misdemeanor threats offense punishes infliction of bodily harm only.[37] Consequently, although there are two penalty gradations under current law, the gradations do not limit liability for less severe threats.[38]

The current District assault statutes are silent as to the type of conduct that may constitute an "intent-to-frighten" form of assault. However, District case law holds that intent-to-frighten assault covers a defendant's "conduct as could induce in the victim a well-founded apprehension of peril."[39] District case law concerning intent-to-frighten assault has upheld convictions for placing a person in fear of "immediate injury."[40] However, there is no District case law deciding whether placing someone in fear of an offensive physical contact, the lowest level of assault recognized under current District law,[41] suffices for intent-to-frighten assault liability.[42] Current District threats statutes

[36] Neither current statutes nor case law define the precise meaning of terms like "injure," or "do bodily harm," and it is unclear if the phrases are equivalent to the harm described in case law for simple assault. D.C. Code § 22-404. *See Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001) ("[A]ssault is defined as the unlawful use of force causing injury to another…"). The DCCA has further held that "assault" includes "non-violent sexual touching assault as a distinct type of assault." *Id*. And in fact, even non-sexual but "offensive" touchings can constitute assault. *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990). In at least one case, the DCCA has upheld a threats conviction where the threat consisted of saying, "I'm going to smack the s*** out of you." *Jones v. United States*, 124 A.3d 127, 131 (D.C. 2015). It's unclear whether slapping a person would constitute simple assault *qua* inflicting bodily harm, or simple assault *qua* engaging in an offensive touching.

[37] D.C. Code §§ 22-407, 22-1810.

[38] The current statutory structure provides no lesser-included offenses for threats of kidnapping or threats to property.

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

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

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

refer to a few types of conduct: to "kidnap," "injure the person of another," "physically damage the property of any person," or "do bodily harm."[43] Neither the current statutes nor case law define the precise meaning of terms like "injure" or "do bodily harm," and it is unclear whether the phrases are equivalent to the harm described in case law for simple assault.[44]

In contrast, the RCC criminal threats statute specifies the relevant harms that may be the basis for prosecution and grades according to the severity of the harm threatened. First degree liability requires a threat to immediately inflict death, serious bodily injury, a sexual act,[45] or confinement.[46] Second degree liability requires a threat to cause a bodily injury or a sexual contact.[47] Third degree liability requires a threat to cause property loss or damage. The revised statute also provides a penalty enhancement for threats committed with a weapon, against a protected person,[48] or targeting a law enforcement officer, public safety employee, or District official.[49] This change narrows the scope of the offense by excluding non-sexual, merely offensive physical contacts (that fall short of inflicting bodily injury),[50] but broadens the offense to include kidnapping conduct that does not involve a bodily harm.[51] This change also brings the criminal threats offense into conformity with the approach to penalty gradations used through most of the current

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

[43] D.C. Code §§ 22-407, 22-1810.

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

[45] "Serious bodily injury" and "sexual act" are defined in RCC § 22E-701.

[46] The revised statute's use of "criminal harm involving…confinement" provides an ordinary language approach to specifying the harm commonly involved in kidnapping.

[47] "Bodily injury" and "sexual contact" are defined in RCC § 22E-701.

[48] "Protected person" is defined in RCC § 22E-701.

[49] "Law enforcement officer," "public safety employee," and "District official" are defined in RCC § 22E-701.

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

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

D.C. Code and the RCC[52] and improves the proportionality of the revised offense. This change reduces an unnecessary gap in liability, and improves the clarity, consistency and proportionality of the revised offense.

Second, the revised criminal threats statute uses the word "communicates," which includes all verbal and non-verbal conduct that conveys a message, expanding the means by which a threat may be issued. The current District threats statutes are silent as to the type of conduct that may convey a threat, simply referring to a person who "threatens"[53] or issues a "threat."[54] The current District assault statutes are silent as to the type of conduct that may constitute an "intent-to-frighten" form of assault. However, District case law holds that "mere words do not constitute an assault."[55] Under common law, non-verbal conduct is required for intent-to-frighten assault,[56] although case law does not specify what conduct is required. The current District threats statutes are silent as to the type of conduct that may convey a threat, simply referring to a person who "threatens"[57] or issues a "threat."[58] However, in at least one case, District of Columbia Court of Appeals ("DCCA") has stated that a threat "requires *words* to be communicated to another person" in contrast with intent-to-frighten assault which "requires threatening conduct."[59] Case law describes an element of threats as having "uttered words,"[60] which has been explicitly construed to cover not only oral but written threats.[61] In contrast, the RCC criminal threats statute punishes threatening words (written or oral), gestures, and

[52] Virtually all criminal offenses that have penalty gradations in the current D.C. Code, or in the RCC, are structured such that the more severe penalty is for more harmful conduct that is a subset of the broader set of conduct covered by the less severe gradation. The District's current threats statutes reverse the usual approach to statutory drafting, making the least harmful conduct a subset of the broader set of conduct covered by the more severe gradation. Interestingly, the DCCA has noted that the legislative history behind the District's felony threats offense is somewhat muddled, and actually suggests that the offense was intended to cover extortionate conduct, not merely threatening conduct in the abstract. See *United States v. Young*, 376 A.2d 809, 814-16 (D.C. 1977) (discussing legislative history). The relatively harsh penalty associated with felony threats has been explained by reference to this history. *Id*.

[53] D.C. Code § 22-1810.

[54] D.C. Code § 22-407.

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

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

[57] D.C. Code § 22-1810.

[58] D.C. Code § 22-407.

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

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

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

symbols,[62] as well as conduct. Assuming other elements of the offense are proven, the social harm at issue—the intentional infliction of fear upon a person—occurs whether the message is conveyed verbally or non-verbally.[63] This change improves the consistency and proportionality of the revised offense.

Third, the revised statute does not expressly authorize the issuance of a bond to keep the peace for one year. Current D.C. Code § 22-407 specifies that a person who commits threats to do bodily harm "may be required to give bond to keep the peace for a period not exceeding 1 year." The RCC specifies a maximum term of imprisonment and a maximum fine for each revised offense, but it does not address what, if any, terms of probation may be appropriate or desirable for a given offense. Nor does it limit a period of probation or a condition of probation to a term of one year. A court may, in its discretion, suspend the imposition of a period of incarceration and place an offender on supervised or unsupervised probation on the condition that the person not reoffend for up to five years, under D.C. Code § 16-710(b). This change improves the consistency of the revised offenses.

Fourth, the RCC criminal threats offense eliminates liability based on an "intent to injure." The current District assault statutes are silent as to the types of intent that may constitute an "intent-to-frighten" form of assault. However, District case law has indicated that, in addition to an intent to scare a victim, intent-to-frighten assault liability also may exist where there is an intent to cause bodily injury to the victim.[64] This "intent to cause injury" form of intent-to-frighten assault appears to be distinct from criminal liability for an attempted battery form of simple assault in District case law.[65] In contrast, the RCC criminal threats offense requires only that the defendant intend that communication be perceived as a threat. A person who engages in conduct with an intent to inflict bodily injury may be liable under the RCC assault statute.[66] This new division of criminal liability between the revised assault and revised criminal threats statutes may limit punishment for some conduct currently recognized as a completed form of intent-to-frighten assault to an attempted assault in the revised statute.[67] The change clarifies the revised offenses of assault and criminal threats and eliminates unnecessary overlap in

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

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

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

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

[66] RCC § 22E-1202.

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

current District law between attempted battery forms of assault and intent-to-frighten forms of assault.

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

First, the revised criminal threats statute clarifies that the defendant must act with intent—i.e. must believe to a practical certainty—that his or her communication will be perceived as a serious expression that the defendant would cause a criminal harm. The District's current threats statutes are silent as to the offense's requisite culpable mental states, and recent DCCA case law has addressed but not entirely resolved the culpable mental state as to whether the communication will be understood as a threat. In 2017, an *en banc* DCCA decision, *Carrell v. United States*, held that something more than negligence, but less than purpose, is necessary.[68] The DCCA, following recent Supreme Court precedent,[69] said that acting with intent that the communication be perceived as a threat is sufficient for liability, but did not decide whether recklessness is also sufficient and acknowledged that it was leaving the law unsettled.[70] Current District case law has often indicated that recklessness may suffice for such assaults,[71] however, in some instances a higher level of intent has been required,[72] and the DCCA recently declined to hold that recklessness is sufficient.[73] To resolve this ambiguity, the revised statute clarifies that the defendant must act with intent, not mere recklessness, as to whether the communication is perceived as a threat. Applying an intent culpable mental state requirement (an inchoate form of a knowledge requirement, as defined in the RCC[74]) to

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[68] *Carrell v. United States*, 165 A.3d 314, 324-25 (D.C. 2017).

[69] *Elonis v. United States*, 135 S. Ct. 2001 (2015).

[70] 165 A.3d 314, 323-24 (D.C. 2017) ("[W]e decline to decide whether a lesser threshold mens rea for the second element of the crime of threats—recklessness—would suffice.").

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

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

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

[74] RCC § 22E-206(b).

statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[75] Requiring an intent culpable mental state in the revised threats offense also appears to be consistent with existing District practice.[76] These changes improve the clarity and consistency of the offense.

Second, the revised criminal threats statute includes an "objective element" in paragraphs (a)(3), (b)(3), and (c)(3), subject to strict liability.[77] The District's current threats statutes are silent as to whether the communication must be one that would cause a reasonable recipient to believe that the threatened harm would take place. However, longstanding District case law requires proof that that the "ordinary hearer would reasonably believe that threatened harm would take place."[78] Case law further specifies that this reference to an "ordinary hearer" takes into account all the context-specific factual circumstances of the case.[79] The DCCA's recent *en banc* opinion in *Carrell* reaffirmed that there must be proof of this "objective element,"[80] while adding the additional requirement "that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat."[81] However, the *Carrell* decision did not fully specify the relationship between the objective standard and the defendant's culpable mental state of knowledge that his communication be a threat.[82] The District's current assault statutes are silent as to whether the communication must be one that would cause a reasonable recipient to believe that the threatened harm would take place. However, District case law on intent-to-frighten assault requires that the defendant had the "apparent present ability to injure" the complainant.[83] The DCCA further qualified that a reasonable person test is to be used to determine such an ability.[84] In contrast, the RCC criminal threats offense specifies that while the defendant must act

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

[76] *See* D.C. Crim. Jur. Instr. § 4.130 (applying knowledge). The DCCA also noted that "the United States Attorney's Office [ ] disclaims reliance on recklessness…and states that it does not intend to prosecute future threats cases on a recklessness theory." *Carrell v. United States*, 165 A.3d 314, 325 (D.C. 2017). Of course, other parties, including the Office of the Attorney General, may rely on the threats statute as well.

[77] *See Carrell v. United States*, 165 A.3d 314, 320 (D.C. 2017).

[78] *Id*.

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

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

[81] *Id*.

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

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

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

with intent that the communication be perceived as a threat,[85] the objective elements in paragraphs (a)(3) and (b)(3) are additional, separate elements,[86] independent of the defendant's own awareness of the threatening nature of the message. The RCC's use of "in fact" with the objective requirement in the threats statutes clarifies the state of the law and appears to be consistent with District practice[87] and the recent DCCA ruling in *Carrell.* This change improves the clarity of the law and is consistent with prevailing District law on criminal threats.

Fourth, the revised criminal threats statute specifies that the defendant must know that the communication conveys that the defendant will cause a criminal harm, and have intent that the communication be perceived as a serious expression that the actor would cause the harm. The District's current threats statutes are silent as to whether the harm that is threatened is criminal, and case law has not directly addressed the issue. However, a knowledge requirement as to the nature of the communication as a threat is consistent with the DCCA's recent *en banc* opinion in *Carrell*.[88] Moreover, in other contexts, District case law has recognized that consent may be a valid general defense to harms that otherwise would be criminal, [89] and that a parent or other person in a custodial relationship is not liable for committing some harms that are in fulfillment of the duties of that relationship.[90] The RCC criminal threats statute clarifies that the actor must know and have intent that the harm he or she communicates to another is a criminal harm. The requirement that the harm be "criminal" clarifies that there is no liability for a communication of a harm to which there is an effective consent[91] or other general defense, or other harms that do not rise to the level of criminality. Moreover, District practice[92] has long recognized the general existence of a consent defense that is consistent with the RCC criminal threat requirement that the harm be criminal. This change improves the clarity of the law and, to the extent it may result in a change,

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

[86] Even though paragraphs (a)(3) and (b)(3) provide for an objective assessment, the factfinder may take into account, among other factors, the subjective reactions of the recipients of the communication. *See Gray*, 100 A.3d at 134-35 ("[W]hether an ordinary hearer would understand words to be in the nature of a threat of serious bodily harm is a highly context-sensitive question.").

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

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

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

[90] *See, e.g., Faunteroy v. United States*, 413 A.2d 1294, 1300 (D.C. 1980) (Parents have common law duty of care to provide medical care for minor dependent children.)

[91] For example, but for the requirement that the harm be "criminal," a surgeon describing the procedure he is intends to carry out on a patient would appear to be liable under the plain language of the statute. Similarly, threats made as part of sports, acting, sexual interactions, and other activity not forbidden by law would appear to fall within the scope of the criminal threat offense.

[92] D.C. Crim. Jur. Instr. § 9-320 ("If [name of complainant] voluntarily consented to [the act] [insert description of the act], or [name of defendant] reasonably believed [name of complainant] was consenting, the crime of [insert offense] has not been committed.").

improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fifth, the RCC first degree criminal threats offense explicitly addresses threatening by displaying or using imitation dangerous weapons. The current District assault with a dangerous weapon statute is silent as to whether the offense may be completed using an imitation weapon.[93] The DCCA has held that imitation *firearms* are within the scope of the assault with a dangerous weapon statute[94] but has not yet explicitly addressed non-firearm imitation weapons (e.g., fake knives).[95] The current District threats statutes do not include the use of dangerous weapon as an element.[96] In contrast, the RCC criminal threats offense explicitly includes all imitation dangerous weapons, a term defined in RCC § 22E-701. Assuming other elements of the offense are proven, the social harm at issue—the immediate, intentional infliction of fear upon a person—occurs whether the weapon is real or an imitation that a reasonable person would believe is real. This change improves the clarity of the statute and may fill a gap in existing law.

Sixth, the RCC criminal threats offense replaces penalty enhancements based on the victim's status as a minor, a senior citizen, a transportation worker, a District official or employee, or a citizen patrol member. Under current District statutes, certain penalty enhancements apply to simple assault (including intent-to-frighten assault)[97] and assault with a deadly weapon.[98] By contrast, under the RCC, it must be proven that the person was reckless as to the complainant being a "protected person" as defined in the RCC[99] or target the complainant based on their status as a "law enforcement officer," "public safety employee," or "District official," as defined in the RCC.[100] This change simplifies current law and improves the consistency and proportionality of the revised offenses.

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

First, the revised offense clarifies that a threat to harm a third party is sufficient for criminal liability. The current District threats statutes are silent on this matter.

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[93] D.C. Code § 22-402.

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

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

[96] D.C. Code §§ 22-407, 22-1810.

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

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

[99] *See* RCC § 22E-701.

[100] *See* RCC § 22E-701.

However, DCCA case law has long recognized that threats to harm a third party, other than the recipient of the communication, are sufficient for liability if other elements of the offense are met.[101] This does not appear to have been addressed in District assault case law.[102] Additionally, although the current statutes do not explicitly note that the offenses only apply to natural persons, the revised statute incorporates current DCCA case law holding that business and government entities are not protected by the threats statutes.[103]

Second, the revised criminal threats statute specifies that the offense is complete only when the message is communicated to another person. Thus, a person is not guilty of a completed criminal threat if the communication does not reach a person other than the defendant. This requirement is well established in District case law.[104] Of course, a failed attempt to deliver a message to another person could constitute attempted criminal threats, as could a message that is transmitted but "garbled and not understood."[105] This, too, is well established in District case law.[106]

Third, under the revised criminal threats statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current threats statutes are silent as to the availability of an intoxication defense, and case law has not addressed the matter since the DCCA's recent *en banc* opinion in *Carrell* found that knowledge or some subjective intent is required for liability.[107] Under the RCC criminal threats statute, a defendant will be able to raise and present relevant and admissible evidence in support of a claim of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a criminal threat.

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

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

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

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

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

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

[107] *Id.* at 324.

Likewise, where appropriate, a defendant will be entitled to an instruction on intoxication.[108]

Fourth, the revised criminal threats offense clarifies that the defendant need not threaten to carry out the harm himself. The District's current threats statutes do not address whether a threat to have another person harm someone is sufficient for liability.[109] At least one case suggests that it is sufficient for liability that a defendant communicates that another person will harm the victim,[110] but there is no case law directly on point. The District's current simple assault and assault with a deadly weapon statutes do not address whether a threat to have another person harm someone is sufficient for liability.[111] In contrast, paragraphs (a)(2) and (b)(2) of the revised statute prohibit threats that "the actor will cause a criminal harm." This includes causing the harm personally, remotely, through an accomplice, through an innocent instrumentality, or otherwise. This change improves the clarity of the revised offense.

Fifth, the revised criminal threats statutes clarifies that there is no gradation distinction based on whether harm did or did not result from the defendant's communication. Current District law provides more severe penalties for causing assaults that result in more severe physical harms—for example, the felony assault statute punishes anyone who "unlawfully assaults…[and] causes significant bodily injury to another," thus creating the offense of "felony assault."[112] Consequently, it may be possible under current District law for a person whose conduct amounts to an intent-to-frighten form of assault to be liable for felony punishment if that frightening conduct results in significant or serious bodily injury. No DCCA case law has addressed such felony-level liability based on intent-to-frighten conduct versus battery. The fact patterns that would give rise to such liability are unlikely,[113] though arguably possible.[114] District

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

[109] Arguably, however, the current statutory language suggests that the utterer of the threat must directly inflict the harm. *See, e.g.*, D.C. Code § 22-1810: "Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part…"

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

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

[112] D.C. Code § 22-404(a)(2).

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

threats statutes do not grade on the basis of the infliction of a bodily harm.[115] While the revised statute does not grade based on whether there are any resulting physical harms, conduct that causes such a harm may be punishable under the RCC assault statute.[116]

Sixth, the first degree criminal threats offense requires that the harm threatened must be immediate. The current District simple assault and assault with a dangerous weapon statutes are silent as to immediacy. However, District case law on intent-to-frighten assault and assault with a dangerous weapon implicitly require it, particularly through requirements that the defendant have the "apparent present ability to injure" the complainant.[117] As noted above, the DCCA held "that at the time of the assault the surrounding circumstances must connote the intention and present ability to do immediate violence."[118] Although the District's threats statutes are silent on the matter, District case law has affirmed liability for threats regardless of physical presence or the immediacy of harm.[119] The revised criminal threats statute clarifies these immediacy and physical presence requirements in existing law.

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

[115] D.C. Code §§ 22-407, 22-1810.

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

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

[118] *Id*. at 205.

[119] See commentary to RCC § 22E-204.

RCC § 22E-1205. Offensive Physical Contact.

Explanatory Note. *This section establishes the offensive physical contact offense and penalty for the Revised Criminal Code (RCC). The offense proscribes conduct in which the accused knowingly causes offensive physical contact to the complainant. Offensive physical contact includes behavior that does not rise to the level of causing bodily injury as the revised assault offense[1] requires. The penalty gradations are primarily based on the type of offensive physical contact, with enhancements for harms to special categories of persons. The offensive physical contact offense partially replaces[2] eighteen distinct offenses in the current D.C. Code: assault with intent to kill,[3] assault with intent to commit first degree sexual abuse,[4] assault with intent to commit second degree sexual abuse,[5] assault with intent to commit child sexual abuse,[6] and assault with intent to commit robbery;[7] willfully poisoning any well, spring, or cistern of water;[8] assault with intent to commit mayhem;[9] assault with a dangerous weapon;[10] assault with intent to commit any other felony;[11] simple assault;[12] assault with significant bodily injury;[13] aggravated assault;[14] assault on a public vehicle inspection officer[15] and aggravated assault on a public vehicle inspection officer;[16] assault on a law enforcement officer[17] and assault with significant bodily injury to a law enforcement officer;[18] mayhem[19] and maliciously disfiguring.[20] Insofar as they are applicable to current assault-type offenses, the revised offensive physical contact offense also replaces the protection of District public officials statute,[21] certain minimum statutory penalties for assault-type offenses,[22] and five penalty enhancements: the enhancement for senior*

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[1] RCC § 22E-1202.

[2] As is discussed in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. Numerous other RCC offenses, such as the RCC offensive physical contact offense (RCC § 22E-1205) criminalize this conduct and should also be considered to replace many of these current D.C. Code "assault" offenses although they are generally not discussed in this commentary.

[3] D.C. Code § 22-401.

[4] D.C. Code § 22-401.

[5] D.C. Code § 22-401.

[6] D.C. Code § 22-401.

[7] D.C. Code § 22-401.

[8] D.C. Code § 22-401.

[9] D.C. Code § 22-401.

[10] D.C. Code § 22-402.

[11] D.C. Code § 22-403.

[12] D.C. Code § 22-404(a)(1).

[13] D.C. Code § 22-401(a)(2).

[14] D.C. Code § 22-404.01.

[15] D.C. Code § 22-404.02.

[16] D.C. Code § 22-404.03.

[17] D.C. Code § 22-405.

[18] D.C. Code § 22-405.

[19] D.C. Code § 22-406.

[20] D.C. Code § 22-406.

[21] D.C. Code § 22-851.

[22] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree

citizens;[23] *the enhancement for citizen patrols;*[24] *the enhancement for minors;*[25] *the enhancement for taxicab drivers;*[26] *and the enhancement for transit operators and Metrorail station managers.*[27]

Paragraph (a)(1) specifies the prohibited conduct for first degree offensive physical contact, the most serious gradation of the offense—causing the complainant to come into physical contact with bodily fluid or excrement. Paragraph (a)(1) specifies that the required culpable mental state is "knowingly." Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (a)(1) applies to each element in paragraph (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that he or she will cause physical contact between the complainant and bodily fluid or excrement.

Paragraph (a)(2) further requires that the accused act "with intent that" the physical contact be offensive to the complainant. "Intent" is a defined term in RCC § 22E-206 meaning here that the accused was practically certain that the physical contact was offensive to the complainant. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the physical contact actually offended the complainant, only that the actor believed to a practical certainty that it would do so. Paragraph (a)(3) requires that a reasonable person in the situation of the complainant would regard the physical contact as offensive. "In fact," a defined term in § 22E-207, here is used to indicate that there is no culpable mental state requirement as to whether a reasonable person in the situation of the complainant would regard the physical contact as offensive.

Subsection (b) establishes the prohibited conduct for second degree offensive physical contact, the lowest gradation of the offense. Paragraph (b)(1) specifies the prohibited conduct—causing the complainant to come into physical contact with any person[28] or any object or substance. Paragraph (b)(1) specifies that the required culpable mental state is "knowingly." Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (c)(1) applies to each element in

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sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f)(1) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[23] D.C. Code § 22-3601.

[24] D.C. Code § 22-3602.

[25] D.C. Code § 22-3611.

[26] D.C. Code §§ 22-3751; 22-3752.

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

[28] "Any person" includes the actor or the complainant. For example, if the actor pushes the complainant and does not cause "bodily injury" as required by the RCC assault statute (RCC § 22E-1202), that would constitute causing the complainant to come into physical contact with "any person." Similarly, if the actor causes the complainant to hit or touch themselves—for example, pushing the complainant's hand into the complainant's face—and it does not cause "bodily injury" as required by the RCC assault statute (RCC § 22E-1202),that would constitute causing the complainant to come into physical contact with "any person."

paragraph (c)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that he or she will cause the complainant to come into physical contact with any person or any object or substance. The requirements in paragraph (b)(2) and (b)(3) are identical to the requirements in paragraphs (a)(2) and (a)(3).

Subsection (c) codifies an exclusion from liability for the offense. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all exclusions from liability in the RCC. An actor does not commit an offense under the revised offensive physical contact statute when, in fact, the actor's conduct is specifically permitted by a District statute or regulation. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[29]

Subsection (d) codifies a defense for the revised offensive physical contact statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all defenses in the RCC.

Paragraph (d)(1) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (d)(1) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements for the defense. Paragraph (d)(1) requires that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in subsection (d), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is under 18 years of age, RCC § 22E-701 defines a "person with legal authority over the complainant" as "the parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the complainant, or someone acting with the effective consent of such a parent or such a person." "Person acting in the place of a parent per civil law" and "effective consent" also are defined terms in RCC § 22E-701. When the complainant is an "incapacitated individual," RCC § 22E-701 defines a "person with legal authority over the complainant" as "the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian." RCC § 22E-701 further defines "incapacitated individual."

The effect of paragraph (d)(1) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have

[29] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

this effective consent defense[30] to the revised offensive physical contact statute. However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[31]

Paragraph (d)(2) and its subparagraphs specify the individuals from whom an actor must receive "effective consent" in order for the defense to apply. Each subparagraph will be discussed separately, but general principles that apply to each subparagraph will be discussed first.

Paragraph (d)(2) requires that the actor "reasonably believes" that the specified individuals in the following subparagraphs—either the complainant or a "person with legal authority over the complainant" acting consistent with that authority—give "effective consent" to the actor to cause the physical contact. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires some indication (by word or action) of agreement given by a person generally competent to do so. In addition, the RCC definition of "consent" excludes consent from a person that "[b]ecause of youth, mental illness or disorder, or intoxication, is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." Thus, although subparagraph (d)(2) and its subparagraphs permit complainants under the age of 18 years to give effective consent in certain situations, the RCC definition of "consent" may preclude a very young person from giving consent and, in such a case, if the actor believes it, the defense does not apply.

The "in fact" specified in subsection (d) applies to paragraph (d)(2) and the requirements in the following subparagraphs. No culpable mental state, as defined in RCC § 22E-205, applies to paragraph (d)(2) or the following subparagraphs. It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[32] There is no effective consent defense under paragraph (d)(2) when the actor makes an unreasonable mistake as to the effective

[30] The defense under subsection (d) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[31] These defenses have different requirements than the effective consent defense in subsection (d). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

[32] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under paragraph (d)(2) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Paragraph (d)(2) further requires that the actor "reasonably believes" that the complainant and the actor meet various age requirements in the following subparagraphs. As is discussed above, due to the "in fact" specified in subsection (d), no culpable mental state, as defined in RCC § 22E-205, applies to paragraph (d)(2) or the following subparagraphs. However, the actor must subjectively believe, and that belief must be reasonable,[33] that the actor and the complainant satisfy the age requirements in the subparagraphs under paragraph (d)(2). There is no effective consent defense under paragraph (d)(2) when the actor makes an unreasonable mistake as to the required age of the complainant or required age of the actor.

Finally, paragraph (d)(2) requires that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to cause the injury. As is discussed above, due to the "in fact" specified in subsection (d), no culpable mental state, as defined in RCC § 22E-205, applies to paragraph (d)(2) or the following subparagraphs. However, the actor must subjectively believe, and that belief must be reasonable,[34] that there is effective consent to cause the physical contact. There is no effective consent defense under paragraph (d)(2) when the actor makes an unreasonable mistake as to the type of physical contact to which effective consent is given.[35]

Having discussed the general principles that apply to the defense requirements in paragraph (d)(2) and its subparagraphs, each subparagraph will now be discussed

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[33] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[34] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[35] For example, if, the complainant gives effective consent to the actor to push the complainant then instead throws urine at the complainant, the effective consent does not apply, and the actor is still guilty of first degree offensive physical contact.

Under paragraph (d)(2) and subparagraph (d)(2)(A), the actor must reasonably believe that the complainant is 18 years of age or older and that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority, gives "effective consent" to the actor to either cause the physical contact, or to engage in a lawful sport, occupation, or other concerted activity.[36] As is discussed above, "effective consent" and "person with legal authority over the complainant" are defined terms in RCC § 22E-701. The provision in subparagraph (d)(2)(A) for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of incompetent adults giving effective consent to the actor. Sub-subparagraph (d)(2)(A)(ii), in the alternative, requires that, if the physical contact occurs during a lawful sport, occupation, or other concerted activity, the defense is applicable when the actor's infliction of the physical contact is a reasonably foreseeable hazard of that activity. As specified by the "in fact" in subsection (d), no culpable mental state, as defined in RCC § 22E-205, applies to the requirement that the actor's infliction of the physical contact is a reasonably foreseeable hazard of a permissible activity. This is an objective determination and the defense does not apply if the infliction of the physical contact is not a reasonably foreseeable hazard.

Second, and in the alternative, under subparagraph (d)(2)(B), the actor must reasonably believe that the complainant is under 18 years of age and the actor is 18 years of age or older and more than four years older than the complainant (subparagraph (d)(2)(B)(i)). In addition, the actor must reasonably believe that a "person with legal authority over the complainant" gives "effective consent" to the actor to either cause the physical contact, or to engage in a lawful sport, occupation, or other concerted activity,[37] where the actor's infliction of the physical contact is a reasonably foreseeable hazard of that activity. The above discussion of "engage in a lawful sport, occupation . . ." for sub-subparagraph (d)(2)(A)(ii) applies here to sub-subparagraph (d)(2)(B)(ii)(II).

Finally, and in the alternative, under paragraph (d)(2) and subparagraph (d)(2)(C), the actor must reasonably believe that the complainant is under 18 years of age, and that the actor is either under years of age or over 18 years of age and not more than four years older (sub-subparagraph (d)(2)(C)(i)). Paragraph (d)(2) and subparagraph (d)(2)(C)(ii) further require that the actor must reasonably believe that the complainant gives "effective consent" to the actor to cause the physical contact, or to engage in a lawful sport, occupation, or other concerted activity,[38] where the actor's infliction of the physical contact is a reasonably foreseeable hazard of that activity. The above discussion of "engage in a lawful sport, occupation . . ." for sub-subparagraph (d)(2)(A)(ii) applies here to sub-subparagraph (d)(2)(C)(ii)(II).

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[36] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

[37] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

[38] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

Subsection (e) specifies relevant penalties for the offense. [*See* Fourth Draft of Report #41.] Paragraph (e)(3) codifies a penalty enhancement for either gradation of the revised physical contact offense. If either of the specified enhancements apply, the penalty classification for the offense is increased by one class.

The first penalty enhancement is in subparagraph (e)(3)(A). The actor must commit the offense "reckless" as to the fact that the complainant is a "protected person" as that term is defined in RCC § 22E-701, such as being a law enforcement officer in the course of his or her duties. "Reckless," a term defined at RCC § 22E-206, here means the accused must consciously disregard a substantial risk that the complainant is a "protected person" as that term is defined in RCC § 22E-701.

The second penalty enhancement is in subparagraph (e)(3)(B). The actor must commit the offense with the "purpose" of harming the complainant because of his or her status as a "law enforcement officer," "public safety employee," or "District official" as those terms are defined in RCC § 22E-701. "Purpose" is a defined term in RCC § 22E-206 that here means that the actor must consciously desire to harm the complainant because of his or her status as a "law enforcement officer," "public safety employee," or "District official."[39] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes. Per RCC § 22E-205, the object of the phrase "has the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

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

Relation to Current District Law. *The revised offensive physical contact statute clearly changes current District law in ten main ways.*

First, the RCC offensive physical contact offense punishes as a separate offense, with a distinct name, low-level conduct that is part of assaultive conduct in current law. Current District assault statutes are silent as to whether offensive physical contacts are sufficient for liability,[40] but DCCA case law establishes that a simple assault includes: 1) non-violent sexual touching[41] that causes no pain or impairment to the complainant's

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

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

[41] "Where the assault involves a nonviolent sexual touching the court has held that there is an assault . . . because 'the sexual nature [of the conduct] suppl[ies] the element of violence or threat of violence.'" *Matter of A.B.*, 556 A.2d 645, 646 (D.C. 1989) (quoting *Goudy v. United States*, 495 A.2d 744, 746 (D.C.1985), *modified*, 505 A.2d 461 (D.C.), *cert. denied*, 479 U.S. 832, 107 S.Ct. 120, 93 L.Ed.2d 66 (1986)). The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240,

body; and 2) any completed battery where the accused inflicts an unwanted touching on the complainant that causes no pain or impairment to the complainant's body.[42] However, a recent DCCA case that is in active litigation may ultimately call into question whether an unwanted touching on the complainant that causes no pain or impairment is sufficient.[43] In contrast, in the RCC, the revised assault statute (RCC § 22E-1202) is limited to causing three types of bodily injury—"serious bodily injury," "significant bodily injury," and "bodily injury"—as those terms are defined in RCC § 22E-701—as well as serious and permanent disfigurement and injuries. The RCC offensive physical contact statute generally criminalizes offensive physical contacts that fall short of inflicting "bodily injury." However, the RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law,[44] and, depending on the facts of the case, and there may be liability under RCC Chapter 12 offenses, RCC weapons offense, or sex offenses RCC Chapter 13. This change improves the organization and proportionality of the District's current law on assaults, by distinguishing harms of different severity.

Second, the RCC offensive physical contact statute is not subject to a penalty enhancement for the involvement of a dangerous weapon. The District's current assault with a dangerous weapon (ADW) statute is a separate offense with a ten-year maximum penalty.[45] Although the statute is silent as to what level of conduct suffices as a predicate for liability, District case law specifies that engaging in any conduct that constitutes a

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246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)); *see also Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted).

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

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

[44] *See, e.g.*, *Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020).

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

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

simple assault is sufficient.[46] In contrast, the RCC offensive physical contact offense does not have an enhancement for the use of a "dangerous weapon" or "imitation dangerous weapon," as those terms are defined in RCC § 22E-70. The use or display of a dangerous weapon or imitation dangerous weapon during conduct that satisfies the RCC offensive physical contact offense may be criminalized as attempted assault under the RCC general attempt provision (RCC § 22E-301) or the criminal threats statute and its weapon enhancement (RCC § 22E-1204). In addition, simple possession of a dangerous weapon during offensive physical contact may also entail liability for an RCC weapons offense.[47] This change improves the law's clarity and proportionality by distinguishing harms of different severity.

Third, the conduct in the RCC offensive physical contact offense no longer is a predicate for liability when an assault occurs with intent to commit another crime. Current District law recognizes as separate offenses assault with intent to kill,[48] assault with intent to commit first degree sexual abuse,[49] assault with intent to commit second degree sexual abuse,[50] assault with intent to commit child sexual abuse,[51] assault with intent to commit robbery,[52] assault with intent to commit mayhem,[53] and assault with intent to commit any other felony,[54] collectively referred to as the "assault with intent to" or "AWI" offenses. Current District case law generally indicates that conduct constituting a simple assault, with the appropriate intent, is sufficient for liability for the AWI offenses[55]—and insofar as the conduct in the RCC offensive physical contact offense constitutes simple assault in current law, such conduct also would be a predicate for liability under existing AWI offenses. In contrast, in the RCC, the AWI offenses no longer exist and liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed

[46] *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011) ("Because there was no crime of "assault with a dangerous weapon" at common law, we have interpreted the statute to require no more than is required to prove the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon . . . ."). However, as this commentary noted elsewhere, a recent DCCA case that is in active litigation may ultimately call into question whether an unwanted touching on the complainant that causes no pain or impairment is sufficient. If an individual merely possesses a dangerous weapon during offensive physical contact, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of offensive physical contact per RCC § 22E-4104) or other RCC weapons offenses.

[47] If an individual merely possesses a dangerous weapon during offensive physical contact, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of offensive physical contact per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an imitation firearm under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon."

[48] D.C. Code § 22-401.

[49] D.C. Code § 22-401.

[50] D.C. Code § 22-401.

[51] D.C. Code § 22-401.

[52] D.C. Code § 22-401.

[53] D.C. Code § 22-402.

[54] D.C. Code § 22-403.

[55] *See, e.g.*, *Anthony v. United States*, 361 A.2d 202, 204 (D.C. 1976) ("The assault which comprises an essential element of the offense of assault with intent to commit robbery is common law assault.").

offenses.[56] The RCC general attempt provision provides for liability that is *at least as expansive* as that afforded by AWI offenses.[57] The change improves the clarity of the revised offensive physical contact statute, and eliminates unnecessary overlap between the AWI offenses and general attempt liability for assault-type offenses.

Fourth, under the revised offensive physical contact statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current assault statute from which the offense of offensive physical contact is derived is silent as to the effect of intoxication. However, District law seems to have established that assault is a general intent offense,[58] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary culpable mental state requirement for the crime.[59] This DCCA case law would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[60]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess the knowledge or intent required for any element of offensive physical contact.[61] In contrast, under the revised offensive physical contact offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove offensive physical contact. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue

[56] For example, rather than having a separate offense of assault with intent to kill, as is codified in current D.C. Code § 22-401, the RCC criminalizes that conduct as an attempt to commit an offense such as murder or aggravated assault.

[57] For more details, see Commentary to the revised assault statute (RCC § 22E-1202).

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

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

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

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

in offensive physical contact.[62] This change improves the clarity, consistency, and proportionality of the offense.

Fifth, to the extent that certain statutory minimum penalties[63] apply to the current assault statute and related assault offenses, the RCC offensive physical contact offense partially replaces them. The statute is silent as to whether the penalties are intended to apply to low-level assaultive conduct and there is no DCCA case law on the issue. In contrast, in the RCC, low-level assaultive conduct is no longer subject to these statutory minimum penalties. For the RCC offensive physical contact offense specifically, offensive physical contacts that fall short of "bodily injury" required in the revised assault statute are no longer subject to these penalties.[64] This change improves the proportionality of the revised offense.[65]

Sixth, the revised offensive physical contact statute's enhanced penalties for harming a law enforcement officer (LEO) partially replace[66] the separate assault on a police officer (APO) offenses. Under current District law, a simple assault against a LEO "on account of, or while that law enforcement officer is engaged in the performance of his or her official duties"[67] is a misdemeanor, with a maximum term of imprisonment of 6 months,[68] and an assault that causes "significant bodily injury" or "a violent act that creates a grave risk of causing significant bodily injury" carries a maximum penalty of

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

[63] D.C. Code §§ 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[64] As discussed in this commentary, in addition to unwanted touchings that do not cause pain or impairment to the complainant, current District law generally includes in assault: 1) non-violent sexual touching that causes no pain or impairment to the complainant's body; and 2) intent-to-frighten assaults that do not result in physical contact with the complainant's body. In the RCC, this conduct is no longer covered by the revised assault statute, but may be covered by attempted assault under the general attempt provision (RCC § 22E-301), or by criminal threats (RCC § 22E-1204), or second degree nonconsensual sexual conduct (RCC § 22E-1307(b)). As with the RCC offensive physical contact offense, criminal threats (RCC § 22E-1204), and second degree nonconsensual sexual conduct (RCC § 22E-1307(b)) are no longer subject to these statutory minimums, which is discussed further in the commentaries to these RCC statutes.

[65] For further discussion of how these enhancements and provisions apply to the District's current assault statutes, see the commentary to the revised assault statute (RCC § 22E-1202).

[66] As is discussed earlier in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. The RCC offensive physical contact offense is one RCC offense that criminalizes this conduct. However, other RCC offenses may also criminalize this conduct and should also be considered to replace the separate APO offenses even though they are generally not discussed in this entry.

[67] D.C. Code § 22-405(b), (c).

[68] D.C. Code § 22-405(b).

ten years imprisonment.[69] In contrast, the revised offensive physical contact statute provides enhanced penalties for offensive physical contact with LEOs that falls short of the "bodily injury" requirements in the RCC assault statute (RCC § 22E-1202).[70]

Codifying the LEO enhancement in the revised offensive physical contact statute results in several changes to current District law. First, the enhanced gradations of the revised offensive physical contact offense require recklessness as to whether the LEO is a "protected person," rather than negligence.[71] A culpable mental state of recklessness makes the enhanced LEO gradations of the revised offensive physical contact statute consistent with the other enhancements in the revised offense that are based on the complainant's status. Fourth, the revised definition of "law enforcement officer" in RCC § 22E-701 changes the scope of the enhanced penalties in the revised offensive physical contact statute as compared to the current APO statute,[72] particularly for certain members of fire departments, investigators, and code inspectors.[73] The commentary to RCC § 22E-701 discusses the revised definition of "law enforcement officer" in detail. Third, the revised offensive physical contact statute does not enhance offensive physical contact against family members of LEOs due to their relation to a LEO, which is part of the repeal of the general provision prohibiting targeting family members of District officials

[69] D.C. Code § 22-405(c).

[70] Codifying enhanced penalties for causing offensive physical contact with a LEO is consistent with recent District legislation that amended the APO statute. Prior to June 30, 2016, in addition to an assault, the APO statute prohibited "resist[ing], oppos[ing], imped[ing], intimidate[ingt], or interfer[ing] with a law enforcement officer" in the course of his or her official duties or on account of those duties. D.C. Code § 22-405(b), (c) (repl.). On January 28, 2016, the Office of the District of Columbia Auditor issued a report titled "The Durability of Police Reform: The Metropolitan Police Department and Use of Force, 2008-2015," available at http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf (Office of the District of Columbia Auditor Report). The report recommended that the APO misdemeanor statute "be amended so that the elements of the offense require an actual assault rather than mere resistance or interference with a [Metropolitan Police Department] officer." Office of the District of Columbia Auditor Report at 107.
The Neighborhood Engagement Achieves Results Amendment Act of 2016 ("NEAR Act") amended the current APO statute by limiting it to "assault[s]" and created a new statute for resisting arrest (D.C. Code § 22-405.01). The Committee Report for this legislation cited the Office of the District of Columbia Auditor Report. Committee on the Judiciary, *Report on Bill 21-0360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016)* (January 27, 2016).

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

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

[73] It should be noted that while the RCC definition of "law enforcement officer" no longer includes these categories of complainants, they remain covered by the revised definition of "public safety employee," also defined in RCC § 22E-701. As such, they still receive enhanced protection as a category of "protected person" and as a category of complainant when the assault is committed with the purpose of harming the complainant due to the complainant's status.

and employees in D.C. Code § 22-851.[74] Collectively, these changes partially replace the APO offenses in current law with enhanced penalties in the gradations of the revised offensive physical contact statute, improve the clarity of existing statutes, and generally provide for consistent treatment of LEOs and other specially protected complainants. The changes reduce unnecessary gaps and overlap between offenses, and improve the proportionality of the statutes as well.

Seventh, the revised offensive physical contact statute partially replaces[75] the current offenses of assault and aggravated assault on a public vehicle inspection officer. Under current District law, "assault[ing]" a "public vehicle inspection officer" or "imped[ing], intimidate[ing], or interfer[ing] with" that officer while that officer "is engaged in or on account of the performance of his or her official duties" is a misdemeanor with a maximum term of imprisonment of 180 days.[76] If the accused causes "serious bodily injury," the offense is a felony with a maximum penalty of ten years imprisonment.[77] In contrast, in the revised offensive physical contact statute, offensive physical contact against a "vehicle inspection officer"[78] receives enhanced

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

[75] As is discussed earlier in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. The RCC offensive physical contact offense is one RCC offense that criminalizes this conduct. However, other RCC offenses may also criminalize this conduct and should also be considered to replace the separate assault and aggravated assault on a public vehicle inspection officer offenses even though they are generally not discussed in this entry.

[76] D.C. Code § 22-404.02.

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

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

penalties, but is no longer a separate offense. A "vehicle inspection" officer is included in the definition of "protected person" in RCC § 22E-701 as a "public safety employee," also defined in RCC § 22E-701. Since they are included in the definition of "public safety employee," vehicle inspection officers are also included in the offensive physical contact penalty enhancements for having the purpose of harming the complainant due to the complainant's status. Conduct that falls short of offensive physical contact may receive an enhanced penalty elsewhere in the RCC,[79] but conduct that consists merely of "imped[ing], intimidat[ing], or interfer[ing] with" a public vehicle inspection officer does not.

Replacing the offenses of assault and aggravated assault on a public vehicle inspection officer with the revised offensive physical contact statute results in several additional changes to District law. First, under the revised offensive physical contact statute, unlike current law,[80] there is no longer an automatic civil penalty of loss of a license to operate public vehicles-for-hire upon conviction of offensive physical contact of a vehicle inspection officer. Second, the revised offensive physical contact statute does not enhance offensive physical contact against family members of vehicle inspection officers because of their relation to the public vehicle inspection officers, which is part of the repeal of the general provision regarding targeting family members of District officials and employees in D.C. Code § 22-851.[81] Third, the revised offensive physical contact statute does not bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority.[82] This change clarifies the

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

[79] Depending on the facts of the case, intent-to-frighten assaults and incomplete batteries against vehicle inspection officers may be punishable under the revised criminal threats statute (RCC § 22E-1204), which has a "protected person" penalty enhancement, or attempted assault or attempted physical contact under the RCC general attempt provision in RCC § 22E-301.

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

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

[82] The current assault on a public vehicle inspection officer statutes bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority. D.C. Code §§ 22-404.02(c), 22-404.03(c) ("It is neither justifiable nor excusable for a person to use force to resist the civil enforcement authority exercised by an individual believed to be a public vehicle inspection officer, whether or not such

revised offensive physical contact statute and reduces unnecessary overlap with other provisions that specially penalize assaults on District officials.

Eighth, the RCC definition of "protected person," discussed in the commentary to RCC § 22E-701, results in several changes to the scope of enhanced offensive physical contact. First, through the definition of "protected person," offensive physical contact against complainants under the age of 18 years or against complainants 65 years of age or older receive enhanced penalties in the revised offensive physical contact offense, but only if certain age requirements are met. Current District law enhances various assault offenses against complainants under the age of 18 years if there is at least a two year age gap between the complainant and an actor that is 18 years of age or older,[83] and against all complainants 65 years of age or older.[84] In contrast, the "protected person" penalty enhancement in the revised offensive physical contact statute requires at least a four year age gap between a complainant under 18 years of age and an actor that is 18 years of age or older, and require that the actor be under the age of 65 years and at least 10 years younger than a complainant that is 65 years of age or older. With respect to minors, these age requirements are consistent with other offenses in current District law[85] and the age gap for seniors,[86] while new to District law, reserve the enhanced penalties for predatory

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enforcement action is lawful."). The RCC assault statute deletes this provision and bar to self-defense against a public vehicle inspection officer, and instead relies on the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when "The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct." RCC § 22E-403(b)(3) allows an actor who otherwise meets the requirements for self-defense to use force to oppose a public vehicle inspection officer's use of force that either is not lawful or when the actor is not reckless as to the lawfulness. The RCC continues to bar a claim of self-defense whenever an actor is reckless as to the public vehicle inspection officer's conduct being lawful.

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

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

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

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

behavior. Second, offensive physical contact against a driver of a private vehicle-for-hire, a "vulnerable adult," and a "public safety employee" receive new enhanced penalties in the revised offensive physical contact statute through the definition of a "protected person." A driver of a private vehicle-for-hire does not receive any enhanced penalties under current District law, and a vulnerable adult[87] or "public safety employee"[88] receives enhanced penalties in a few non-assault offenses. In contrast, the "protected person" penalty enhancement in the revised offensive physical contact statute recognize the prevalence of drivers of private vehicles-for-hire and the special status elsewhere under current District law for vulnerable adults and public safety employees. Third, offensive physical contact against a "citizen patrol member"[89] or a "District employee" no longer receive enhanced penalties in the revised offensive physical contact offense as they do under current District law.[90] The breadth of these current enhancements is inconsistent as compared to other penalty enhancements in current District law.

The RCC definition of "protected person" also makes broader changes to the revised offensive physical contact statute. First, the "protected person" penalty enhancement applies to each type of offensive physical contact, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[91] the "assault with intent to" offenses,[92] and the various felony assault offenses,[93] resulting in

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of age. The 10 year age gap recognizes that both the complainant and the actor are adults, as opposed to teenagers.

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

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

[89] D.C. Code § 22-3602.

[90] D.C. Code § 22-851(d).

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

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

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

disproportionate penalties for similar conduct. Second, the revised offensive physical contact statute applies a mental state of "recklessness" to whether the complainant is a "protected person." None of the separate penalty enhancements under current District law specify a culpable mental state, but the penalty enhancements for senior citizens[94] and minors[95] have affirmative defenses for a reasonable mistake of age. The "reckless" culpable mental state[96] in the protected person penalty enhancement preserves the substance of these affirmative defenses[97] and establishes a consistent culpable mental state requirement for each category of complainant in the RCC definition of "protected person." Finally, the RCC offensive physical contact statute prohibits the stacking of multiple penalty enhancements based on the categories in the definition of "protected

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

[94] D.C. Code § 22-3601(c) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[95] D.C. Code § 22-3611(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence.").

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

[97] The current enhancement for crimes against senior citizens makes it a defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, the current enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). In the RCC, it must be proven that an actor was reckless that the complainant was 65 years or older or under 18 years of age. The actor must consciously disregard a substantial risk that a circumstance (here the fact that the complainant is over 65 or under 18) exists. Per RCC § 22E-206, a reasonable mistake as to the complainant's age would negate the recklessness required for an age-based gradation enhancement for assault. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element. However, given the inherent difficulty in judging the age of another person, an actor who assesses a person's age based on appearance alone likely would be reckless as to the person being over 65 or under 18 if the actor judges a person to be very close in age to the 65 and 18 year old thresholds. For example, if an actor assessed the complainant's age to be in their early 60s based on appearance alone, the actor is likely aware of a substantial risk that the complainant is actually 65 years or older. Whether the actor's disregard of such risk is blameworthy will depend on why the risk was ignored. For example, an assault based on the actor's allegedly knocking down and harming a complainant, reckless that they were 67 year old might reach different conclusions as to blameworthiness depending on whether the actor was running to a hospital to see a family member versus an actor who was running to the front of a line to see a sports star. Ultimately it is up to the factfinder to determine whether an actor's alleged mistake as to age of the complainant is reasonable given the facts of the case.

person" and stacking of penalty enhancements for a protected person and the use of a weapon.[98]

Collectively, these changes provide a consistent enhanced penalty for offensive physical contact against categories of individuals included in the definition of "protected person," removing gaps in the current patchwork of separate enhancements, clarifying the law, and improving the proportionality of offenses.

Ninth, the revised offensive physical contact statute enhances the penalty for offensive physical contact committed against LEOs, public safety employees, or District officials when the assault is committed with the "purpose of harming the complainant because of the complainant's status." Current District law has separate penalty enhancements or enhanced penalties for committing assault-type offenses because of the complainant's status as a LEO,[99] a member of a citizen patrol,[100] a District "official or employee,"[101] or a "family member" of a District "official or employee."[102] Current District law also enhances the penalty for the murder of a "public safety employee"[103] on account of the complainant's status. In contrast, the revised offensive physical contact statute limits this type of enhanced penalty to a "law enforcement officer" and a "District official," and extends it to a "public safety employee," resulting in several changes to current District law. First, as is discussed in the commentary to RCC § 22E-§ 22E-701, the revised definitions of "law enforcement officer," "District official," and "public safety employee" change the scope of the revised enhancements as compared to current

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

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

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

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

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

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

District law. Second, offensive physical contact committed against a citizen patrol member, a District "employee," or the "family member" of a District "official or employee" because of the complainant's status no longer receive an enhanced penalty. These provisions raise a number of difficult definitional issues[104] and current sentencing practices in the District indicate that these penalty enhancements rarely, if ever, are necessary to proportionate sentences. Third, the enhancement applies consistently to offensive physical contact, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[105] the "assault with intent to" offenses,[106] and the various felony assault offenses,[107] resulting in disproportionate penalties for similar conduct. Codifying enhanced protection for assaulting individuals based on their status as LEOs, public safety employees, or District officials clarifies the law and improves the proportionality of offenses.

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[104] For example, the enhancement for District employees in D.C. Code § 22-851(b) states that it applies "while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties." However, District case law has held, in construing other statutes, that a law enforcement officer may be considered always on duty, *Mattis v. United States*, 995 A.2d 223, 225 (D.C. 2010). There follows an ambiguity whether any offensive physical contact of a law enforcement officer is subject to heightened liability—regardless whether the offensive physical contact was part of a domestic dispute or the officer was off-duty and not known to the assailant as an officer. The RCC, instead, through a separate reference to law enforcement officers as protected persons, provides heightened penalties where an officer is subjected to offensive physical contact while in the performance of his or her duties.

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

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

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

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

Tenth, the revised offensive physical contact statute deletes the limitation on justification and excuse defenses that is in the current D.C. Code assault on a police officer (APO) statute.[108] The current D.C. Code APO statute states "[i]t is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."[109] This provision is a categorical bar to self-defense against the use of force that is not excessive by a law enforcement officer (LEO).[110] In contrast, the RCC offensive physical conctact statute deletes this provision and bar to self-defense against a law enforcement officer, and instead relies on the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when "The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct." RCC § 22E-403(b)(3) allows an actor who otherwise meets the requirements for self-defense to use force to oppose a law enforcement officer's use of force that either is not lawful or when the actor is not reckless as to the lawfulness. The RCC continues to bar a claim of self-defense whenever an actor is reckless as to the law enforcement officer's conduct being lawful. By eliminating the special bar on self-defense against an unlawful arrest, the RCC effectively reverts to the common law rule regarding defense against a law enforcement officer which existed in the District until Congress passed a new statute with a new policy in 1970.[111] This change improves the clarity, consistency, and proportionality of the revised statutes.

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

First, the RCC offensive physical contact statute limits liability to contacts that are intended to be, and objectively are, "offensive." Current District assault statutes are silent as to whether physical contacts that are merely offensive to another person are sufficient for liability.[112] DCCA case law generally establishes that a simple assault includes any completed battery where the accused inflicts an unwanted touching on the

[108] As is discussed earlier in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. Thus, the limitation on justification and excuse defenses in the current D.C. Code APO statute would apply to conduct that is criminalized as offensive physical contact in the RCC.

[109] D.C. Code § 22-405(d).

[110] Current D.C. Code § 22-405 and § 22-405.01 provide that it is: "neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."

[111] As explained by the DCCA in McDonald v. United States, "The legislative history indicates that Congress intended to adopt 'the modern rule' in recognition that it is no longer necessary for a citizen to resist what he suspects may be an illegal arrest since criminal procedural rights (such as prompt presentment, Fed. R. Crim. Proc. 5(b) & (c)) as well as civil remedies under the Civil Rights Act of 1871, 42 U.S.C. § 1983) are readily available. H.R.Rep. No. 907 at 71–72." McDonald v. United States, 496 A.2d 274, 276 (D.C. 1985).

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

complainant,[113] but contains conflicting statements as to whether there is any requirement that the battery be objectively "offensive."[114] In addition, under DCCA case law, a simple assault consisting of conduct undertaken with intent to frighten another person has been held to require proof that the defendant's conduct would induce fear in "a person of reasonable sensibility."[115] Following this case law, District practice appears to require that for assault liability, physical contact must be "offensive to a person of reasonable sensibility."[116] Resolving this ambiguity, the RCC offensive physical contact statute clearly establishes that the contact in question must be "offensive" as evaluated from the perspective of a reasonable person in the complainant's position, and that the accused must have at least believed to a practical certainty that the contact was "offensive." This change improves the clarity of the law by specifying the requisite culpable mental state, and improves the proportionality of the statute by excluding conduct that is ordinarily considered non-criminal.[117]

Second, the RCC offensive physical contact statute requires a culpable mental state of "knowingly" as to causing the physical contact and the fact that bodily fluid or

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[113] *See, e.g., Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Dunn v. United States*, 976 A.2d 217, 218-19, 220, 221 (D.C. 2009) (stating that the injury resulting from an assault "may be extremely slight," requiring "no physical pain, no bruises, no breaking of the skin, no loss of blood, no medical treatment" and finding the evidence sufficient for assault when appellant "shoved" the complainant because the contact was "offensive."). However, a panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[114] *Compare, e.g., Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990) *with* Ray v. United States, 575 A.2d 1196, 1198–99 (D.C. 1990) ("What we distill from these cases, particularly *Harris*, is that an assault conviction will be upheld when the assaultive act is merely offensive, even though it causes or threatens no actual physical harm to the victim.") *and Comber v. United States*, 584 A.2d 26, 50 (D.C. 1990) ("Although some misdemeanors, at least when viewed in the abstract, prohibit activity which seems inherently dangerous, they may also reach conduct which might not pose such danger. A special difficulty arises in the case of simple assault, as presented here, because that misdemeanor is designed to protect not only against physical injury, but against all forms of offensive touching…."). However, a panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[115] *Antony v. United States*, 361 A.2d 202, 206 (D.C. 1976).

[116] D.C. Crim. Jur. Instr. § 4.100. See also, *id.*, cmt. 4-5 ("The instruction explains that 'injury' includes an offensive touching. [citations omitted] To ensure the jury uses an objective standard of judging "offensive," the Committee borrowed the "reasonable sensibility" standard from *Anthony v. U.S.*, [citation omitted], where it was used in a related context.").

[117] Without requiring that a non-consensual physical contact be "offensive," even the most casual touching of another person—e.g., brushing elbows on a bus or a pat on a colleague's back—could be potentially be subject to criminal liability.

excrement is used, and "intent" as to the offensive nature of the contact. The current D.C. Code is silent as to the culpable mental states required for simple assault.[118] Current District case law suggests that recklessness may suffice for simple assault,[119] but the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient.[120] Resolving this ambiguity, the RCC offensive physical contact statute clearly establishes that knowledge is required as to causing the physical contact and the fact that bodily fluid or excrement is used, and "intent" as to the offensive quality of the contact. This change improves the clarity of the law by specifying the requisite culpable mental states, and improves the proportionality of the statute by excluding conduct that is ordinarily considered non-criminal.[121]

Third, the revised offensive physical contact statute codifies an effective consent defense, discussed extensively in the explanatory note to the offense. The District's current assault statutes do not address whether consent of the complainant is a defense to liability, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[122] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[123] Another court ruling is pending regarding the elements of assault that may expand upon the requirement of lack

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[118] D.C. Code § 22-404(a)(1).

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

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

[121] A culpable mental state of recklessness as to the physical contact and its offensive nature may, for instance, criminalize a person's efforts to pass through a crowded Metro car in which it is likely the person will brush against other passengers in a way they would find offensive. While such conduct may be rude, it is not ordinarily considered criminal absent some intent to cause offense by such action.

[122] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

of consent.[124] To resolve this ambiguity, the revised offensive physical contact statute effective consent defense clarifies when the actor's reasonable belief that the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701, has given "effective consent" is a defense. The revised statute's effective consent defenses specifically addresses situations where the person giving effective consent is an adult or under 18 years of age. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised offensive physical contact statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current assault statutes do not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for assault. The exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[125] This change improves the clarity, consistency, and proportionality of the revised statute.

[124] *Perez Hernandez v. United States*, 207 A.3d 594, 602–03 (D.C.), *vacated,* 207 A.3d 605 (D.C. 2019)]

[125] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

RCC § 22E-1301. Sexual Assault.

Explanatory Note. *The RCC sexual assault offense prohibits engaging in a sexual act or sexual contact with a complainant or causing a complainant to engage in or submit to specified acts of sexual penetration or sexual touching by means of physical force, threats, nonconsensual intoxication of the complainant, or when the complainant is physically or mentally impaired. The penalty gradations are based on the nature of the sexual conduct, as well as the means by which the actor engages in the sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to the sexual conduct. The revised sexual assault offense replaces four distinct offenses in the current D.C. Code: first degree sexual abuse,[1] second degree sexual abuse,[2] third degree sexual abuse,[3] and fourth degree sexual abuse.[4] The revised sexual assault offense also replaces in relevant part four distinct provisions for the sexual abuse offenses: the consent defense,[5] the attempt statute,[6] the limitation on prosecutorial immunity,[7] and the aggravating sentencing factors.[8] Insofar as they are applicable to first degree through fourth degree sexual abuse, the revised sexual assault offense also replaces the penalty enhancement for committing an offense "while armed,"[9] the penalty enhancement for committing an offense against minors,[10] the penalty enhancement for committing an offense against senior citizens,[11] certain minimum statutory penalties,[12] and the heightened penalties and aggravating circumstances in D.C. Code § 24-403.01(b-2).*

Subsection (a) specifies the various types of prohibited conduct in first degree sexual assault, the highest gradation of the revised sexual assault offense. Paragraph (a)(1) specifies part of the prohibited conduct—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. Paragraph (a)(1) specifies a culpable

[1] D.C. Code § 22-3002.
[2] D.C. Code § 22-3003.
[3] D.C. Code § 22-3004.
[4] D.C. Code § 22-3005.
[5] D.C. Code § 22-3007.
[6] D.C. Code § 22-3018.
[7] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised sexual assault statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[8] D.C. Code § 22-3020.
[9] D.C. Code § 22-4502.
[10] D.C. Code § 22-3611.
[11] D.C. Code § 22-3601.
[12] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she will engage in a sexual act with the complainant or cause the complainant to engage in or submit to a sexual act.

Paragraph (a)(2) and subparagraphs (a)(2)(A), (a)(2)(B), and (a)(2)(C) specify the prohibited means by which the actor must engage in a sexual act with the complainant or cause the complainant to engage in or submit to the sexual act. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to paragraph (a)(2) and each type of prohibited conduct in subparagraphs (a)(2)(A), (a)(2)(B), and (a)(2)(C). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual with the complainant in a prohibited manner or that he or she causes the complainant to engage in or submit to a sexual act in a prohibited manner.

For paragraph (a)(2) and subparagraph (a)(2)(A), the actor must be "practically certain" that he or she engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act by causing "bodily injury" to the complainant, or by using physical force that moves or immobilizes the complainant. "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition."

Paragraph (a)(2), subparagraph (a)(2)(B), and sub-subparagraphs (a)(2)(B)(i) and (a)(2)(B)(ii) specify the prohibited threats for first degree of the revised sexual assault statute. Subparagraph (a)(2)(B) and sub-subparagraph (a)(2)(B)(i) require that the actor "communicat[e]" to the complainant, explicitly or implicitly, that the actor will cause the complainant to suffer bodily injury, confinement, or death. Communication requires not only that the defendant take action to convey a message, but also that the message is received and understood by another person.[13] No precise words are necessary to convey a threat; it may be bluntly spoken, or done by innuendo or suggestion.[14] The verb "communicates" is intended to be broadly construed, encompassing all speech[15] and other messages[16] that are received and understood by another person. "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition." Given the "knowingly" culpable mental state in paragraph (a)(1), discussed above, the actor must be "practically certain" that he or she causes the

[13] DCCA case law clarifies in *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), and the RCC criminal threats statute recognizes, that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

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

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

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

complainant to engage in or submit to a sexual act by communicating, explicitly or implicitly, that the actor will cause the complainant to suffer a bodily injury, confinement, or death.

Paragraph (a)(2), subparagraph (a)(2)(B), and sub-subparagraph (a)(2)(B)(ii) require that the actor communicate to the complainant, explicitly or implicitly, that the actor will cause a third party to suffer bodily injury, a sexual act, a sexual contact, confinement, or death. "Bodily injury," "sexual act," and "sexual contact" are defined terms in RCC § 22E-701. Given the "knowingly" culpable mental state in paragraph (a)(1), discussed above, the actor must be "practically certain" that the actor causes the complainant to engage in or submit to a sexual act by communicating, explicitly or implicitly, that the actor will cause a third party to suffer a bodily injury, sexual act, sexual contact, confinement, or death.

For paragraph (a)(2) and subparagraph (a)(2)(C), the actor must be "practically certain" that he or she engages in a sexual act or causes the complainant to engage in or submit to a sexual act by administering or causing to be administered to the complainant an intoxicant or other substance without the complainant's "effective consent." "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." In addition, the actor must administer the intoxicant or other substance "with intent" to impair the complainant's ability to express willingness or unwillingness to engage in the sexual act (sub-subparagraph (a)(2)(C)(i)). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that administering the intoxicant or other substance would impair the complainant's willingness or unwillingness to engage in the sexual act. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the drug or intoxicant impaired the complainant's ability to express willingness or unwillingness to engage in the sexual act, only that the defendant believed to a practical certainty that it would. However, sub-subparagraph (a)(2)(C)(ii) does require that the intoxicant or other substance have a specified effect on the complainant. The intoxicant or other substance must, "in fact," render the complainant asleep, unconscious, substantially paralyzed, or passing in and out of consciousness (sub-subparagraph (a)(2)(C)(ii)(a)), "substantially incapable of appraising the nature of the sexual act" (sub-subparagraph (a)(2)(C)(ii)(b)), or "substantially incapable of communicating willingness or unwillingness to engage in the sexual act (sub-subparagraph (a)(2)(C)(ii)(c)). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to a given element, here the required effect of the intoxicant or other substance on the complainant.

Subsection (b) specifies the various types of prohibited conduct in second degree sexual assault. Like first degree sexual assault, second degree sexual assault requires the actor to "knowingly" engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act," but the prohibited means of doing so differ. Paragraph (b)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she engages in a sexual act or causes the complainant to engage in or submit to a sexual act. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable

mental state in paragraph (b)(1) applies to each of the prohibited means of engaging in a sexual act with the complainant or causing the complainant to engage or submit to the "sexual act" in paragraph (b)(2), subparagraph (b)(2)(A), subparagraph (b)(2)(B), and sub-subparagraphs (b)(2)(B)(i), (b)(2)(B)(ii), and (b)(2)(B)(iii). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual act or causes the complainant to engage in or submit to a sexual act in the prohibited manner. For paragraph (b)(2) and subparagraph (b)(2)(A), the actor must be "practically certain" that he or she engages in a sexual act with the complainant or causes the complainant to engage in or submit to the sexual act by making an explicit or implicit "coercive threat." "Coercive threat" is a defined term in RCC § 22E-701 that prohibits specific threats such as accusing someone of a criminal offense, as well as sufficiently serious threats that would cause a reasonable person to comply.

Under paragraph (b)(2), subparagraph (b)(2)(B), and sub-subparagraph (b)(2)(B)(i), the actor must be "practically certain" that the complainant is asleep, unconscious, or passing in and out of consciousness. Under paragraph (b)(2), subparagraph (b)(2)(B), and sub-subparagraph (b)(2)(B)(ii), the actor must be "practically certain" that the complainant is "incapable of appraising the nature of the sexual act" or of understanding the right to give or withhold consent to the sexual act. In addition, the actor must be "practically certain" that the complainant's inability is either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. Under paragraph (b)(2), subparagraph (b)(2)(B), and sub-subparagraph (b)(2)(B)(iii), the actor must be "practically certain" that the complainant is incapable of communicating willingness or unwillingness to engage in the sexual act. Sub-subparagraph (b)(2)(B)(iii) includes paralyzed individuals who are able to appraise the nature of the sexual act or of understanding the right to give or withhold consent to the sexual act under sub-subparagraph (b)(2)(B)(ii), but are unable to communicate.

Subsection (c) specifies the various types of prohibited conduct in third degree sexual assault. Paragraph (c)(1) specifies part of the prohibited conduct—engaging in a "sexual contact" with the complainant or causing the complainant to engage in or submit to a "sexual contact." "Sexual contact" is a defined term in RCC § 22E-701 that means touching specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (c)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she engages in a sexual contact with the complainant or causes the complainant to engage in or submit to sexual contact. Paragraph (c)(2) and subparagraphs (c)(2)(A), (c)(2)(B), and (c)(2)(C) specify the prohibited the means by which the actor must engage in a sexual contact with the complainant or cause the complainant to engage in or submit to the sexual contact. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (c)(1) applies to each type of prohibited conduct in paragraph (c)(2) and subparagraphs (c)(2)(A), (c)(2)(B), and (c)(2)(C). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual contact with the complainant or causes the complainant to engage in or submit to sexual contact in a prohibited manner. The prohibited means are the same as they are for first degree sexual assault.

Subsection (d) specifies the various types of prohibited conduct in fourth degree sexual assault. Like third degree sexual assault, fourth degree sexual assault requires the actor to "knowingly" engage in a "sexual contact" with the complainant or cause the complainant to engage in or submit to "sexual contact," but the prohibited means of doing so differ. Paragraph (d)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (d)(1) applies to each of the prohibited means of engaging in a sexual contact with the complainant or causing the complainant to engage or submit to the sexual contact in paragraph (d)(2), subparagraph (d)(2)(A), subparagraph (d)(2)(B), and sub-subparagraphs (d)(2)(B)(i), (d)(2)(B)(ii), and (d)(2)(B)(iii). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual contact or causes the complainant to engage in or submit to sexual contact in the prohibited manner. The prohibited means are the same as they are for second degree sexual assault.

Subsection (e) codifies an affirmative defense to the revised sexual assault offense. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC.

The affirmative defense applies to subparagraphs (a)(2)(A), (a)(2)(B), (b)(2)(A), (b)(2)(B), (c)(2)(A), (c)(2)(B), (d)(2)(A), and (d)(2)(B) of the offense—all prohibited conduct in the revised sexual assault statute except involuntary intoxication in first degree and third degree (subparagraphs (a)(2)(C) and (c)(2)(C)), which require the lack of effective consent as an element. While the affirmative defense extends to incapacitated and intoxicated complainants in second degree and fourth degree sexual assault (subparagraphs (d)(2)(B) and (d)(2)(B)), in practice such complainants will generally not be able to give "effective consent," as defined in RCC § 22E-701, and the affirmative defense will usually not apply.[17] The RCC definition of "effective consent" requires "consent," defined in RCC § 22E-701 which precludes consent given by a person who is legally incompetent or, because of youth, mental illness or disorder, or intoxication, is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct constituting the offense or to the result thereof. Whether a person, particularly a young person, is able to consent to conduct that otherwise satisfies the RCC sexual assault statute is a fact-specific inquiry. In addition, even if the sexual assault effective consent defense does apply, there may still be liability under another RCC sex offense, such as sexual abuse of a minor (RCC § 22E-1302).[18]

[17] However, in some situations under subparagraphs (b)(2)(B) and (d)(2)(B), the affirmative defense will apply, and there is no liability for sexual assault. For example, if the actor reasonably believes that the complainant gives the actor effective consent to engage in a sexual contact at a later time, after the complainant takes an intoxicant or when the complainant is asleep, the effective consent eliminates liability for sexual assault.

[18] For example, consider a situation where during sexual intercourse a 20 year old actor reasonably believes that a 15 year old complainant gives valid effective consent to the actor to slap the complainant. The effective consent affirmative defense applies to first degree sexual assault, and there would be no liability for first degree sexual assault. However, the actor still would be guilty of second degree of the RCC sexual

The affirmative defense in subsection (e) requires that the actor reasonably believes that the complainant gives "effective consent," as that term is defined in RCC § 22E-701, to the actor to engage in the conduct constituting the offense. Subsection (e) specifies "in fact," a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element of the defense in subsection (e), and no culpable mental state, as defined in RCC § 22E-205, applies to the affirmative defense. For example, it is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of the complainant. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[19] There is no effective consent affirmative defense when the actor makes an unreasonable mistake as to the effective consent of the complainant.

In addition, even if the effective consent affirmative defense precludes liability for sexual assault, an actor may have liability under an RCC offense against persons or an RCC weapons offense if the actor's conduct goes beyond the complainant's effective consent or if the resulting harm is one that cannot be consented to in the RCC. For example, if the complainant gives effective consent to being slapped during sex, but in doing so the actor causes the complainant serious bodily injury, there would be no liability for sexual assault, but there may be liability under the RCC assault statute (RCC § 22E-1202), depending on the actor's culpable mental state. Similarly, if the complainant gives effective consent to the actor choking the complainant during sex and in doing so the actor causes death, there would be no liability for sexual assault, but there may be liability for an RCC homicide offense, depending on the actor's culpable mental state.

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

Subparagraph (f)(5) codifies several penalty enhancements for the revised sexual assault offense and specifies that if one or more of the penalty enhancements applies, the penalty classification for the offense is increased by one class. Subparagraph (f)(5)(A) codifies a penalty enhancement for recklessly causing the sexual act or sexual contact by displaying or using what, in fact, is a "dangerous weapon" or "imitation dangerous weapon." "Displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch." Per the rules of interpretation in

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abuse of a minor statute (RCC § 22E-1302), unless the reasonable mistake of age affirmative defense to the RCC sexual abuse of a minor offense applied.

[19] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

RCC § 22E-207, the culpable mental state of recklessly applies to both causing serious bodily injury and causing such injury by displaying or using an object. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused the sexual conduct by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the object is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Subparagraph (f)(5)(B) codifies a penalty enhancement if the actor "knowingly" acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. Subparagraph (f)(5)(C) codifies a penalty enhancement if the actor "recklessly" caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness.

Subparagraph (f)(5)(D) and sub-subparagraphs (f)(5)(D)(i), (f)(5)(D)(ii), (f)(5)(D)(iii), (f)(5)(D)(iv), and (f)(5)(D)(v) codify penalty enhancements based on the age of the complainant or whether the complainant is a "vulnerable adult." These penalty enhancements use the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element, and the culpable mental state of "reckless." "Reckless" is a defined term in RCC § 22E-206 that means the actor was aware of a substantial risk of a given element.

For the penalty enhancement in sub-subparagraph (f)(5)(D)(i), the complainant must be "in fact" under the age of 12 years and the actor must be "in fact" at least four years older the complainant. There is no culpable mental state requirement for either the age of the complainant or the required age gap. For the penalty enhancement in sub-subparagraphs (f)(5)(D)(ii), the actor must be "reckless" as to the fact that the complainant was under 16 years of age and the actor must be, "in fact," at least four years older than the complainant. The actor must be aware of a substantial risk that the complainant was under the age of 16 years, but there is no mental state requirement for the required age gap. For the penalty enhancement in sub-subparagraphs (f)(5)(D)(iii), the actor must be "reckless" as to the fact that the complainant was under 18 years of age and that the actor was in a "position of trust with or authority over" the complainant, and the actor must be, "in fact," at least four years older than the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. The actor must be aware of a substantial risk that the complainant is under the age of 18 years and that the actor is in a "position of trust with or authority over" the complainant, but there is no mental state requirement for the required age gap. For the penalty enhancement in sub-subparagraphs (f)(5)(D)(iv), the actor must be "reckless" as to the fact that the complainant was 65 years

of age or older and the actor must, "in fact," be under the age of 65 years and at least ten years younger than the complainant. The actor must be aware of a substantial risk that the complainant was 65 years of age or older, but there is no culpable mental state requirement for the required age of the complainant or the age gap. Finally, the penalty enhancement in sub-subparagraph (f)(5)(D)(v) requires that the actor be "reckless" as to the fact that the complainant was a "vulnerable adult." The actor must be aware of a substantial risk that the complainant was a "vulnerable adult" as that term is defined in RCC § 22E-701.

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

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

First, first degree and third degree of the revised sexual assault statute prohibit threats of "bodily injury," as that term is defined in RCC § 22E-701. The current D.C. Code first degree[20] and third degree[21] sexual abuse statutes prohibit threats of "bodily injury," currently defined for the sexual abuse statutes as an "injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain."[22] There is no DCCA case law interpreting the definition of "bodily injury" for the current D.C. Code sexual abuse statutes. In contrast, first degree and third degree of the revised sexual assault statute prohibit threats of "bodily injury," as that term is defined in RCC § 22E-701—"physical pain, physical injury, illness, or impairment of physical condition." The RCC definition of "bodily injury" leads to two changes to the scope of prohibited threats in first degree and third degree of the RCC sexual assault as compared to current D.C. Code first degree and third degree sexual abuse.[23] First, first degree and third degree of

[20] D.C. Code § 22-3002(a)(2) ("(a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: . . . (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.").

[21] D.C. Code § 22-3004(2) ("A person shall be imprisoned for not more than 10 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner: . . . (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.").

[22] D.C. Code § 22-3001(2).

[23] The RCC definition of "bodily injury" makes two additional changes to the current D.C. Code definition of "bodily injury." First, the RCC definition of "bodily injury" requires either "physical injury" or "impairment of physical condition." The current D.C. Code definition of "bodily injury" includes "loss or impairment of the function of a bodily member [or] organ" or "physical disfigurement." It is unclear what level of physical harm is required and there is no DCCA case law on this issue. However, the current D.C. Code sexual abuse statutes define "serious bodily injury" as "bodily injury that involves . . . protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty," D.C. Code § 22-3001(7), which suggests that "bodily injury" is limited to comparatively less serious harms. It is unclear if this revision changes the scope of threats of "bodily injury" in first degree and third degree of the RCC sexual assault statute as compared to first degree and third degree of the current D.C. Code sexual abuse statutes.

the revised sexual assault statute no longer include threats of impairment of a "mental faculty," unless the threatened harms otherwise satisfy the RCC definition of "bodily injury." It is unclear whether "mental faculty" in the current D.C. Code definition of "bodily injury" refers to the physical condition of the brain or more generally to psychological distress. Second, first degree and third degree of the revised sexual assault statute include threats of *any* physical pain, as opposed to threats of "an injury involving significant pain," as required by the current D.C. Code definition of "bodily injury." It is difficult, if not impossible, to assess whether a threat is a threat of "significant physical pain," as opposed to a threat of any physical pain. In the RCC sex assault offense, a threat of "bodily injury" that involves any physical pain must still satisfy the causation requirement and the "knowingly" culpable mental state—i.e. the threat must cause the complainant to engage in the sexual act and the actor must be "practically certain" of this fact. This change improves the clarity, completeness, and consistency of the revised statutes.

Second, as applied to first degree and third degree of the revised sexual assault statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow an actor to claim that he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication. The current D.C. Code first degree and third degree sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[24] and similar logic would appear to apply to third degree sexual abuse. This case law precludes an actor from receiving a jury instruction on whether intoxication prevented the actor from forming the necessary culpable mental state requirement for the crime.[25] This DCCA case law would also likely mean that an actor would be precluded from directly raising—though not necessarily presenting evidence in support of[26]—the claim that, due to his or her self-induced intoxicated state, the actor did not possess any knowledge or intent required for any element of first degree or third degree sexual abuse.[27] In contrast, under the revised sexual assault statute, an actor would both have a basis for, and would be able to raise and present relevant and

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Second, the current D.C. Code sexual offense definition of "bodily injury" includes "disease" or "sickness," which the RCC definition simplifies by referring to "illness." This is a clarificatory change that does not change the scope of threats of "bodily injury" in the RCC sexual assault statute as compared to first degree and third degree of the current D.C. Code sexual abuse statutes.

[24] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

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

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

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

admissible evidence in support of, a claim that voluntary intoxication prevented the actor from forming the knowledge or intent required to prove the offense. Likewise, where appropriate, the actor would be entitled to an instruction which clarifies that a not guilty verdict is necessary if the actor's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue the revised sexual assault statute.[28] This change improves the clarity, consistency, and proportionality of the offense.

Third, second degree and fourth degree of the RCC sexual assault statute specify as a discrete basis of liability that the complainant's incapacitation is due to "an intellectual, developmental, or mental disability or mental illness," which excludes age as the sole cause of a complainant's inability. The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct.[29] The language is not statutorily defined, but the DCCA has held that the current fourth degree sexual abuse statute categorically merges into the current second degree child sexual abuse statute,[30] in part because "once the government proves in a sexual assault case that the defendant was four or more years older than the [complainant under the age of 16 years], there is a conclusive presumption that the defendant knew or should have known that the [complainant under the age of 16 years] was incapable of appraising the nature of the sexual conduct."[31] However, such a conclusive presumption categorically convicts defendants of sexual assault that are themselves under the age of 16 years even if they, due to their young age, are also incapable of appraising the nature of the sexual activity. This is inconsistent with the protected status of persons under the age of 16 years in the current D.C. Code sexual abuse statutes. In contrast, in the RCC, a defendant cannot be found guilty of second degree or fourth degree sexual assault based solely on the complainant's age[32] and there is no longer a conclusive presumption that a complainant under the age of 16 years is incapable of appraising the nature of the sexual activity when the defendant is at least four years older.[33] Age remains the basis of liability for the RCC sexual abuse of a minor statute (RCC § 22E-1302), which would entirely overlap with the second and fourth

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

[29] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[30] *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017) ("[W]e hold that it is impossible to commit second-degree child sexual *166 abuse without also committing fourth-degree sexual abuse. Therefore, appellant's fourth-degree sexual abuse adjudications merge into his second-degree child sexual abuse adjudications.").

[31] *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017).

[32] A complainant's young age may be relevant in assessing whether the complainant has an intellectual, developmental, or mental disability or mental illness that makes the complainant incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact. In addition, although this commentary focuses on the young age of a complainant, the age of an older complainant may not be the sole basis of determining whether that complainant is incapable of appraising the nature of the sexual conduct or of understanding the right to give or withhold consent to the sexual conduct. It may, however, be relevant in determining whether an older complainant has an intellectual, developmental, or mental disability or mental illness and otherwise meets the requirements of this provision.

[33] However, a defendant of any age that engages in sexual activity with a complainant under the age of 18 years may still have liability under other provisions of the RCC sexual assault statute.

degree sexual assault statutes without this change, and age may form the basis of liability for the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the clarity, consistency, and proportionality of the revised sexual assault and sexual abuse of a minor statutes, and reduces unnecessary overlap.

Fourth, the revised sexual assault statute specifies one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Some or all of the current D.C. Code sex offenses[34] are subject to general penalty enhancements based on the age of the complainant,[35] a general "while armed" penalty enhancement in D.C. Code § 22-4502,[36] as well as the enhancements in the current sex offense aggravators in D.C. Code § 22-3020.[37] The D.C. Code is silent as to whether or how these different penalty

[34] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[35] Current District law has a general penalty enhancement for committing specified crimes against complainants under the age of 18 years and a general penalty enhancement for committing specified crimes against complainants that are 65 years of age or older. The penalty enhancement for crimes committed against complainants under the age of 18 years applies to child sexual abuse and first degree, second degree, or third degree sexual abuse, and authorizes a possible term of imprisonment of 1 ½ times the maximum term of imprisonment otherwise authorized. D.C. Code §§ 22-3611(a), (c). The penalty enhancement for crimes committed against complainants that are 65 years of age or older authorizes a possible term of imprisonment of 1 ½ times the maximum term of imprisonment otherwise authorized and applies to first degree, second degree, and third degree sexual abuse. D.C. Code § 22-3601(a), (c).

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

[37] The current sexual abuse aggravators apply to all the sex offenses. D.C. Code § 22-3020(a) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (1) The victim was

enhancements can be stacked, although case law suggests stacking at least some penalty enhancements is permitted.[38] In contrast, the revised sexual assault statute specifies a single set of enhancements, including age-based and weapon enhancements, that is capped at a penalty increase of one class.[39] Because the revised statute incorporates multiple enhancements in the offense, the statute clarifies that it is not possible to enhance a sexual assault with, for example, both a weapon enhancement and an enhancement based on the identity of the complainant, or to double-stack different weapon penalties[40] and offenses. In addition, the scope of the revised weapons aggravator is slightly narrower than the current "while armed" enhancement as it pertains to mere possession[41] and excludes objects the complainant incorrectly perceives as being a dangerous weapon or imitation dangerous weapon.[42] Consolidating the multiple penalty enhancements improves the consistency and proportionality of the revised sexual assault offense.

Fifth, the revised sexual assault penalty enhancements require at least a four year age gap between the actor and the complainant when the complainant is under the age of 12 years, and, by the use of the phrase "in fact," require strict liability for the age gap. The current D.C. Code sex offense aggravators include an aggravator for when the "victim was under the age of 12 at the time of the offense."[43] The aggravator does not

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under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[38] For example, the facts as discussed in several DCCA cases on offenses against persons other than sexual abuse indicate that such stacking does occur with the weapon enhancement and senior citizen enhancement. *See, e.g., McClain v. United States*, 871 A.2d 1185 (D.C. 2005) (determining "whether the trial court committed plain error when it instructed the jury regarding to lesser-included offenses of the crime of armed robbery of a senior citizen," charged under the enhancements in now D.C. Code §§ 22-4502 and 22-3601).

[39] Note, however, that subtitle I of the RCC specifies certain penalty enhancements (e.g., hate crime) that may apply *in addition to* the penalty enhancements specified in the revised sexual assault offense.

[40] In addition to the "while armed" enhancement in D.C. Code § 22-4502(a) applicable to child sexual abuse and first degree, second degree, and third degree sexual abuse, the current sex offense aggravators include an aggravator if "the defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon." D.C. D.C. Code § 22-3020(a)(6).

[41] The current "while armed" enhancement applies if the actor merely has "readily available" a dangerous weapon. D.C. Code § 22-4502(a). Having a dangerous weapon "readily available" is insufficient for the revised weapon aggravator in the sexual assault statute. However, possessing a dangerous weapon or a firearm during sexual assault, without using or displaying it, may have liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[42] The current "while armed" enhancement in D.C. Code § 22-4502 includes the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon. *See, e.g., Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."). The definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 exclude these objects.

[43] D.C. Code § 22-3020(a)(1).

require an age gap between the complainant and the actor, unlike the current child sexual abuse statutes, which require at least a four year age gap between the actor and a person under the age of 16.[44] In contrast, the revised penalty enhancement requires at least a four year age gap between the actor and a complainant under the age of 12 years. A four year age gap ensures that the enhancement is reserved for predatory behavior targeting very young complainants. An actor with less than a four year age gap that commits a sexual assault against a complainant under the age of 12 years continues to face criminal liability, but the penalty would not be enhanced. The revised enhancement also uses the phrase "in fact" to require strict liability for the age gap, which is consistent with strict liability for the age gap in the other revised age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). These changes improve the clarity, consistency, and proportionality of the revised sex assault offense.

Sixth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant was under the age of 16 years when the actor, in fact, was at least four years older. The current D.C. Code sex offense aggravators include a penalty aggravator for when "the victim was under the age of 12 years"[45] and when "the victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[46] There is no aggravator for a complainant under the age of 16 years. However, the current D.C. Code first degree and second degree sexual abuse of a child statutes punish sexual acts and sexual contacts when the complainant was under the age of 16 years and the actor was at least four years older.[47] In contrast, the revised sexual assault statute codifies a penalty enhancement for an actor recklessly disregarding the fact that the complainant is under the age of 16 years when the actor is at least four years older than the complainant. A four year age gap ensures that the enhancement is reserved for predatory behavior targeting young complainants. An actor with less than a four year age gap that commits sexual assault against a complainant under the age of 16 years continues to face criminal liability, but the penalty would not be enhanced. The "recklessly" culpable mental state for the complainant's age is consistent with this element in the other revised age-based penalty enhancements. Using "in fact" to require strict liability for the age gap is consistent with the age gap in the other revised age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). These changes improve the clarity, consistency, and proportionality of the revised sex assault offense.

Seventh, the revised sexual assault penalty enhancements require at least a four year age gap between the actor and a complainant under the age of 18 years when the actor is in a position of trust with our authority over the complainant, and, by use of the phrase "in fact," require strict liability for the age gap. The current D.C. Code sex offense aggravators include an aggravator for when the "victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the

[44] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[45] D.C. Code § 22-3020(a)(1).
[46] D.C. Code § 22-3020(a)(2).
[47] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

victim."[48] The current aggravator does not specify any culpable mental states and there is no DCCA case law on this issue. In contrast, the revised penalty enhancement requires at least a four year age gap between the actor and the complainant and, by use of the phrase "in fact," specifies that there is no culpable mental state for this element. A four year age gap ensures that the revised enhancement is reserved for predatory behavior targeting complainants under the age of 18 years. Strict liability for the age gap is consistent with the age gap in the other age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the consistency and proportionality of the revised sexual assault offense.

Eighth, the current D.C. Code penalty enhancement for crimes committed against minors no longer applies to the revised sexual assault statute. Current D.C. Code § 22-3611 codifies a general penalty enhancement for specified crimes, including first degree, second degree, and third degree sexual abuse, when the actor is 18 years of age or older, the complainant is under 18 years of age, and the actor is at least two years older than the complainant.[49] In contrast, the revised sexual assault statute limits the age-based penalty enhancements when the complainant is a minor to situations that mirror the requirements for liability in the RCC sexual abuse of minor statute (RCC § 22E-1302): 1) the complainant is under the age of 12 years and the actor is at least four year older; 2) the complainant is under the age of 16 years and the actor is at least four years older; and 3) the complainant is under the age of 18 years and the actor is at least four years older, and in a position of trust with or authority over the complainant. This change improves the consistency of the RCC sexual assault and sexual abuse of a minor statutes and improves the proportionality of the penalties.

Ninth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant is 65 years of age or older when the actor is, in fact, under the age of 65 years and at least 10 years younger than the complainant. Current D.C. Code § 22-3601 provides a general penalty enhancement for any actor, regardless of age, committing specified crimes against complainants 65 years of age or older, including first degree, second degree, or third degree sexual abuse.[50] The penalty enhancement does not specify any culpable mental states, but there is an affirmative defense if the actor "knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed."[51] There is no DCCA case law on this issue. In contrast, the revised sexual assault statute codifies a penalty enhancement for an actor that was reckless as to the fact that the complainant was 65 years of age or older when the actor, in fact, is under the age of 65 years and at least 10 years younger than the complainant. The revised penalty enhancement applies to all gradations of the revised sexual assault statute, including fourth degree sexual assault. The "reckless" culpable mental state preserves the substance of the current affirmative

[48] D.C. Code § 22-3020(a)(2).
[49] D.C. Code §§ 22-3611(a), (c).
[50] D.C. Code § 22-3601(a), (b).
[51] D.C. Code § 22-3601(c).

defense for the senior citizen enhancement[52] and is consistent with the culpable mental states in several of the other revised age-based penalty enhancements. Requiring at least a ten year age gap between the actor and the complainant reserves the enhancement for predatory behavior targeting the elderly, rather than violence between elderly persons. Strict liability for the age of the actor is consistent with several of the other age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). The revised penalty enhancement improves the consistency and proportionality of the revised offense.

Tenth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant is a "vulnerable adult." The current D.C. Code sexual abuse statutes do not have specific offenses or enhanced penalties for complainants that are "vulnerable adult[s]," as that term is defined in RCC § 22E-701, although some current District statutes prohibit the abuse[53] or neglect[54] of a "vulnerable adult" without specifically addressing sexual violence against these complainants. In contrast, the revised sexual assault statutes codify a penalty enhancement for an actor recklessly disregarding the fact that the complainant was a vulnerable adult, as that term is defined in RCC § 22E-701. The "recklessly" culpable mental state matches the culpable mental state required for several of the other sexual assault penalty enhancements. This change improves the consistency and proportionality of the revised statute.

Eleventh, the revised sexual assault penalty enhancement for weapons requires that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" an object that, in fact, is a dangerous weapon or imitation dangerous weapon. The current weapons aggravator for the current sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[55] No culpable mental state is specified, and there is no DCCA case law interpreting the current weapons aggravator.[56]

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[52] In the RCC, an actor that knew or reasonably believed that the complainant was not 65 years or older or an actor that could not have known or determined the age of the complainant, as is required in the current affirmative defense, would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial that the complainant was 65 years of age or older. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[53] D.C. Code § 22-933. The offense has a misdemeanor gradation and felony gradations that require "serious bodily injury or severe mental distress" or "permanent bodily harm or death." D.C. Code § 22-936.

[54] D.C. Code § 22-934. The offense has a misdemeanor gradation and felony gradations that require "serious bodily injury or severe mental distress" or "permanent bodily harm or death." D.C. Code § 22-936.

[55] D.C. Code § 22-3020(a)(6).

[56] However, there is DCCA case law interpreting the repealed armed rape offense that may inform how the DCCA would interpret the current armed aggravator. The previous armed rape offense required that the defendant commit rape "when armed with or [when] having readily available any . . . dangerous or deadly weapon," which is the same language in the current armed aggravator. *Johnson v. United States*, 613 A.2d 888, 897 (D.C. 1992) (quoting D.C. Code § 22-3202(a) (1989 & 1991 Suppl.)). In *Johnson v. United States*, the appellant did not actually use the dangerous weapon during the sexual assault, but used the dangerous weapon prior to the sexual assault to injure the complainant and the weapon was present in the room at the time of the sexual assault. *Johnson v. United States*, 613 A.2d 888, 891, 898 (D.C. 1992). The

In addition to the sex offense weapons aggravator, current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit first degree, second degree, and third degree sexual abuse[57] "while armed" or "having readily available" a dangerous weapon.[58] In contrast, the revised sexual assault penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" an object that, in fact, is a dangerous weapon or imitation weapon.[59] Displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch. The revised enhancement is narrower than the current D.C. Code sex offense aggravator because it requires the use or display of the weapon, and also requires that the use or display of the weapon caused the sexual activity. An actor that is merely "armed with" or "had readily available" a dangerous weapon or imitation dangerous weapon may still face liability under the RCC weapons offenses as well as liability for second degree or fourth degree of the revised sexual assault statute for a "coercive threat." The "recklessly" culpable mental state is consistent with weapons gradations in other RCC offenses against persons. The revised enhancement includes imitation dangerous weapons because in the context of sexual assault, an imitation dangerous weapon can be as coercive as a real dangerous weapon. This change improves the proportionality of the revised sexual assault statute.

Twelfth, the revised sexual assault penalty enhancement for causing serious bodily injury, due to the revised definition of "serious bodily injury," no longer includes rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current D.C. Code sex offense aggravator for causing serious

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DCCA held that "the government satisfied its burden of proving the 'armed' element by demonstrating that the coercive element of the sexual assault arose directly from appellant's use of a dangerous weapon." *Johnson*, 613 A.2d at 898. Although the armed rape offense has been repealed, *Johnson* may support requiring a causation element in the current armed aggravator for the sexual abuse statutes because of the identical "while armed" language.

[57] D.C. Code §§ 22-4501(1); 22-4502(a).

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

[59] The current sexual abuse weapons aggravators refers to "a pistol or any other firearm (or imitation thereof). D.C. Code § 22-3020(a)(6). The revised enhancement does not, however, because the revised definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 specifically include firearms and imitation firearms.

bodily injury[60] incorporates the current D.C. Code definition of "serious bodily injury" for the sex offenses, which includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[61] As is discussed in the commentary to the revised definition of "serious bodily injury" in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that otherwise fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised penalty enhancement using that term, are limited to a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ, or a protracted loss of consciousness. This change improves the consistency and proportionality of the revised sex offenses.

Thirteenth, first degree sexual assault[62] is no longer subject to the heightened penalties and aggravating circumstances in current D.C. Code § 24-403.01(b-2). Current D.C. Code § 24-403.01(b-2) establishes heightened penalties for first degree sexual abuse and first degree sexual abuse while armed if specified procedural requirements are met[63] and "one or more aggravating circumstances exist beyond a reasonable doubt."[64] In contrast, the revised sexual assault statute is subject to a single set of aggravators in

[60] D.C. Code § 22-3020(a)(3).

[61] D.C. Code § 22-3001(7).

[62] As will be discussed, current D.C. Code § 24-403.01(b-2) authorizes enhanced penalties for first degree sexual abuse and first degree sexual abuse while armed, and the RCC replaces those enhanced penalties. In the RCC, however, there is no longer a sexual assault "while armed" offense. Depending on the facts of the case, the equivalent offense would be first degree sexual assault with a weapons enhancement under subsection (g) of the revised sexual assault statute or first degree sexual assault with additional liability under RCC §§ 22E-4104, possession of a dangerous weapon during a crime. For clarity, the commentary for this entry refers only to first degree sexual assault when discussing the relevant RCC statute, even though the various forms of liability for first degree sexual assault committed with the use or presence of a weapon are also affected by the revision.

[63] D.C. Code § 24-403.01(b-2) ("(1) The court may impose a sentence in excess of 60 years for first degree murder or first degree murder while armed, 40 years for second degree murder or second degree murder while armed, or 30 years for armed carjacking, first degree sexual abuse, first degree sexual abuse while armed, first degree child sexual abuse or first degree child sexual abuse while armed, only if: (A) Thirty-days prior to trial or the entry of a plea of guilty, the prosecutor files an indictment or information with the clerk of the court and a copy of such indictment or information is served on the person or counsel for the person, stating in writing one or more aggravating circumstances to be relied upon; and (B) One or more aggravating circumstances exist beyond a reasonable doubt.").

[64] The aggravating circumstances that apply to first degree sexual abuse are unclear. D.C. Code § 24-403.01(b-2)(2) establishes that the "[a]ggravating circumstances for first degree sexual abuse . . . are set forth in § 22-3020," but the statute also codifies an additional set of aggravating circumstances that apply to "all offenses." It is unclear whether first degree sexual abuse is included in "all offenses" and is subject to the additional set of aggravating circumstances, or if "all offenses" is limited to the offenses for which D.C. Code § 24-403.01(b-2) authorizes an enhanced penalty that do not have offense-specific aggravating circumstances. The aggravating circumstances that apply for first degree sexual abuse while armed are similarly unclear. D.C. Code § 24-403.01(b-2)(2) does not specify whether first degree sexual abuse while armed is included in the reference to first degree sexual abuse and the aggravating circumstances in D.C. Code § 22-3020, or if it is subject only to the additional set of aggravating circumstances for "all offenses." Regardless, the revised sexual assault statute replaces the aggravating circumstances in D.C. Code § 24-403.01(b-2) insofar as they are applicable to first degree sexual abuse and first degree sexual abuse while armed. The revised sexual assault statute also replaces the aggravating circumstances in D.C. Code § 22-3020, which is discussed elsewhere in this commentary as a substantive change in law.

subsection (f) of the revised statute, as well as the general enhancements in the RCC for repeat offenders (RCC § 22E-606), hate crimes (RCC § 22E-607), and pretrial release (RCC § 22E-608). As a result, the general aggravating circumstances in D.C. Code § 24-403.01(b-2) no longer apply to first degree sexual assault, although several of them are covered by other provisions in the RCC.[65] The special procedures in D.C. Code § 24-403.01(b-2) to give notice to a defendant are unnecessary because aggravating circumstances must be charged in the criminal indictment per Supreme Court case law decided after passage of the District statute.[66] This revision improves the consistency and proportionality of the revised sexual assault statute.

Fourteenth, the revised sexual assault statute replaces certain minimum statutory penalties for first degree sexual abuse, second degree sexual abuse, and child sexual abuse in D.C. Code § 24-403.01(e).[67] These minimum statutory penalties require

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[65] The general aggravating circumstances in D.C. Code § 24-403.01(b-2)(2) are: "(A) The offense was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression (as defined in § 2-1401.02(12A); (B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning; (G) The victim was less than 12 years old or more than 60 years old or vulnerable because of mental or physical infirmity; [and] (H) Except where death or serious bodily injury is an element of the offense, the victim sustained serious bodily injury as a result of the offense." D.C. Code § 24-403.01(b-2)(2).
In the RCC, none of these aggravating circumstances apply to the revised first degree sexual assault offense. However, the offense is subject to several penalty enhancements that are substantially similar to several of the aggravating circumstances—the general penalty enhancement for hate crimes in RCC § 22E-607, the sexual assault penalty enhancement for recklessly disregarding that the complainant was a "vulnerable adult" (RCC § 22E-1301), and the sexual assault penalty enhancement for recklessly causing serious bodily injury to the complainant (RCC § 22E-1301). In addition, the revised sexual assault statute continues to enhance penalties for complainants under the age of 12 years (RCC § 22E-1301) and for an elderly complainant (RCC § 22E-1301), but has additional requirements for these enhancements that differ from D.C. Code § 24-403.01(b-2)(2).
The remaining aggravators in D.C. Code § 24-403.01(b-2)(2) appear better suited for the homicide offenses that are subject to enhanced penalties in the statute: "(B) The offense was serious because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning." To the extent that these aggravators would apply to the revised first degree sexual assault offense, other offenses in the RCC may cover the conduct, such as [RCC §§ 22E-XXX obstruction of justice] or are more appropriate for consideration at sentencing.

[66] The D.C. Council approved D.C. Code § 24-403(b-2) well before *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) was decided, and the statute became law shortly before *Apprendi* was decided. D.C. Code § 24-403(b-2) was approved on August 2, 2000, and became effective on June 8, 2001. The Sentencing Reform Amendment Act of 2000, 2000 District of Columbia Laws 13-302 (Act 13–406). *Apprendi* was decided on June 26, 2000. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[67] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code[68] apply, if at all, to these provisions. In contrast, the revised sexual assault statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. This change improves the consistency and proportionality of the revised offense.

Beyond these fourteen changes to current District law, twenty-one other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised sexual assault statute consistently requires that the actor engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current D.C. Code sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[69] This variation creates different plain language readings of the current D.C. Code sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[70] In addition to case law, District practice does not appear to follow the variations in statutory language.[71] Instead of these variations in language, the revised

[68] D.C. Code §§ 22-1804; 22-1804a.

[69] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[70] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[71] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit

sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the revised sexual assault statute prohibits using physical force that "moves" or "immobilizes" the complainant. The current D.C. Code first degree[72] and third degree[73] sexual abuse statutes prohibit the use of "force" against the complainant, currently defined to include "the use of such physical strength or violence as is sufficient to overcome, [or] restrain . . . a person"[74] and "the use of a threat of harm sufficient to coerce or compel submission by the victim."[75] It is unclear whether "force" includes the use of physical force that moves, but does not injure, the complainant, such as a shove. There is no DCCA case law interpreting the current D.C. Code definition of "force." Resolving this ambiguity, the revised sexual assault statute prohibits the use of physical force that "moves" or "immobilizes" the complainant. The term "overcomes" in the current D.C. Code definition of "force" may erroneously imply that the complainant must be actively opposing the use of force. Instead, "moves" in first and third degree of the revised sexual assault statute covers forceful conduct such as pushing. The term "restrains" in the current D.C. Code definition of "force" may erroneously imply that non-physical control is included. First degree and third degree of the revised sexual assault statute cover conduct such as a hug or hold, instead, by the word "immobilizes." As a whole, "moves" and "immobilizes" clarify that first degree and third degree of the revised sexual assault statute prohibit certain use of physical force that falls short of causing "bodily injury," as defined in RCC § 22E-701.[76] It is consistent and proportionate to include this forceful conduct in first degree and third degree of the revised sexual assault statute. This change improves the clarity, consistency, and proportionality of the revised statute, and removes a possible gap in liability.

Third, first degree and third degree of the revised sexual assault statute prohibit the actor threatening to harm the complainant or a third party, and exclude the actor threatening to harm himself or herself. The current D.C. Code first degree[77] and third degree[78] sexual abuse statutes prohibit the actor threatening to subject "any person" to death, bodily injury, or kidnapping. It is unclear whether "any person" would include the

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to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

[72] D.C. Code § 22-3002(a)(1).

[73] D.C. Code § 22-3004(1).

[74] D.C. Code § 22-3001(5).

[75] D.C. Code § 22-3001(5).

[76] "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition."

[77] D.C. Code § 22-3002(a)(2).

[78] D.C. Code § 22-3004(2).

actor threatening to harm himself or herself and there is no DCCA case law on this issue. In addition, the current D.C. Code first degree[79] and third degree[80] sexual abuse statutes prohibit the use of "force" against the complainant, currently defined to include "the use of a threat of harm sufficient to coerce or compel submission by the victim"[81] It is unclear whether this provision in the definition of "force" would include the actor threatening to harm himself or herself and there is no DCCA case law on this issue. Resolving this ambiguity, first degree and third degree of the revised sexual assault statute limit threats of the actor harming the complainant or a third party. An actor that threatens to harm himself or herself may have liability for second degree or fourth degree sexual assault for an explicit or implicit coercive threat provided the other requirements of the offense are met. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, first degree and third degree of the revised sexual assault statute prohibit threatening to inflict a "sexual act" or "sexual contact" against a third party. The current D.C. Code first degree[82] and third degree[83] sexual abuse statutes prohibit threats of death, bodily injury, or kidnapping. The current D.C. Code definition of "bodily injury" for the sexual abuse statutes is "injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain."[84] It is unclear whether the current D.C. Code definition of "bodily injury" includes threats of sexual penetration or sexual touching, and there is no DCCA case law interpreting this definition. In addition, the current D.C. Code first degree[85] and third degree[86] sexual abuse statutes prohibit the use of "force" against the complainant, currently defined to include "the use of a threat of harm sufficient to coerce or compel submission by the victim"[87] It is unclear whether this provision in the definition of "force" would include the actor threatening to inflict a "sexual act" or "sexual contact" against a third party. Resolving this ambiguity, first degree and third degree of the revised sexual assault statute prohibit threats to inflict a "sexual act" or "sexual contact," as those terms are defined in RCC § 22E-701, against a third party. A sexual act or sexual contact is a serious harm that may fall outside the current D.C. Code and RCC[88] definitions of "bodily injury" and should be included in first degree and third degree of the revised statute.[89] First degree and third degree of the RCC sexual assault statute limit threats of a "sexual act" or "sexual contact" to a third party consistent with

[79] D.C. Code § 22-3002(a)(1).
[80] D.C. Code § 22-3004(1).
[81] D.C. Code § 22-3001(5).
[82] D.C. Code § 22-3002(a)(2).
[83] D.C. Code § 22-3004(2).
[84] D.C. Code § 22-3001(2).
[85] D.C. Code § 22-3002(a)(1).
[86] D.C. Code § 22-3004(1).
[87] D.C. Code § 22-3001(5).
[88] RCC § 22E-701 defines "bodily injury" as "physical pain, physical injury, illness, or impairment of physical condition."
[89] The explanatory note to this offense discusses the threats provision in first degree and third degree sexual assault in more detail.

the other requirements of the revised sexual assault statute.[90] This change improves the clarity, consistency, and proportionality of the revised statute, and may remove a possible gap in liability.

Fifth, first and third degree of the revised sexual assault statute prohibit causing the complainant to engage in or submit to sexual activity "by" causing the nonconsensual intoxication of the complainant. The current D.C. Code first degree[91] and third degree[92] sexual abuse statutes prohibit a sexual act or sexual contact "after" the actor involuntarily intoxicates the complainant. There is no DCCA case law interpreting the current intoxication provision. It is unclear whether a causal connection is required between the sexual conduct and the involuntary intoxication of the complainant, although the legislative history suggests that such a causation requirement may have been intended.[93] Resolving this ambiguity, the revised sexual assault statute clarifies that involuntary intoxication of the complainant must be causally related (a "but for" condition) to the sexual conduct. The causation requirement, in addition to the culpable mental states in the revised intoxication provision discussed elsewhere in this commentary, ensures that the intoxication provision applies only to actors that knowingly cause a sexual act or sexual contact by administering an intoxicant or causing an intoxicant to be administered.[94] This change improves the clarity and consistency of the revised sexual assault offense.

Sixth, the intoxication provision in first and third degree of the revised sexual assault statute specifies the required effect of the intoxicant. The intoxication provision in the current D.C. Code first degree and third degree sexual abuse requires that the intoxicant "substantially impairs the ability of that other person to appraise or control his

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[90] As is discussed elsewhere in this commentary, threats of the actor engaging in self-harm, or, in this case, a sexual act or sexual contact, are included in second degree and fourth degree of the revised sexual assault statute as a "coercive threat," if the other requirements of the offense are met. Including threats to inflict a sexual act or sexual contact against the complainant in first degree and third degree of the revised sexual assault statute may, by nature of the offense, elevate every sexual assault into first degree or third degree, which is inconsistent with the current D.C. Code sexual abuse statutes and the RCC sexual assault statute, which distinguish the gradations, in part, based on the type of threat.

[91] D.C. Code § 22-3002(a)(4).

[92] D.C. Code §§ 22-3004(4).

[93] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 10-87, The "Anti-Sexual Abuse Act of 1994" at 14-15 ("Where the offender covertly administers drugs or intoxicants to the victim with the specific intent to engage in the sexual act . . . the use of force element under the existing rape statute cannot be established because there is no proof that the act was 'against the will' of the victim.").

[94] The revised intoxication provision ensures the proper scope of liability when the actor does not directly administer the intoxicant to the complainant, such as when the actor sets out a generally available bowl of punch that is spiked with alcohol. In such a situation, the actor may be "practically certain" that the complainant will consume the punch, satisfying the "knowingly" culpable mental state for administering or causing to be administered an intoxicant to the complainant without the complainant's consent. However, there is only liability for first degree or third degree sexual assault if the actor is "practically certain" that the sexual activity occurs as a result of administering the intoxicant. In addition, there can be no liability for first degree or third degree sexual assault unless the actor set out the punch bowl "with intent to impair the complainant's ability to express unwillingness." If an actor fails to satisfy the requirements of the revised intoxication provision, there may still be liability under second degree or fourth degree of the revised sexual assault statute for engaging in sexual activity with an impaired complainant.

or her conduct."[95] This language is not further statutorily defined and there is no DCCA case law interpreting it. The language is similar to one basis of liability in the current D.C. Code second degree and fourth degree sexual abuse statutes for sexual conduct with a complainant that is "incapable of appraising the nature of the conduct,"[96] but the current D.C. Code intoxication provision does not mirror the other types of incapacitation referenced in second degree and fourth degree sexual abuse—"incapable of declining participation in" the sexual act or sexual contact[97] and "incapable of communicating unwillingness to engage in" the sexual act or sexual contact.[98] Resolving these ambiguities, the revised intoxication provision in first and third degree of the revised sexual assault statute makes two changes to the current intoxication provision to clarify its scope. First, the revised intoxication provision specifies that an intoxicant that renders the complainant "[a]sleep, unconscious, substantially paralyzed, or passing in and out of consciousness" is sufficient. These conditions mirror the required physical incapacitation in second degree and fourth degree of the revised sexual assault statute and satisfy the current intoxication provision's requirement that the intoxicant "substantially impairs the ability" of the complainant to "appraise or control his or her conduct." Second, the revised intoxicant includes an intoxicant that renders the complainant "[s]ubstantially incapable of appraising the nature of" the sexual act or sexual contact or "[s]ubstantially incapable of communicating willingness or unwillingness to engage in" the sexual act or sexual contact. This language is similar to the language in second degree and fourth degree of the revised sexual assault statute and establishes other types of incapacitation that may not fall within the conditions specified elsewhere in the intoxication provision, e.g., asleep, unconscious, etc. This change improves the clarity and consistency of the revised statute and removes possible gaps in liability.

Seventh, first degree and third degree of the RCC sexual assault statute delete "after rendering [the complainant] unconscious" as a discrete form of liability. The current D.C. Code first degree[99] and third degree[100] sexual abuse statutes prohibit a sexual act or sexual contact "after" the actor "render[s] that other person unconscious."[101] There is no DCCA case law interpreting this provision. It is unclear whether a causal connection is required between the actor rendering the complainant unconscious and the sexual conduct. Requiring a causal connection would render the provision surplusage because the current first degree and third degree sexual abuse statutes separately prohibit "[b]y" using force against the complainant,[102] which would include rendering the complainant unconscious.[103] Without a causal connection, however, the provision overlaps with second degree and fourth degree sexual abuse, which prohibit a sexual act

[95] D.C. Code §§ 22-3002(a)(4); 22-3004(4)
[96] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).
[97] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).
[98] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).
[99] D.C. Code § 22-3002(a)(4).
[100] D.C. Code §§ 22-3004(4).
[101] D.C. Code §§ 22-3002(a)(3); 22-3004(3).
[102] D.C. Code §§ 22-3002(a)(1); 22-3004(1)
[103] D.C. Code § 22-3001(5) (defining "force" to include "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure" the complainant).

or sexual contact with an incapacitated complainant.[104] Resolving this ambiguity, first degree and third degree of the RCC sexual assault statute include engaging in or causing a complainant to engage in or submit to a sexual act "by causing bodily injury to the complainant." The RCC definition of "bodily injury" in RCC § 22E-701 would extend to unconsciousness ("physical pain, physical injury, illness, or impairment of physical condition."). If the actor renders the complainant unconscious and then later decides to sexually assault the complainant, without the causal connection that first degree and third degree require, there is liability in second degree and fourth degree sexual assault for engaging in a sexual act or sexual contact with an "unconscious" complainant. This change improves the clarity, consistency, and proportionality of the revised statute.

Eighth, first degree and third degree of the revised sexual assault offense require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by causing bodily injury, a specified use of physical force, specified threats, or involuntary intoxication of the complainant. The current D.C. Code first degree[105] and third degree[106] sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[107] and similarly logic would appear to apply to third degree sexual abuse. However, it is unclear what general intent means in terms of required culpable mental states.[108] Resolving this ambiguity, first degree and third degree of the revised sexual assault statute require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by the specified use of physical force, specified threats, or involuntary intoxication of the complainant. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[109] A "knowingly" culpable mental state is consistent with current District law for threats[110] and the RCC criminal threats statute (RCC § 22E-1204) and also may clarify that second degree and fourth degree sexual assault are lesser included offenses, which is an unresolved issued in current DCCA case law.[111] This change improves the clarity and consistency of the revised offense.

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[104] D.C. Code §§ 22-3003; 22-3005.

[105] D.C. Code § 22-3002.

[106] D.C. Code § 22-3004.

[107] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

[108] The DCCA has defined "general intent" in different ways, including that a "defendant cannot possess the requisite general intent to commit a crime without 'be[ing] aware of all those facts which make his or her conduct criminal.'" *Campos v. United States*, 617 A.2d 185, 199 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962)).

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

[110] While the District's threats statutes are silent as to required culpable mental states, knowledge or as least some subjective intent is required by case law interpreting the threats statutes. See commentary to RCC § 22E-1204.

[111] In *In re E.H.*, the DCCA declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but noted that"[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-

Ninth, second degree and fourth degree of the revised sexual assault statute require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by "a coercive threat" or with a physically or mentally impaired complainant. The current D.C. Code second degree[112] and fourth degree[113] sexual abuse statutes do not specify any culpable mental states. However, DCCA case law appears to have required specific intent for second degree sexual abuse in one recent case,[114] and the DCCA also has been clear that the statutory definition of "sexual contact" requires specific intent.[115] Resolving this ambiguity, second degree and fourth degree of the revised sexual assault statute require a "knowingly" culpable mental state. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[116] A "knowingly" culpable mental state is consistent with current District law for threats[117] and the RCC criminal threats statute (RCC § 22E-1204) and may also clarify that second degree and fourth degree sexual assault are lesser included offenses of

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degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child]). *In re E.H.*, 967 A.2d 1270, 1275 n.9 (D.C. 2009). The DCCA compared subsections (A) and (B) of the current definition of "sexual act" in D.C. Code § 22-3001(8) and noted that they do not require a specific intent "to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" like the current definition of "sexual contact" in D.C. Code § 22-3001(9) does. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense," but "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes second degree and fourth degree sexual abuse from being lesser included offenses of first degree and third degree sexual abuse in some instances. In the revised sexual assault statute, all gradations require a "knowingly" culpable mental state and the revised definition of "sexual act" in RCC § 22E-701 requires the same "intent to sexually degrade, arouse, or gratify any person" that the revised definition of "sexual contact" does. Second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault in the RCC.

[112] D.C. Code § 22-3003.

[113] D.C. Code §§ 22-3006.

[114] *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) ("There was also evidence from which a reasonable fact-finder could conclude that appellant had the specific intent to obtain sex by placing [the complainant] in fear of arrest."). Older District case law predating the 1994 Anti-Sexual Abuse Act that enacted first degree through fourth degree sexual abuse, characterized rape as a general intent offense. *See, e.g., United States v. Thornton*, 498 F.2d 749, 753 (D.C. Cir. 1974) (internal quotations omitted).

[115] *See, e.g., In re E.H.*, 967 A.2d 1270, 1271, 1275 n.9 (D.C. 2009) ("[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child]).").

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

[117] While the District's threats statutes are silent as to required culpable mental states, knowledge or as least some subjective intent is required by case law interpreting the threats statutes. See commentary to RCC § 22E-1204.

first degree and third degree, which is an unresolved issue in current DCCA case law.[118] This change improves the clarity and consistency of the revised offense.

Tenth, the revised first degree and third degree sexual assault statutes no longer include the "use of a threat of harm sufficient to coerce or compel submission by the victim." The current D.C. Code first degree[119] and third degree[120] sexual abuse offenses prohibit the use of "force" against the complainant, and the current definition of "force" includes "the use of a threat of harm sufficient to coerce or compel submission by the victim."[121] The DCCA has never interpreted the threats part of the current definition of "force." However, inclusion of any type of threat in the current D.C. Code first and third degree sexual abuse statutes appears to render moot the overall statutory framework in the current felony sexual abuse statutes, which purports to differentiate threats by the severity of harm involved.[122] Resolving this ambiguity, first degree and third degree of the revised sexual assault are limited to specified threats against the complainant and specified threats against a third party. Any other threat may lead to liability under second degree and fourth degree of the revised sexual assault statute as a "coercive threat." This change improves the consistency and proportionality of the revised statutes.

Eleventh, first degree and third degree of the revised sexual assault statute no longer include "the use or threatened use of a weapon" as a discrete basis of liability. The current D.C. Code definition of "force" in the sexual abuse statutes prohibits "the use

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[118] In *In re E.H.*, the DCCA declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but noted that"[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child]). *In re E.H.*, 967 A.2d 1270, 1275 n.9 (D.C. 2009). The DCCA compared subsections (A) and (B) of the current definition of "sexual act" in D.C. Code § 22-3001(8) and noted that they do not require a "specific intent" "to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" like the current definition of "sexual contact" in D.C. Code § 22-3001(9). The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense," but "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).
Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes second degree and fourth degree sexual abuse from being lesser included offenses of first degree and third degree sexual abuse in some instances. In the revised sexual assault statute, all gradations require a "knowingly" culpable mental state, and the revised definition of "sexual act" in RCC § 22E-701 requires the same "intent to sexually degrade, arouse, or gratify any person" that the revised definition of "sexual contact" does. Second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault in the RCC.

[119] D.C. Code § 22-3002(a)(1).

[120] D.C. Code §§ 22-300(1).

[121] D.C. Code § 22-3001(5).

[122] The current first degree and third degree sexual abuse statutes prohibit threats to subject any person to "death, bodily injury, or kidnapping." D.C. Code §§ 22-3002(a)(2); 22-3004(2). The current second degree and fourth degree sexual abuse statutes prohibit threats "other than" threats of death, bodily injury, or kidnapping. D.C. Code §§ 22-3003(1); 22-3005(1).

or threatened use of a weapon,"[123] but "weapon" is not defined statutorily and there is no DCCA case law interpreting the term. It is unclear how a "weapon" in the current D.C. Code definition of "force" differs from a "deadly or dangerous weapon" in the current sexual abuse aggravators.[124] Resolving this ambiguity, the RCC sexual assault statute deletes "the use or threatened use of a weapon" as a discrete basis of liability. The use or threatened use of a weapon is sufficient for first degree or third degree of the revised sexual assault statute if it causes bodily injury to the complainant, accompanies physical force that moves or immobilizes the complainant, or if it constitutes a specified threat, provided the other requirements of the offense are met. If the use or threatened use of a weapon does not satisfy the requirements for liability for first degree or third degree sexual assault, there may be liability for second degree or fourth degree sexual assault for an explicit or implicit coercive threat (subparagraphs (b)(2)(A) and (d)(2)(A)), provided the other requirements of the offense are met. This change improves the clarity of the revised statute.

Twelfth, the intoxication provision in first degree and third degree of the revised sexual assault statute specifies several culpable mental states. The intoxication provision in current D.C. Code first degree and third sexual abuse does not specify any culpable mental states,[125] although the legislative history references a specific intent to engage in the sexual activity.[126] DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[127] and similar logic would appear to apply to third degree sexual abuse. It is unclear what general intent means in terms of required culpable mental states, but the DCCA has defined "general intent" in different ways, including that a "defendant cannot possess the requisite general intent to commit a crime without 'be[ing] aware of all those facts which make his or her conduct criminal.'"[128] Resolving this ambiguity, the revised intoxication provision specifies several culpable mental states. First, a "knowingly" culpable mental state applies to administering or causing to be administered an intoxicant, doing so without the complainant's "effective consent," and the fact that the substance is an intoxicant. The "knowingly" culpable mental state also applies to the required causation between administering the intoxicant and the sexual conduct. Second, the actor must act "with intent to impair the complainant's ability to express willingness or unwillingness" to engage in the sexual act or sexual contact. Finally, the revised intoxication provision, by

[123] D.C. Code § 22-3001(5) (defining "force" as "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").
[124] D.C. Code § 22-3001(6) ("The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").
[125] D.C. Code §§ 22-3002(a)(4); 22-3004(4).
[126] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 10-87, The "Anti-Sexual Abuse Act of 1994" at 14-15 ("Where the offender covertly administers drugs or intoxicants to the victim with the specific intent to engage in the sexual act . . . the use of force element under the existing rape statute cannot be established because there is no proof that the act was 'against the will' of the victim.").
[127] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").
[128] *Campos v. United States*, 617 A.2d 185, 199 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962)).

the use of "in fact," requires strict liability for the effects of the intoxicant because administering an intoxicant without the complainant's "effective consent" is an assault. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[129] However, an actor may be held strictly liable for elements of an offense that aggravate what is already illegal conduct.[130] If an actor fails to satisfy any of the culpable mental states in the revised intoxication provision, there may still be liability for sexual activity with an intoxicated or incapacitated complainant in second degree or fourth degree of the revised sexual assault statute. This change improves the clarity and consistency of the revised sexual assault statute.[131]

Thirteenth, second degree and fourth degree of the revised sexual assault statute prohibit sexual assault by making a "coercive threat," as that term is defined in RCC § 22E-701. The current D.C. Code second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact by "threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping)."[132] There is no apparent statutory limit to the type of threats or fear, and the legislative history generally notes that the offenses "encompass other types of coercion."[133] The DCCA has sustained convictions for second degree sexual abuse for placing a complainant in reasonable fear

[129] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[130] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464)."). In this instance, administering an intoxicant without consent and with the specified intent is already sufficient to impose assault or attempted assault liability.

[131] The revised intoxication provision ensures the proper scope of liability when the actor does not directly administer the intoxicant to the complainant, such as when the actor sets out a generally available bowl of punch that is spiked with alcohol. In such a situation, the actor may be "practically certain" that the complainant will consume the punch, satisfying the "knowingly" culpable mental state for administering or causing to be administered an intoxicant to the complainant without the complainant's consent. However, there is only liability for first degree or third degree sexual assault if the actor is "practically certain" that the sexual activity occurs as a result of administering the intoxicant. In addition, there can be no liability for first degree or third degree sexual assault unless the actor set out the punch bowl "with intent to impair the complainant's ability to express unwillingness." If an actor fails to satisfy the requirements of the revised intoxication provision, there may still be liability under second degree or fourth degree of the revised sexual assault statute for engaging in sexual activity with an impaired complainant.

[132] D.C. Code §§ 22-3003; 22-3005. First degree and third degree sexual abuse prohibit "threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping."). D.C. Code §§ 22-3002; 22-3004.

[133] Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15 ("The first degree offense would encompass any type of physical force, as well as coercion through threats that any person will be subjected to death, bodily injury, or kidnapping. . . The second degree offense would encompass other types of coercion."). The legislative history refers to "the second degree offense," but also applies to what is now fourth degree sexual abuse. In the legislation as introduced, what is now fourth degree sexual abuse was a lower gradation for a sexual contact. *Id.* at 7.

of arrest[134] and reasonable fear of being fired from employment.[135] Instead of a general reference to threats, second degree and fourth degree of the revised sexual assault statute prohibit making a "coercive threat," a defined term in RCC § 22E-701 that is used consistently in the RCC. The RCC definition specifies certain common types of coercive threats, but also has a broad catch-all provision for threats of a harm that is "sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." This change improves the clarity and consistency of the revised offense.

Fourteenth, the revised sexual assault statute codifies an effective consent affirmative defense. The current D.C. Code consent defense to the general sexual abuse statutes simply states that "[c]onsent by the victim is a defense to a prosecution" for first degree through fourth degree sexual abuse, and misdemeanor sexual abuse.[136] The statutory definition of "consent"[137] further specifies that such consent must be "freely given," but the meaning of this language is unclear in the statute. DCCA case law recognizes two situations where consent is an appropriate defense to the use of force in a sexual encounter—when the complainant gave consent despite the use of force[138] or the defendant reasonably believed that the complainant consented.[139] Under current case law, if the actor raises a consent defense, "evidence of consent may be relevant to the issue of whether the defendant did in fact use force to engage the complainant in sexual activity."[140] However, the DCCA has not discussed the government's burden of

[134] *Way v. United States*, 982 A.2d 1135, 1135, 1137 (D.C. 2009) ("The evidence was sufficient [for second degree sexual abuse] to show that [the complainant] engaged in sexual acts with appellant only because she had a reasonable fear of being arrested.").

[135] *Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (stating that the government's evidence was sufficient for second degree sexual abuse that the complainant "was in reasonable fear of being fired.").

[136] D.C. Code § 22-3007 ("Consent by the victim is a defense to a prosecution under §§ 22-3002 to 22-3006, prosecuted alone or in conjunction with charges under § 22-3018 or §§ 22-401 and 22-403.").

[137] D.C. Code § 22-3001(4) (defining "consent" as "words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[138] *Hatch v. United States*, 35 A.3d 1115, 1116 (D.C. 2011) ("[I]f the government proves the sexual encounter was forcible, the defendant then may attempt to prove that the victim effectively consented *despite* whatever force was involved. Such consent is rare; mere submission by the victim to the use of force is not the equivalent of consent.") (emphasis in original). The DCCA has stated generally that "it is both constitutionally impermissible and logically incoherent to place the burden of persuasion with respect to consent on the defendant if the claim of consensual participation is nothing more than a denial of the use of force, an element of the offense that the government has the burden of proving." *Id.* at 1121-22.

[139] *Hatch*, 35 A.3d at 1122. ("An affirmative defense of consent to a charge of forcible sexual assault makes sense only in the unusual case in which there is evidence that the defendant's otherwise culpable use of force was excused—as where the complainant led the defendant to believe (if not correctly, then at least reasonably) that she engaged in sado-masochistic or "rough" sex willingly."). The DCCA has stated generally that "it is both constitutionally impermissible and logically incoherent to place the burden of persuasion with respect to consent on the defendant if the claim of consensual participation is nothing more than a denial of the use of force, an element of the offense that the government has the burden of proving." *Id.* at 1121-22.

[140] *Hatch*, 35 A.3d at 1116. DCCA case law makes clear that "at least when the legislature has not expressed otherwise, [the] jury should be expressly instructed that it may consider whether the government

disproving the consent defense under the current consent defense statute.[141] With respect to limitations on the consent defense, the DCCA, relying on various indications of legislative intent, has held that persons under 16 years of age categorically cannot consent to the use of force by an adult that is at least four years older in a sexual encounter.[142] Although no case law is on point, case law on the District's assault statute[143] and dicta in one sexual abuse case[144] suggest that a person may not be able to consent to more severe harms.

The revised sexual assault offense's effective consent affirmative defense is generally consistent with DCCA case law interpreting the current D.C. Code consent defense. It requires that the actor reasonably believe[145] that the complainant gave effective consent to the actor to engage in the conduct constituting the offense—which would include the use of force or threats—as well as the sexual act or sexual contact. The RCC sexual assault affirmative defense extends the affirmative defense to include the use of threats, as well as to incapacitated or intoxicated complainants in second degree and fourth degree. As the explanatory note discusses, however, the affirmative defense may rarely be available in second degree and fourth degree due to the RCC

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has met its burden to prove all the elements of the offense beyond a reasonable doubt." *Russell v. United States*, 698 A.2d 1007, 1015-16 (D.C. 1997).

[141] The original consent defense in the Anti-Sexual Abuse Act of 1994 required that the actor establish the complainant's consent by a preponderance of the evidence. D.C. Code § 22-3007 (1995). In 2009, due to concerns that the preponderance requirement was creating confusion allowing impermissible burden shifting, the preponderance requirement was deleted. In 1997, in *Russell v. United States*, the DCCA discussed in dicta the government's burden after the actor proved consent by a preponderance of the evidence. In *Russell*, the trial court instructed the jury that if the defendant proved consent by a preponderance of the evidence, the government must prove beyond a reasonable doubt that the complainant's consent was voluntary. *Russell v. United States*, 698 A.2d 1007, 1011 (D.C. 1997). The DCCA noted in dicta that the trial court misstated the law because voluntariness is not the standard for consent. *Russell*, 698 A.2d 1016 n.12. The court stated that the "correct standard under the new statute is whether a reasonable person would think that the complainant's 'words or overt actions indicate[d] a freely given agreement to the sexual act or sexual contact in question.'" *Id.* The court did not discuss the source of the reasonable person standard.

[142] The DCCA has held that in a prosecution under the current general sexual abuse statutes, if the complainant is a "child" under the age of 16 years "an adult defendant who is at least four years older than the complainant may not assert a "consent" defense. In such a case, the child's consent is not valid." *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005). "Child" is defined in D.C. Code § 22-3001 as "a person who has not yet attained the age of 16 years." D.C. Code § 22-3001(3). "Adult" is not statutorily defined in the current sex offenses, and the DCCA does not provide a definition in *Davis*. The DCCA further noted that the four-year age gap requirement in the current child sexual abuse statutes "appears [to] modify the traditional rule [that a child is legally incapable of consenting to sexual conduct with an adult] so as to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child." *Id.* at 1105 n.8.

[143] The DCCA recently held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances. *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).

[144] *Hatch*, 35 A.3d at 1120 (noting that "consenting at gunpoint is "an absurd proposition").

[145] It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability for attempted sexual assault under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."

definitions of "effective consent" and "consent." The RCC definition of "effective consent" is generally consistent with the current D.C. Code definition" and is discussed in the commentary to the definition in RCC § 22E-701.

The RCC sexual assault effective consent affirmative defense does not place any limitations on the type or severity of conduct to which a complainant can consent. In the context of sexual activity in the RCC, a complainant can consent to conduct, such as temporary asphyxiation, that creates a risk of, or actually causes, significant bodily injury, serious bodily injury, or death. Similarly, a complainant can consent to conduct that involves the use of a dangerous weapon because objects used in a sexual context may otherwise constitute a "dangerous weapon" as defined in RCC § 22E-701. However, an actor may have liability under an RCC offense against persons or an RCC weapons offense if the actor's conduct goes beyond the complainant's effective consent or if the resulting harm is one that cannot be consented to in the RCC.[146]

The RCC sexual assault affirmative defense also does not have any age requirements. The current D.C. Code consent defense to the general sexual abuse statutes does not have any age requirement,[147] although the DCCA has held that the defense is not available when the defendant is an adult at least four years older than a complainant under 16 years of age.[148] However, it is unclear if the DCCA holding is still good law,[149] and codifying such a requirement would conflate consent to the use of force or threats

[146] For example, if the complainant gives effective consent to being slapped during sex, but in doing so the actor causes the complainant serious bodily injury, there would be no liability for sexual assault, but there may be liability under the RCC assault statute (RCC § 22E-1202) if the other elements of that offense are met and there is no other applicable defense. Similarly, if the complainant gives effective consent to the actor choking the complainant during sex but in doing so the actor causes death, there would be no liability for sexual assault, but there may be liability for an RCC homicide offense if the other elements of that offense are met and there is no other applicable defense.

[147] D.C. Code § 22-3007.

[148] In *Davis v. United States*, the DCCA held that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child [complainant under the age of 16 years] at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense [under D.C. Code § 22-3007]." *Davis v. United States*, 873 A.2d 1101, 1104 n.4, 1106 (D.C. 2005). The DCCA applied the current D.C. Code definition of "child" in D.C. Code § 22-3001, *Davis*, 873 A.2d at 1104 n.4, but did not provide a definition of "adult."

[149] In *Davis v. United States*, the DCCA held that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child [complainant under the age of 16 years] at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense [under D.C. Code § 22-3007]." *Davis v. United States*, 873 A.2d 1101, 1104 n.4, 1106 (D.C. 2005).

It is unclear, however, whether the holding in *Davis* is still good law. After *Davis*, the DCCA judicially narrowed the consent defense in D.C. Code § 22-3007 to consent to the use of force, as opposed to consent to sexual activity more broadly. *See Hatch v. United States*, 35 A.3d 1115 (D.C. 2011). The DCCA has not had occasion since *Hatch* to determine how the narrowed consent defense applies to complainants under the age of 16 years. It is unclear whether the DCCA would categorically hold that a complainant under the age of 16 years cannot consent to the use of force in a sexual encounter with a defendant that is at least four years older, even though under current District law such a complainant cannot consent to the sexual activity. *See, e.g.*, *Davis*, 873 A.2d at 1105 & n.8 (stating "[Current D.C. Code § 22-3011] preserves the longstanding rule that a child is legally incapable of consenting to sexual conduct with an adult" and noting that the current D.C. Code child sexual abuse statutes "[b]y adopting the four-year age differential as an element . . . do[] modify the traditional rule to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child.").

with consent to sexual activity. The RCC sexual assault statute allows an effective consent affirmative defense to the use of force when the complainant is under 16 years of age and the actor is at least four years older. If the defense is successful, there is no liability for forceful sexual assault, but there would still be liability for RCC sexual abuse of a minor, which does not require force, and relies on the ages and relationship between the parties to impose liability.[150] In practice, the definition of "consent" in RCC § 22E-701 may preclude a complainant sufficiently under the age of 16 years from giving consent to the use of force by an actor that is at least four years older because the definition excludes consent given by a person who "is legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof" or "because of youth . . . is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct." While the RCC provides no bright-line as to what age may render a youth unable to give consent under this provision, the flexible standard would allow for sex assault (not just sexual abuse) charges in some cases.

Lastly, the RCC effective consent affirmative defense deletes now unnecessary language "prosecuted alone or in conjunction with charges under § 22-3018 [attempt statute for sex offenses] or §§ 22-401 [assault with intent to commit specified offenses] and 22-403 [assault with intent to commit specified offenses]."[151] This change improves the clarity and consistency of the revised sexual assault statute.

Fifteenth, the revised sexual assault penalty enhancements require that accomplices be "physically present at the time of the sexual act or sexual contact." The accomplice aggravator for the current D.C. Code sexual abuse statutes requires that the "defendant was aided or abetted by 1 or more accomplices."[152] There is no DCCA case law interpreting this aggravator.[153] It is unclear whether the aggravator would apply if an accomplice was not physically present. It is also unclear if the required aiding and abetting is limited to the sexual act or sexual contact, or encompasses the totality of the actor's conduct leading to the sexual act or sexual contact. Resolving this ambiguity, the revised sexual assault penalty enhancement requires that the accomplices must be "physically present at the time of the sexual act or sexual contact." Accomplices that are physically present at the time of the sexual act or sexual contact potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do not. Limiting the enhancement to accomplices that are present at the time of the offense improves the proportionality of the revised offense.

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[150] For example, if a 20 year old actor has sex with a 15 year old complainant and the complainant gives effective consent to being tied up during sex, there is no liability for sexual assault, but there would be liability for second degree sexual abuse of a minor.

[151] D.C. Code § 22-3007. The RCC sex offenses no longer have their own assault statute and liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses. See Commentary to RCC § 22E-1202 (revised assault statute).

[152] D.C. Code § 22-3020(a)(4).

[153] However, current District law generally extends aider and abettor liability to accomplices who are not present at the time of the offense. *See, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994) (upholding aider and abettor liability where "the jury could reasonably have found that appellant had participated in planning the robbery," and served as getaway driver, but was not physically present during the robbery) (collecting District case law).

Sixteenth, the revised sexual assault penalty enhancement requires a "knowingly" culpable mental state for the actor acting with one or more accomplices. The accomplice aggravator for the current D.C. Code sex offenses requires that the "defendant was aided or abetted by 1 or more accomplices."[154] The current statute does not specify any culpable mental states and there is no DCCA case law for this issue. Resolving this ambiguity, the revised sexual assault penalty enhancement requires a "knowingly" culpable mental state for acting with "one or more accomplices that are physically present at the time of the sexual act or sexual contact."[155] The "knowingly" culpable mental state improves the clarity and consistency of the revised sexual assault statute.

Seventeenth, the revised sexual assault statute is subject to the RCC general provision enhancement for repeat offenders. The current D.C. Code sex offense aggravators include an aggravator if the "defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories."[156] The plain language of the enhancement is unclear[157] and there is no case law clarifying the issue. In addition, current District law has general recidivist penalty enhancements applicable to sex offenses.[158] It is unclear how the multiple recidivist enhancements apply to the sex offenses, and there is no case law. Resolving these ambiguities, the revised sexual assault statute is subject to the RCC general recidivist penalty enhancement (RCC § 22E-606), consistent with other RCC offenses. By eliminating overlapping recidivist penalty enhancements, the RCC improves the consistency and proportionality of the revised sexual assault statutes.

Eighteenth, by use of the phrase "in fact," the revised sexual assault penalty enhancements apply strict liability to the age of a complainant when the complainant is under 12 years or age. The current D.C. Code sex offense aggravators include when the "victim was under the age of 12 at the time of the offense."[159] The statute does not specify any culpable mental states and there is no DCCA case law on this issue. However, the current D.C. Code child sexual abuse statutes require strict liability for the age of the complainant.[160] Resolving this ambiguity, the revised penalty enhancement,

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[154] D.C. Code § 22-3020(a)(4).

[155] The revised penalty enhancement no longer uses the words "aided or abetted" that are in the current enhancement because they are surplusage. The revised penalty enhancement also no longer specifies that "[i]t is not necessary that the accomplices have been convicted for an increased punishment (or enhanced penalty) to apply" as the current penalty enhancement specifies in D.C. Code § 22-3020(a)(6).

[156] D.C. Code § 22-3020(a)(5). In addition to the specific sexual abuse aggravator, current District law has general penalty enhancements for prior convictions. D.C. Code §§ 22-1805; 22-1805a. It is unclear how the multiple recidivist penalty enhancements apply to the sex offenses, and there is no DCCA case law.

[157] One possible interpretation is that priors will only be counted if they are against different complainants. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses.

[158] D.C. Code §§ 22-1805; 22-1805a.

[159] D.C. Code § 22-3020(a)(1).

[160] D.C. Code §§ 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."); 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child.").

by use of the phrase "in fact," applies strict liability to the age of a complainant under the age of 12 years. Strict liability for these ages and age gaps is consistent with the strict liability requirement in first degree and third degree of the revised sexual abuse of a minor statute (RCC § 22E-1302) for the age of a complainant that is under the age of 12 years.[161] This change improves the consistency and proportionality of the revised statutes.

Nineteenth, the revised sexual assault penalty enhancements require that the actor "recklessly disregard" the fact that the complainant was under the age of 18 years and that the actor was in a "position of trust with or authority over the complainant." One of the current D.C. Code sex offense aggravators applies when "the victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[162] The current D.C. Code sex offense aggravators statute does not specify any culpable mental states and there is no DCCA case law on this issue. However, the current D.C. Code sexual abuse of a minor statutes require strict liability for the age of the complainant.[163] Resolving this ambiguity, the revised penalty enhancement requires that the actor was reckless as to the fact that the complainant was under the age of 18 years, and the fact that the actor is in a "position of trust with or authority over" the complainant. The RCC definition of "position of trust with or authority over" may differ in scope from the current definition of "significant relationship" and is discussed further in the commentary to RCC § 22E-701. Given that the RCC definition of a "position of trust with or authority over" the complainant includes positions where the actor may not have any prior knowledge or interaction with the complainant, and that sixteen and seventeen year olds generally are able to consent to sexual encounters under current law and the RCC, requiring some degree of subjective awareness as to the special relationship is appropriate. An actor who is not at least reckless as to being in a position of trust with or authority over the complainant would still be subject to liability for sexual assault, but not this penalty enhancement. These changes improve the consistency and proportionality of the revised statutes.

Twentieth, the revised serious bodily injury penalty enhancement requires a "recklessly" culpable mental state and requires that the defendant cause serious bodily injury "immediately before, during, or immediately after" the sexual act or sexual contact. The current sex offense aggravators include when the "victim sustained serious bodily injury as a result of the offense."[164] The current D.C. Code sex offense aggravators statute does not specify any culpable mental states and the scope of "as a result of the offense" is unclear.[165] There is no DCCA case law for these issues.

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[161] The revised sexual abuse of a minor statute (RCC § 22E-1302) does not have an affirmative defense for mistake of age for complainants under the age of 12 years, unlike the remaining gradations for complainants under the age of 16 years and under the age of 18 years.

[162] D.C. Code § 22-3020(a)(2).

[163] D.C. Code §§ 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.").

[164] D.C. Code § 22-3020(a)(3).

[165] It is unclear whether "the offense" refers to the sexual act or sexual contact, or the totality of the defendant's actions leading to the sexual act or sexual contact. It is also unclear how to determine whether an injury is a "result" of the sexual act or sexual contact, particularly if a significant period of time passes between the incident and the development or discovery of the serious bodily injury.

Resolving this ambiguity, the revised penalty enhancement requires a "recklessly" culpable mental state for causing serious bodily injury immediately before, during, or immediately after the sexual act or sexual contact. The "recklessly" culpable mental state consistent with several gradations of the revised assault statute (RCC § 22E-1202). An actor who is not at least reckless as to causing serious bodily injury would still be subject to liability for sexual assault, but not this penalty enhancement. This change improves the consistency and proportionality of the revised offense.

Twenty-first, there is liability in second degree and fourth degree of the revised sexual assault statute for a sexual act or sexual contact with a mentally incapacitated complainant only if the actor doesn't also have a similarly serious mental disability or illness. The current D.C. Code second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact with a complainant that is: 1) "incapable of appraising the nature of the conduct";[166] 2) incapable of declining participation in" the sexual act or sexual contact;[167] or 3) "incapable of communicating unwillingness to engage in" the sexual act or sexual contact.[168] The language is not statutorily defined, and there is no DCCA case law interpreting these provisions when the defendant has a similar disability or illness as the complainant. Resolving this ambiguity, second degree and fourth degree of the revised sexual assault statute establish liability for a sexual act or sexual contact with an incapacitated complainant only if the actor doesn't also have a "similarly serious" disability or illness as the complainant. There may still be liability under other provisions of the RCC sexual assault statute or the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency of the revised statute.

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

First, the RCC sexual assault statute deletes "as is sufficient" from the current D.C. Code definition of "force." The current D.C. Code definition of "force" requires "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person."[169] It is unclear whether "as is sufficient" means the force must actually overcome, restrain, or injure the complainant, or whether the force must be sufficient to overcome, restrain, or injure a "reasonable" or "average" person, regardless of the effect on the complainant. However, independent of the current definition of "force," the current D.C. Code first degree and third degree sexual abuse statutes require that the defendant's use of force actually cause the complainant to engage in a sexual act or sexual contact.[170] Given this causation requirement, first degree and third degree of the

[166] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).
[167] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).
[168] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).
[169] D.C. Code § 22-3001(5) (defining "force" as "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").
[170] D.C. Code §§ 22-3002(a)(1) (first degree sexual abuse statute stating "if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person."); 22-3004(1) (third degree sexual abuse statute stating "if that person engages in

revised sexual assault statute no not use this "as is sufficient" language. First degree and third degree of the revised sexual assault statute require that the actor cause bodily injury to the complainant, or use physical force that actually moves or immobilizes the complainant. This change improves the clarity of the revised statute.

Second, the RCC sexual assault statute prohibits "causing bodily injury" to the complainant by any means. The current D.C. Code first degree and third degree sexual abuse statutes prohibit the use of "force" against the complainant[171] and "force" is defined to include "the use of such physical strength or violence as is sufficient to . . . injure a person."[172] It is unclear whether the definition requires that the actor's body injure the complainant—such as hitting the complainant—or if indirect means of causing injury are sufficient—like firing a gun or dropping an object on the complainant. However, the current D.C. Code definition of "force" also includes "the use or threatened use of a weapon"[173] and "the use of a threat of harm sufficient to coerce or compel submission by the victim,"[174] which include indirect ways of causing injury within the definition of "force." The revised statute focuses on whether the actor caused "bodily injury" instead of how. This change improves the clarity of the revised statute.

Third, the revised sexual assault statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses. Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[175] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[176] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[177] In the revised sexual assault statute, the RCC General Part's attempt

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or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.").

[171] D.C. Code §§ 22-3002(a)(1) ("(a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person."); 22-3004(1) ("A person shall be imprisoned for not more than 10 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.").

[172] D.C. Code § 22-3001(5).

[173] D.C. Code § 22-3001(5).

[174] D.C. Code § 22-3001(5).

[175] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[176] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[177] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-

provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence, as in current D.C. Code § 22-3018. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of revised statutes.

Fourth, the revised sexual assault statute specifically prohibits "implicit" threats—communicating specified harms "implicitly" in first degree and third degree and making "implicit" coercive threats in second degree and fourth degree. Current D.C. Code first degree through fourth degree sexual abuse prohibit "threatening or placing the other person in reasonable fear."[178] DCCA case law has interpreted "placing the other person in reasonable fear" as covering implicit threats.[179] The revised sexual assault statute omits "reasonable fear" and specifically prohibits both explicit and implicit threats and coercive threats. This change improves the clarity of the revised statute.

Fifth, the revised intoxication provision in first degree and third degree sexual assault specifically includes "causes [an intoxicant] to be administered." The intoxication provision in the current D.C. Code first degree and third degree sexual abuse statutes prohibits "administering" an intoxicant.[180] It is unclear from the statute whether the defendant has to personally administer the intoxicant and there is no DCCA case law on point. For clarification, the revised intoxication provision includes the actor personally administering or causing the intoxicant to be administered. This change clarifies the revised statutes.

Sixth, first degree and third degree of the revised sexual assault statute provide liability for sexual conduct caused by administering an intoxicant without "effective consent." The intoxication prong in the current D.C. Code first degree and third degree sexual abuse statutes prohibits administering an intoxicant to the complainant by "force

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3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse, second degree sexual abuse, and third degree sexual abuse are "crimes of violence" and would have a maximum term of imprisonment of five years. Fourth degree sexual abuse is not "crime of violence," however, and would have a maximum term of imprisonment of 180 days.

[178] D.C. Code §§ 22-3002(a)(2); 22-3003(1); 22-3004(2); 22-3005(1).

[179] *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) (finding the evidence sufficient for second degree sexual abuse that the complainant "engaged in sexual acts with appellant only because she had a reasonable fear of being arrested" and that "the jury could reasonably conclude that appellant intentionally obtained sex from [the complainant] by intimidating her with the unspoken threat of arrest.").

[180] The intoxication provision in the current first degree sexual abuse and third degree sexual abuse statutes is "After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct." D.C. Code §§ 22-3002(a)(4); 22-3004(4).

or threat of force, or without the knowledge or permission" of the complainant.[181] "Force" is statutorily defined in the current sex offenses,[182] but the other terms in the current intoxication provision are not. There is no DCCA case law on the intoxication provision. For clarification, the revised intoxication provision in first degree and third degree of the revised sexual assault statute requires the intoxicant to be administered "without the complainant's effective consent." The definition of "effective consent" in RCC § 22E-701 appears to include conduct that constitutes "force or threat of force"[183] or "without the knowledge or permission"[184] in the current intoxication provision and is a term that is used consistently throughout the RCC. This change clarifies the revised statutes.

Seventh, second degree and fourth degree sexual assault specify as a basis for liability that a complainant's inability to appraise the nature of the sexual act or sexual contact or give or withhold consent is due to "a drug, intoxicant, or other substance." The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct.[185] This language is not statutorily defined, and there is no DCCA case law on point. However, the DCCA has stated in dicta that "incapable of appraising the nature of the conduct" for "an adult victim . . . might involve proof of the victim's intoxication or general mental incapacity."[186] This change improves the clarity consistency, and proportionality of the revised statute.

Eighth, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) of second degree and fourth degree of the revised sexual assault statute include a complainant that is incapable of "understanding the right to give or withhold consent to" the sexual act or sexual contact. The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of the conduct,"[187] as well as "incapable of declining participation in that [sexual act or sexual contact]."[188] The language is not statutorily defined and there is no DCCA case law that interprets the meaning of "the nature of the conduct" or "declining participation." The revised language clarifies that understanding the right to give or withhold consent is a crucial part of sexual conduct and a complainant's mental inability to understand this right can be a

[181] D.C. Code §§ 22-3002(a)(4); 22-3004(4).
[182] D.C. Code § 22-3001(5) ("'Force' means "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").
[183] "Effective consent" is defined in RCC § 22E-701 as "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."
[184] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. If an actor obtains a complainant's consent to consume an intoxicant by lying about the presence of an intoxicant or without telling the complainant that an intoxicant is present, this would not be "effective consent" because it was obtained by "deception," as defined in RCC § 22E-701.
[185] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).
[186] In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013).
[187] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).
[188] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

basis for liability in second degree and fourth degree of the RCC sexual assault statute. This change improves the clarity, consistency, and proportionality of the revised statute.

Ninth, second and fourth degree of the revised sexual assault statute specifically include a complainant that is "[a]sleep, unconscious, or passing in and out of consciousness." The current D.C. Code second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact with a complainant that is "incapable of declining participation in" the sexual act or sexual contact.[189] This language is not statutorily defined further and there is no DCCA case law. The revised language clearly specifies situations when a complainant would satisfy these requirements. This change improves the clarity of the revised statute.

Tenth, by the use of the phrase "in fact," the revised weapon penalty enhancement for the sexual assault statute applies strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." The current D.C. Code sex offense aggravators include that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[190] The sex offense aggravators statute does not specify any culpable mental states. There is no DCCA case law regarding the aggravator, but DCCA case law for assault with a dangerous weapon[191] and the "while armed" enhancement in D.C. Code § 22-4502[192] support applying strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." For clarification, the revised weapons enhancement uses the phrase "in fact" to establish that strict liability applies to this element. Strict liability for this element is also consistent with the weapons gradations in other RCC offenses against persons. This change clarifies the revised statutes.

Eleventh, the revised sexual assault penalty enhancements consistently refer to the "sexual act or sexual contact" as opposed to "the offense." Several of the current D.C. Code sexual abuse aggravators refer to "at the time of the offense"[193] or "as a result of the offense."[194] The revised penalty enhancements consistently refer to the sexual act or sexual contact, improving the clarity of the revised statute.

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[189] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

[190] D.C. Code § 22-3020(a)(6) (authorizing a possible "penalty up to 1 ½ times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse if" the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[191] *See, e.g., Perry v. United States*, 36 A.3d 799, 812 (D.C. 2011) ("[Whether the actor used the object in a dangerous manner] is an objective test, and has nothing to do with the actor's subjective intent to use the weapon dangerously."); *Powell v. United States,* 485 A.2d 596, 601 (D.C. 1984) (rejecting appellant's argument that "unless one is possessed with the specific intent to use an object offensively, it is not a dangerous weapon.").

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

[193] D.C. Code § 22-3020(a)(1) ("The victim was under the age of 12 years at the time of the offense."); (a)(2) ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim.").

[194] D.C. Code § 22-3020(a)(3) ("The victim sustained serious bodily injury as a result of the offense.").

Twelfth, second degree and fourth degree of the revised sexual assault statute include a complainant that is incapable of communicating "willingness or unwillingness to engage in" the sexual act or sexual contact. The current D.C. Code second degree[195] and fourth degree[196] sexual abuse statutes include complainants that are "[i]ncapable of communicating unwillingness to engage in" the sexual act or sexual contact. This language is not statutorily defined, and there is no DCCA case law on point. The revised language clarifies that the relevant determination is whether the complainant is incapable of communicating in the context of sexual activity, not whether the complainant specifically unable to decline sexual activity, physically resist, or otherwise communicate unwillingness. This change improves the clarity of the revised statutes.

Thirteenth, first degree and third degree of the revised sexual assault statute prohibit threats of "confinement" as opposed to threats of "kidnapping." The current D.C. Code first degree[197] and third degree[198] sexual abuse statutes require threats of "kidnapping" and it is unclear whether this refers to and incorporates the elements of the current kidnapping statute in D.C. Code § 22-2001. The RCC kidnapping offense (RCC § 22E-1401), however, requires confinement with intent to inflict an additional harm on the complainant, and narrows the scope. The word "confinement" more clearly communicates that threats of confinement are sufficient for first degree and third degree of the revised sexual assault statute, without reference to the specific elements of the RCC kidnapping offense. This change improves the clarity of the revised statutes.

Fourteenth, first degree and third degree of the revised sexual assault statute prohibit "communicating"[199] specified harms to the complainant, instead of "threatening" the complainant, as is required in current D.C. Code first degree[200] and third degree[201] sexual abuse. The term "threatening" may erroneously be interpreted to require proof of the RCC criminal threats offense. Also, "threatens" is unclear as to the meaning. The RCC sexual assault offense, like the RCC criminal threats offense and other provisions, clarifies that a "communication" of the specified sort is sufficient for liability when it is causal—i.e. the complainant engages in the sexual act or sexual contact because of the communication. Second degree and fourth degree of the RCC sexual assault statute prohibit making a "coercive threat" and that term is defined in RCC § 22E-701 as a "communication." This change improves the clarity of the revised statutes.

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[195] D.C. Code § 22-3003(2)(C).

[196] D.C. Code § 22-3005(2)(C).

[197] D.C. Code § 22-3002(a)(2)(A) ("By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.").

[198] D.C. Code § 22-3002(2)(A) ("By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.")

[199] The meaning of "communicating" is discussed in the explanatory note to this offense.

[200] D.C. Code § 22-3002(a)(2) ("By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.").

[201] D.C. Code § 22-3002(2) ("By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.").

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

Explanatory Note. *The RCC sexual abuse of a minor offense prohibits specified acts of sexual penetration or sexual touching when the complainant is under the age of 18 years. The penalty gradations are primarily based on the nature of the sexual conduct, as well as the age of the complainant. The revised sexual abuse of a minor offense replaces four distinct offenses in the current D.C. Code: first degree sexual abuse of a child,[1] second degree sexual abuse of a child,[2] first degree sexual abuse of a minor,[3] and second degree sexual abuse of a minor.[4] The revised sexual abuse of a minor offense also replaces in relevant part five distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[5] the state of mind proof requirement,[6] the attempt statute,[7] the limitation on prosecutorial immunity,[8] and the aggravating sentencing factors.[9] Insofar as they are applicable to sexual abuse of a child and sexual abuse of a minor, the revised sexual abuse of a minor offense also replaces the enhancement for committing offenses while armed,[10] the enhancement for committing offenses against minors,[11] certain minimum statutory penalties,[12] and the heightened penalties and aggravating circumstances in D.C. Code § 24-403.01(b-2).*

First degree sexual abuse of a minor (subsection (a)), second degree sexual abuse of a minor (subsection (b)), and third degree sexual abuse of a minor (subsection (c)), each require that the actor engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts.

Paragraph (a)(1) specifies the prohibited conduct for first degree sexual abuse of a minor—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means

[1] D.C. Code § 22-3008.
[2] D.C. Code § 22-3009.
[3] D.C. Code § 22-3009.01.
[4] D.C. Code § 22-3009.02.
[5] D.C. Code § 22-3011.
[6] D.C. Code § 22-3012.
[7] D.C. Code § 22-3018.
[8] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised sexual abuse of a minor statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[9] D.C. Code § 22-3020.
[10] D.C. Code § 22-4502.
[11] D.C. Code § 22-3611.
[12] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

here that the actor must be "practically certain" that he or she engages in a "sexual act" with the complainant or causes the complainant to engage in or submit to a "sexual act." Paragraph (a)(2) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to the elements in subparagraph (a)(2)(A) and subparagraph (a)(2)(B). Subparagraph (a)(2)(A) specifies that the complainant must be under 12 years of age and subparagraph (a)(2)(B) specifies that the actor must be at least four years older than the complainant. There is no culpable mental state required for either the age of the complainant or the age gap.

Paragraph (b)(1) specifies the prohibited conduct for second degree sexual abuse of a minor—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (b)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that he or she engages in a "sexual act" with the complainant or causes the complainant to engage in or submit to a "sexual act." Paragraph (b)(2) uses the phrase "in fact," a defined term that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to the elements in subparagraph (b)(2)(A) and subparagraph (b)(2)(B). Subparagraph (b)(2)(A) specifies that the complainant must be under 16 years of age and subparagraph (b)(2)(B) specifies that the actor must be at least four years older than the complainant. There is no culpable mental state required for either the age of the complainant or the age gap.

Paragraph (c)(1) specifies the prohibited conduct for third degree sexual abuse of a minor—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (c)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that he or she engages in a "sexual act" with the complainant or causes the complainant to engage in or submit to a "sexual act." Paragraph (c)(2) requires that the actor be in a "position of trust with or authority over the" the complainant. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (c)(1) applies to this element. "Knowingly," a defined term in RCC § 22E-206, here requires that the actor be "practically certain" that he or she is in a position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. Paragraph (c)(3) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to the elements in subparagraph (c)(3)(A) and subparagraph (c)(3)(B). Subparagraph (c)(3)(A) specifies that the complainant must be under 18 years of age and subparagraph (c)(3)(B) specifies that the actor must be 18 years of age or older and at least four years older than the complainant. There is no culpable mental state required for the age of the complainant, the age of the actor, or the age gap.

Fourth degree sexual abuse of a minor (subsection (d)), fifth degree sexual abuse of a minor (subsection (e)), and sixth degree sexual abuse of a minor (subsection (f)), are identical to first degree sexual abuse of a minor, second degree sexual abuse of a minor, and third degree sexual abuse of a minor except that they require that the actor engage in

a "sexual contact" with the complainant or cause the complainant to engage in or submit to "sexual contact" instead of "sexual act." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (d)(1), paragraph (e)(1), and paragraph (f)(1) each specify a culpable mental state of "knowingly" for engaging in a "sexual contact" with the complainant or causing the complainant to engage in or submit to "sexual contact." "Knowingly," a defined term in RCC § 22E-206, means here that the actor must be "practically certain" that he or she engages in a "sexual contact" with the complainant or causes the complainant to engage in or submit to "sexual contact." The requirements for the complainant and the actor in fourth degree sexual abuse of a minor (paragraph (d)(2), subparagraph (d)(2)(A), subparagraph (d)(2)(B)) are the same as the requirements in first degree sexual abuse of a minor (paragraph (a)(2), subparagraph (a)(2)(A), subparagraph (a)(2)(B)). The requirements for the complainant and the actor in fifth degree sexual abuse of a minor (paragraph (e)(2), subparagraph (e)(2)(A), subparagraph (e)(2)(B)) are the same as the requirements in second degree sexual abuse of a minor (paragraph (b)(2), subparagraph (b)(2)(A), subparagraph (b)(2)(B)). The requirements for the complainant and the actor in sixth degree sexual abuse of a minor (paragraph (f)(2)), paragraph (f)(3), subparagraph (f)(3)(A), subparagraph (f)(3)(B)) are the same as the requirements in third degree sexual abuse of a minor paragraph (c)(2)), paragraph (c)(3), subparagraph (c)(3)(A), subparagraph (c)(3)(B)).

Subsection (g) codifies three affirmative defenses for the revised sexual abuse of a minor statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC.

Paragraph (g)(1) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant are, "in fact," in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact.

Paragraph (g)(2) codifies an affirmative defense for a reasonable mistake of age for second degree sexual abuse of a minor (subsection (b)) and fifth degree sexual abuse of a minor (subsection (e)). There are several requirements for the affirmative defense. Per subparagraph (g)(2)(A), the actor must reasonably believe that the complainant is 16 years of age or older at the time of the sexual act or sexual contact. Paragraph (g)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rule of construction in RCC § 22E-207, the "in fact" specified in paragraph (g)(2) applies to subparagraph (g)(2)(A), and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (g)(2)(A). However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[13] Subparagraph

[13] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the

(g)(2)(B) requires that the actor's reasonable belief be based on an oral or written statement that the complainant made to the actor about the complainant's age. Subparagraph (g)(2)(C) requires that the complainant is 14 years of age or older at the time of the sexual act or sexual contact. Per the rule of construction in RCC § 22E-207, the "in fact" specified in paragraph (g)(2) applies to subparagraph (g)(2)(B) and subparagraph (g)(2)(C) and no culpable mental state applies to the elements in these subparagraphs—that the actor's reasonable belief is based on the required statement and that the complainant is 14 years of age or older at the time of the sexual act or sexual contact.

Paragraph (g)(3) codifies an affirmative defense for a reasonable mistake of age for third degree sexual abuse of a minor (subsection (c)) and sixth degree sexual abuse of a minor (subsection (f)). There are several requirements for the affirmative defense. Per subparagraph (g)(3)(A), the actor must reasonably believe that the complainant is 18 years of age or older at the time of the sexual act or sexual contact. Paragraph (g)(3) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rule of construction in RCC § 22E-207, the "in fact" specified in paragraph (g)(3) applies to subparagraph (g)(3)(A), and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (g)(3)(A). However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[14] Subparagraph (g)(3)(B) requires that the actor's reasonable belief be based on an oral or written statement that the complainant made to the actor about the complainant's age. Subparagraph (g)(3)(C) requires that the complainant is 16 years of age or older at the time of the sexual act or sexual contact. Per the rule of construction in RCC § 22E-207, the "in fact" specified in paragraph (g)(3) applies to subparagraph (g)(3)(B) and subparagraph (g)(3)(C) and no culpable mental state applies to the elements in these subparagraphs—that the actor's reasonable belief is based on the required statement and that the complainant is 16 years of age or older at the time of the sexual act or sexual contact.

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situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[14] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

There is no affirmative defense for reasonable mistake of age for first degree sexual abuse of a minor (subsection (a)) or fourth degree sexual abuse of a minor (subsection (d)) when the complainant is under the age of 12 years.

Paragraph (h)(1) through paragraph (h)(6) specify relevant penalties for the offense. [*See* Fourth Draft of Report #41.]

Paragraph (h)(7) codifies several penalty enhancements for first degree, second degree, fourth degree, and fifth degree of the revised sexual abuse of a minor statute. If any of the specified enhancements apply, the penalty classification for that gradation is increased by one class. Subparagraph (h)(7)(A) codifies a penalty enhancement for recklessly causing the sexual act or sexual contact by displaying or using an object that, in fact, is a "dangerous weapon" or "imitation dangerous weapon." "Displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch." Per the rules of interpretation in RCC § 22E-207, the culpable mental state of recklessly applies to both causing serious bodily injury and causing such injury by displaying or using an object. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused the sexual conduct by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the object is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Subparagraph (h)(7)(B) codifies a penalty enhancement if the actor "knowingly" acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. Subparagraph (h)(7)(C) codifies a penalty enhancement if the actor "recklessly" caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness. Subparagraph (h)(7)(D) codifies a penalty enhancement if the actor knows at the time of the sexual act or sexual contact that the actor is in a "position of trust with or authority over the complainant." "Knowingly," a defined term in RCC § 22E-206, here requires that the actor be "practically certain" that he or she is in a position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches.

Paragraph (h)(8) codifies several penalty enhancements for third degree and sixth degree of the revised sexual abuse of a minor statute. If any of the specified enhancements apply, the penalty classification for that gradation is increased by one class. The penalty gradations in subparagraph (h)(8)(A), (h)(8)(B), and (h)(8)(C) are the same as the penalty gradations discussed above in subparagraph (h)(7)(A), (h)(7)(B), and (h)(7)(C).

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

Relation to Current District Law. *The revised sexual abuse of a minor statute clearly changes current District law in eight main ways.*

First, the revised sexual abuse of a minor statute provides separate gradations for a complainant under the age of 12 years when the actor is at least four years older than the complainant. The current D.C. Code child sexual abuse statutes only require that the complainant be under the age of 16 years when the actor is at least four years older.[15] The current D.C. Code sex offense aggravators provide a penalty enhancement for when the complainant was "under the age of 12 years at the time of the offense."[16] In contrast, first degree and fourth degree of the revised sexual abuse of a minor statute provide gradations for a complainant under the age of 12 years when the actor is at least four years older. A more serious gradation for harming a complainant under the age of 12 years is consistent with the current penalty enhancement for complainants of such an age. The four year age gap matches the age gap in the current D.C. Code child sexual abuse statutes[17] and the other gradations of the revised sexual abuse of a minor statute. This change improves the consistency and proportionality of the revised sexual abuse of a minor statute.

Second, third degree and sixth degree of the revised sexual abuse of a minor statute require that the actor be at least four years older than the complainant and, by use of the phrase "in fact," require strict liability for this age gap. The current D.C. Code sexual abuse of a minor statutes require that the complainant be under the age of 18 years and that the actor be 18 years of age or older and in a "significant relationship" with the complainant.[18] Unlike the current child sexual abuse statutes, which require at least a four year age gap between the actor and the complainant,[19] the current D.C. Code sexual abuse of a minor statutes do not have a required age gap. In contrast, third degree and

[15] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[16] D.C. Code § 22-3020(a)(1) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (1) The victim was under the age of 12 years at the time of the offense."). First degree child sexual abuse has a maximum term of imprisonment of 30 years. D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). A person convicted of first degree child sexual abuse when the child is under 12 years of age "may" face a maximum term of imprisonment of 45 years or life imprisonment without the possibility of release. Second degree child sexual abuse has a maximum term of imprisonment of 10 years. D.C. Code §§ 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). A person convicted of second degree child sexual abuse when the child is under 12 years of age "may" face a maximum term of imprisonment of 15 years.

[17] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[18] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[19] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

sixth degree of the revised sexual abuse of a minor statute require at least a four year age gap between the actor and complainant and, by use of the phrase "in fact," require strict liability for this age gap. The current definition of "significant relationship"[20] and the revised definition of "position of trust with or authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[21] While the special relationship between the actor and the complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[22] Strict liability for the age gap matches the current D.C. Code sexual abuse of a child statutes,[23] the other gradations of the revised sexual abuse of a minor statute (RCC § 22E-1302), and the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the consistency and proportionality of the revised sexual assault of a minor offense.

Third, the revised sexual abuse of a minor statute provides an affirmative defense for a reasonable mistake of age in certain circumstances when the complainant is under

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[20] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[21] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, touches the buttocks of a 17 year old with "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" may be guilty of second degree sexual abuse of a minor under current District law.

[22] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1302 provides that marriage is a defense to the revised sexual abuse of a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[23] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

the age of 16 years or under the age of 18 years. Current D.C. Code § 22-3012 establishes strict liability for the age of the complainant in the current child sexual abuse statutes[24] (complainant under the age of 16 years) and current D.C. Code § 22-3011 establishes strict liability for the age of the complainant in the current sexual abuse of a minor statutes[25] (complainant under the age of 18 years). In contrast, the revised sexual abuse of a minor statute codifies an affirmative defense to the equivalent gradations in the revised statute—second degree, third degree, fifth degree, and sixth degree sexual abuse of a minor. The accused must reasonably believe that the complainant was 16 years of age or older or 18 years of age or older at the time of the sexual act or sexual contact. The belief must be based on an oral or written statement that the complainant made to the actor about the complainant's age,[26] and the complainant must be 14 or 16 years of age or older at the time of the sexual act or sexual contact. This change removes liability for an otherwise consensual sexual act or sexual contact between two people where the actor makes a reasonable mistake as to the complainant's age that is limited to one or two years and supported by the complainant's own representation as to their age. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[27] and legal experts[28] for any non-regulatory crimes,

[24] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[25] D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01. D.C. Code § 22-3011(a). The current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3009.01 and 22-3009.02 and fall within the specified range of statutes. The current sexual abuse of a minor statutes were enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include them. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[26] The statement does not need to be a statement that the complainant is a specific, numerical age. The RCC reasonable mistake of age requires that the statement be "about" the complainant's age and statements such as "I'm old enough to drink," "I got into this bar, didn't I?" when carding is required for entry, or "I'm old enough to vote" would be sufficient for this requirement, although the other requirements of the defense must still be met. Showing a fake or altered written document of age, such as a fake driver's license, would also be a written statement "about" the complainant's age. Whether the complainant's statement is oral or written, however, the actor's belief as to age must still be proven reasonable.

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

[28] *See* § 5.5(c) Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

although "statutory rape" laws are often an exception.[29] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[30] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[31] An affirmative defense requiring reasonableness is akin to requiring recklessness,[32] but places the initial burden of proof on the accused. The RCC general provision in RCC § 22E-201 establishes the burdens of production and proof for all affirmative defenses in the RCC. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fourth, the revised sexual abuse of a minor statute specifies one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes,[33] D.C. Code § 22-3611 provides a separate penalty enhancement for committing child sexual abuse against complainants under the age of 18 years,[34] and D.C. Code § 22-4502 provides separate penalty enhancements for committing child sexual abuse against complainants when "armed with" or having "readily available" a deadly or dangerous weapon.[35] Current District statutes are silent as to whether or how these different penalty enhancements can each be applied to an offense, although DCCA case law suggests that the age-based sex offense aggravators and separate penalty enhancement may not apply

[29] *See, e.g.,* Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e. consensual intercourse by a male with an underage female.")

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

[31] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[32] *See* RCC § 22E-208(b)(3) and accompanying commentary.

[33] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[34] D.C. Code §§ 22-3611(a), (c); 23-1331(4) (defining "crime of violence" to include child sexual abuse).

[35] D.C. Code § 22-4502.

to certain sex offenses because they overlap with elements of the offense.[36] In contrast, the revised sexual abuse of a minor statute specifies a single set of enhancements that is capped at a penalty increase of one class.[37] The penalty enhancements are generally identical to the penalty enhancements in the RCC sexual assault statute, the main difference being the RCC sexual abuse of a minor statute excludes or limits the applicability of the penalty enhancements that overlap with the requirements of the RCC sexual abuse of a minor offense.[38] The RCC sexual abuse of a minor penalty enhancements result in several changes in law. First, the RCC sexual abuse of a minor statute is no longer subject to the current sex offense aggravators that overlap with the age requirements of the offense, or the current penalty enhancement in D.C. Code § 22-3611 for committing child sexual abuse against complainants under the age of 18 years. Second, because the revised statute incorporates multiple enhancements in the offense, the statute clarifies that it is not possible to enhance sexual abuse of a minor with, for example, both a weapon enhancement and an enhancement based on the identity of the

[36] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, or enticing statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.* assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[37] Note, however, that subtitle I of the RCC specifies certain penalty enhancements (e.g., hate crime) that may apply *in addition to* the penalty enhancements specified in the revised sexual abuse of a minor offense.

[38] The RCC sexual abuse of a minor statute codifies the following penalty enhancements from the RCC sexual assault penalty enhancements: 1) causing the sexual act or sexual contact by displaying or using a dangerous weapon or imitation dangerous weapon; 2) acting with one or more accomplices that are physically present at the sexual act or sexual contact; and 3) causing serious bodily injury immediately before, during, or immediately after the sexual act or sexual contact. These penalty enhancements apply to any gradation of the RCC sexual abuse of a minor offense. In the alternative, for first degree, second degree, fourth degree, and fifth degree of the RCC sexual abuse of a minor offense, the RCC sexual abuse of a minor statute codifies as a penalty enhancement that the actor knows that he or she is in a "position of trust with or authority" over the complainant. The requirements for liability in first degree, second degree, fourth degree, and fifth degree of the RCC sexual abuse of a minor statute encompass the additional requirements for this enhancement in the RCC sexual assault statute—that the complainant is under the age of 18 years and the actor is at least four years older. The enhancement in the RCC sexual abuse of a minor statute requires a knowledge culpable mental state for the fact that the actor is in a position of trust with or authority over the complainant, as opposed to recklessness in the sexual assault penalty enhancement, because the RCC sexual abuse of a minor statute criminalizes otherwise consensual sexual conduct on the basis of the age of the parties. Third degree and sixth degree of the RCC sexual abuse of a minor statute also requires a knowledge culpable mental state for liability for this element.

The RCC sexual abuse of a minor statute also does not codify the RCC sexual assault penalty enhancements for a complainant that is an 65 years of age or older or for a complainant that is a "vulnerable adult," as that term is defined in RCC § 22-701, because these enhancements are inapplicable to the RCC sexual abuse of a minor statute.

complainant, or to double-stack different weapon penalties[39] and offenses. Third, the scope of the revised weapons aggravator is slightly narrower than the current "while armed" enhancement as it pertains to mere possession[40] and excludes objects the complainant incorrectly perceives as being a dangerous weapon.[41] This change improves the proportionality of the revised offense.

Fifth, first degree and second degree of the RCC sexual abuse of a minor statute[42] are no longer subject to the heightened penalties and aggravating circumstances in current D.C. Code § 24-403.01(b-2). Current D.C. Code § 24-403.01(b-2) establishes heightened penalties for first degree sexual abuse of a child and first degree sexual abuse of a child while armed if specified procedural requirements are met[43] and "one or more aggravating circumstances exist beyond a reasonable doubt."[44] In contrast, the revised sexual abuse

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[39] In addition to the "while armed" enhancement in D.C. Code § 22-4502(a) applicable to child sexual abuse and first degree, second degree, and third degree sexual abuse, the current sex offense aggravators include an aggravator if "the defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon." D.C. D.C. Code § 22-3020(a)(6).

[40] The current "while armed" enhancement applies if the actor merely has "readily available" a dangerous weapon. D.C. Code § 22-4502(a). Having a dangerous weapon "readily available" is insufficient for the revised weapon aggravator in the sexual assault abuse of a minor statute. However, possessing a dangerous weapon or a firearm during sexual abuse of a minor, without using or displaying it, may have liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[41] The current "while armed" enhancement in D.C. Code § 22-4502 includes the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon. *See, e.g.*, *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."). The definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 exclude these objects.

[42] As will be discussed, current D.C. Code § 24-403.01(b-2) authorizes enhanced penalties for first degree sexual abuse of a child and first degree sexual abuse of a child while armed, and the RCC replaces those enhanced penalties. In the RCC, however, there is no longer a first degree sexual abuse of a child "while armed" offense. First, in the RCC, the equivalent offenses to first degree sexual abuse of a child are first degree and second degree sexual abuse of a minor. Second, the RCC no longer has a "while armed" version of child sexual abuse. Depending on the facts of the case, the equivalent offense would be first degree or second degree sexual abuse of a minor with the weapons enhancement under subsection (h) of the revised sexual abuse of a minor statute or first degree or second degree sexual abuse of a minor with additional liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses. For clarity, the commentary for this entry refers only to first degree sexual abuse of a minor and second degree sexual abuse of a minor when discussing the relevant RCC statutes, even though the various forms of liability for committing these offenses with the use or presence of a weapon are also affected by the revision.

[43] D.C. Code § 24-403.01(b-2) ("(1) The court may impose a sentence in excess of 60 years for first degree murder or first degree murder while armed, 40 years for second degree murder or second degree murder while armed, or 30 years for armed carjacking, first degree sexual abuse, first degree sexual abuse while armed, first degree child sexual abuse or first degree child sexual abuse while armed, only if: (A) Thirty-days prior to trial or the entry of a plea of guilty, the prosecutor files an indictment or information with the clerk of the court and a copy of such indictment or information is served on the person or counsel for the person, stating in writing one or more aggravating circumstances to be relied upon; and (B) One or more aggravating circumstances exist beyond a reasonable doubt.").

[44] The aggravating circumstances that apply to first degree sexual abuse of a child are unclear. D.C. Code § 24-403.01(b-2)(2) establishes that the "[a]ggravating circumstances for first degree child sexual abuse . . . are set forth in § 22-3020," but the statute also codifies an additional set of aggravating circumstances that

of a minor statute is subject to a single set of aggravators for the revised statute, as well as the general enhancements in the RCC for repeat offenders (RCC § 22E-606), hate crimes (RCC § 22E-607), and pretrial release (RCC § 22E-608). As a result of this revision, the general aggravating circumstances in D.C. Code § 24-403.01(b-2) no longer apply to first degree sexual abuse of a minor and second degree sexual abuse of a minor, although several of them are covered by other provisions in the RCC.[45] The special procedures in D.C. Code § 24-403.01(b-2) to give notice to a defendant are unnecessary because aggravating circumstances must be charged in the criminal indictment per Supreme Court case law decided after passage of the District statute.[46] This revision

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apply to "all offenses." It is unclear whether first degree sexual abuse of a child is included in "all offenses" and is subject to the additional set of aggravating circumstances, or if "all offenses" is limited to the offenses for which D.C. Code § 24-403.01(b-2) authorizes an enhanced penalty that do not have offense-specific aggravating circumstances. The aggravating circumstances that apply for first degree sexual abuse of a child while armed are similarly unclear. D.C. Code § 24-403.01(b-2)(2) does not specify whether first degree sexual abuse of a child while armed is included in the reference to first degree sexual abuse of a child and the aggravating circumstances in D.C. Code § 22-3020, or if it is subject only to the additional set of aggravating circumstances for "all offenses." Regardless, the revised sexual assault statute replaces the aggravating circumstances in D.C. Code § 24-403.01(b-2) insofar as they are applicable to first degree sexual abuse of a child and first degree sexual abuse of a child while armed. The revised sexual assault statute also replaces the aggravating circumstances in D.C. Code § 22-3020, which is discussed elsewhere in this commentary as a substantive change in law.

[45] The general aggravating circumstances in D.C. Code § 24-403.01(b-2)(2) are: "(A) The offense was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression (as defined in § 2-1401.02(12A); (B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning; (G) The victim was less than 12 years old or more than 60 years old or vulnerable because of mental or physical infirmity; [and] (H) Except where death or serious bodily injury is an element of the offense, the victim sustained serious bodily injury as a result of the offense." D.C. Code § 24-403.01(b-2)(2).

In the RCC, none of these aggravating circumstances apply to first degree or second degree of the revised sexual abuse of a minor offense. However, first degree or second degree of the revised sexual abuse of a minor offense is subject to two penalty enhancements that are substantially similar to two of the aggravating circumstances—the general penalty enhancement for hate crimes in RCC § 22E-607 and the sexual abuse of a minor penalty enhancement for recklessly causing serious bodily injury to the complainant (sub-subparagraph (h)(7)(A)(iii)). In addition, first degree and second degree sexual abuse of a minor already grade the offense based on the complainant being under 12 years of age.

The remaining aggravators in D.C. Code § 24-403.01(b-2)(2) appear better suited for the homicide offenses that are subject to enhanced penalties in the statute: "(B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning." To the extent that these aggravators would apply to first degree and second degree sexual abuse of a minor, other offenses in the RCC may cover the conduct, such as [RCC §§ 22E-XXX obstruction of justice] or are more appropriate for consideration at sentencing.

[46] The D.C. Council approved D.C. Code § 24-403(b-2) well before *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) was decided, and the statute became law shortly before *Apprendi* was decided. D.C. Code § 24-403(b-2) was approved on August 2, 2000, and became effective on June 8, 2001. The Sentencing Reform

improves the consistency and proportionality of the revised sexual assault of a minor statute.

Sixth, the revised sexual assault statute replaces certain minimum statutory penalties for child sexual abuse in D.C. Code § 24-403.01(e).[47] These minimum statutory penalties require specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code[48] apply, if at all, to these provisions. There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. In contrast, the revised sexual abuse of a minor statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. This change improves the consistency and proportionality of the revised offense.

Seventh, the revised sexual abuse of a minor penalty enhancement for weapons requires that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" an object that, in fact, is a dangerous weapon or imitation dangerous weapon. The current weapons aggravator for the current D.C. Code sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[49] No culpable mental state is specified, and there is no DCCA case law interpreting the current weapons aggravator.[50] In addition to the sex offense weapons aggravator, current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit first degree, second degree, and third degree sexual abuse[51] "while armed" or "having readily available" a dangerous weapon.[52] In contrast,

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Amendment Act of 2000, 2000 District of Columbia Laws 13-302 (Act 13–406). *Apprendi* was decided on June 26, 2000. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[47] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

[48] D.C. Code §§ 22-1804; 22-1804a.

[49] D.C. Code § 22-3020(a)(6).

[50] However, there is DCCA case law interpreting the repealed armed rape offense that may inform how the DCCA would interpret the current armed aggravator. The previous armed rape offense required that the defendant commit rape "when armed with or [when] having readily available any . . . dangerous or deadly weapon," which is the same language in the current armed aggravator. *Johnson v. United States*, 613 A.2d 888, 897 (D.C. 1992) (quoting D.C. Code § 22-3202(a) (1989 & 1991 Suppl.)). In *Johnson v. United States*, the appellant did not actually use the dangerous weapon during the sexual assault, but used the dangerous weapon prior to the sexual assault to injure the complainant and the weapon was present in the room at the time of the sexual assault. *Johnson v. United States*, 613 A.2d 888, 891, 898 (D.C. 1992). The DCCA held that "the government satisfied its burden of proving the 'armed' element by demonstrating that the coercive element of the sexual assault arose directly from appellant's use of a dangerous weapon." *Johnson*, 613 A.2d at 898. Although the armed rape offense has been repealed, *Johnson* may support requiring a causation element in the current armed aggravator for the sexual abuse statutes because of the identical "while armed" language.

[51] D.C. Code §§ 22-4501(1); 22-4502(a).

[52] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of

the revised sexual abuse of a minor penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" an object that, in fact, is a dangerous weapon or imitation weapon.[53] The term "use" is intended to include making physical contact with the weapon and conduct other speech—i.e. other than oral or written language, symbols, or gestures—that indicates the presence of a weapon. The revised enhancement is narrower than the current D.C. Code sex offense aggravator because it requires the use or display of the weapon, and also requires that the use or display of the weapon caused the sexual activity. An actor that is merely "armed with" or "had readily available" a dangerous weapon or imitation dangerous weapon may still face liability under the RCC weapons offenses as well as liability for second degree or fourth degree of the revised sexual assault statute for a "coercive threat." The "recklessly" culpable mental state is consistent with weapons gradations in other RCC offenses against persons. The revised enhancement includes imitation dangerous weapons because in the context of sexual assault, an imitation dangerous weapon can be as coercive as a real dangerous weapon. This change improves the proportionality of the revised sexual abuse of a minor statute.

Eighth, the revised sexual abuse of a minor penalty enhancement for causing serious bodily injury, due to the revised definition of "serious bodily injury," no longer includes rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current D.C. Code sex offense aggravator for causing serious bodily injury[54] incorporates the current definition of "serious bodily injury" for the sex offenses, which includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[55] As is discussed in the commentary to the revised definition of "serious bodily injury" in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that otherwise fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised penalty enhancement using that term, are limited to a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a

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

[53] The current sexual abuse weapons aggravators refers to "a pistol or any other firearm (or imitation thereof). D.C. Code § 22-3020(a)(6). The revised enhancement does not, however, because the revised definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 specifically include firearms and imitation firearms.

[54] D.C. Code § 22-3020(a)(3).

[55] D.C. Code § 22-3001(7).

bodily member or organ, or a protracted loss of consciousness. This change improves the consistency and proportionality of the revised sex offenses.

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

First, the revised sexual abuse of a minor statute consistently requires that the actor engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current D.C. Code sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[56] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[57] In addition to case law, District practice does not appear to follow the variations in statutory language.[58] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual

[56] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[57] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[58] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the revised sexual abuse of a minor statute requires a "knowingly" culpable mental state for engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. The current D.C. Code child sexual abuse statutes[59] and sexual abuse of a minor statutes[60] do not specify any culpable mental state for engaging in or submitting to a sexual act or sexual contact. Due to the statutory definition of "sexual contact,"[61] the second degree gradations of these offenses require an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," although the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement.[62] There is no DCCA case law regarding commission of a "sexual act" in the current child sexual abuse statutes or the sexual abuse of a minor statutes.[63] The revised sexual abuse of a minor statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for engaging in a sexual act or sexual contact with the complainant causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[64] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[65] This change improves the clarity and consistency of the revised statutes.

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[59] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[60] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[61] D.C. Code § 22-3001(9) (defining "sexual contact.").

[62] *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[63] The DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC § 22E-1301, Sexual assault, above, for further discussion.

[64] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[65] *In re E.H.* is a child sexual abuse case, but the court's reasoning regarding the relationship between "sexual act" and "sexual contact" may be instructive for the general sexual abuse statutes. In *In re E.H.*, the appellant was convicted of first degree child sexual abuse, but the court reversed the conviction due to insufficient evidence. *In re E.H.*, 967 A.2d 1270, 1271, 1275 (D.C. 2009). The court declined to address

Third, third degree and sixth degree of the revised sexual abuse of a minor statute require a "knowingly" culpable mental state for the element that actor was in a "position of trust with or authority over" the complainant. The current D.C. Code sexual abuse of a minor statutes require that the actor be "in a significant relationship with a minor,"[66] but they do not specify what, if any, culpable mental states apply, and there is no DCCA case law on point. Third degree and sixth degree of the revised sexual abuse of a minor statute resolve this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,[67] although recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[68] Given the heightened responsibility that comes with being a person in a position of trust with or authority over a complainant, as well as the expansive scope of the definition, a "knowingly" culpable mental state is proportionate. This change improves the clarity and consistency of the revised statutes.

Fourth, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of third degree and sixth degree of the revised sexual abuse of a minor statute and the penalty enhancement for being in a "position of trust with or authority over" may differ as compared to the current D.C. Code sexual abuse of a minor statutes. The current D.C. Code sexual abuse of a minor statutes[69] require that the actor be in a "significant relationship" with the complainant and the fact that the actor was in a "significant relationship" with the complainant is included in the current sex offense aggravators.[70] "Significant relationship" is defined in D.C. Code § 22-3001[71] as

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whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but did note that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree)." *Id.* at 1276 n. 9. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

[66] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor statute prohibiting "[w]hoever, being 18 years of age or older, is in a significant relationship with a minor, and engages in a sexual act with a minor or causes that minor to engage in a sexual act."); 22-3009.02 (second degree sexual abuse of a minor statute prohibiting "[w]hoever, being 18 years of age or older, is in a significant relationship with a minor[,] and engages in a sexual contact with that minor or causes that minor to engage in a sexual contact."); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[67] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[68] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[69] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[70] D.C. Code § 22-3020(a)(2) ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim.").

[71] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the

"includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[72] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

Fifth, the revised sexual abuse of a minor penalty enhancements require that accomplices be "physically present at the time of the sexual act or sexual contact." The current accomplice aggravator for the D.C. Code sexual abuse statutes requires that the "defendant was aided or abetted by 1 or more accomplices."[73] There is no DCCA case law interpreting this aggravator.[74] It is unclear whether the aggravator would apply if an accomplice was not physically present. It is also unclear if the required aiding and abetting is limited to the sexual act or sexual contact, or encompasses the totality of the actor's conduct leading to the sexual act or sexual contact. Resolving this ambiguity, the revised sexual abuse of a minor penalty enhancement requires that the accomplices must be "physically present at the time of the sexual act or sexual contact." Accomplices that are physically present at the time of the sexual act or sexual contact potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do not. Limiting the enhancement to accomplices that are present at the time of the offense improves the proportionality of the revised offense.

Sixth, the revised sexual abuse of a minor penalty enhancement requires a "knowingly" culpable mental state for the actor acting with one or more accomplices. The current accomplice aggravator for the D.C. Code sex offenses requires that the "defendant was aided or abetted by 1 or more accomplices."[75] The current statute does not specify any culpable mental states and there is no DCCA case law for this issue. Resolving this ambiguity, the revised sexual abuse of a minor penalty enhancement requires a "knowingly" culpable mental state for acting with "one or more accomplices

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person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[72] D.C. Code § 22-3001(10).

[73] D.C. Code § 22-3020(a)(4).

[74] However, current District law generally extends aider and abettor liability to accomplices who are not present at the time of the offense. *See, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994) (upholding aider and abettor liability where "the jury could reasonably have found that appellant had participated in planning the robbery," and served as getaway driver, but was not physically present during the robbery) (collecting District case law).

[75] D.C. Code § 22-3020(a)(4).

that are physically present at the time of the sexual act or sexual contact."[76] The "knowingly" culpable mental state improves the clarity and consistency of the revised sexual abuse of a minor statute.

Seventh, the revised sexual abuse of a minor statute is subject to the RCC general provision enhancement for repeat offenders. The current D.C. Code sex offense aggravators include an aggravator if the "defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories."[77] The plain language of the enhancement is unclear[78] and there is no case law clarifying the issue. In addition, current District law has general recidivist penalty enhancements applicable to sex offenses.[79] It is unclear how the multiple recidivist enhancements apply to the sex offenses, and there is no case law. Resolving these ambiguities, the revised sexual abuse of a minor statute is subject to the RCC general recidivist penalty enhancement (RCC § 22E-606). By eliminating overlapping recidivist penalty enhancements, the RCC improves the consistency and proportionality of the revised sexual abuse of a minor statutes.

Eighth, the revised serious bodily injury penalty enhancement requires a "recklessly" culpable mental state and requires that the defendant cause serious bodily injury "immediately before, during, or immediately after" the sexual act or sexual contact. The current D.C. Code sex offense aggravators include when the "victim sustained serious bodily injury as a result of the offense."[80] The current D.C. Code sex offense aggravators statute does not specify any culpable mental states and the scope of "as a result of the offense" is unclear.[81] There is no DCCA case law for these issues. Resolving this ambiguity, the revised penalty enhancement requires a "recklessly" culpable mental state for causing serious bodily injury immediately before, during, or immediately after the sexual act or sexual contact. The "recklessly" culpable mental state is consistent with several gradations of the revised assault statute (RCC § 22E-1202). An actor who is not at least reckless as to causing serious bodily injury would still be subject to liability for sexual abuse of a minor, but not this penalty enhancement. This change improves the consistency and proportionality of the revised offense.

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[76] The revised penalty enhancement no longer uses the words "aided or abetted" that are in the current enhancement because they are surplusage. The revised penalty enhancement also no longer specifies that "[i]t is not necessary that the accomplices have been convicted for an increased punishment (or enhanced penalty) to apply" as the current penalty enhancement specifies in D.C. Code § 22-3020(a)(6).

[77] D.C. Code § 22-3020(a)(5). In addition to the specific sexual abuse aggravator, current District law has general penalty enhancements for prior convictions. D.C. Code §§ 22-1805; 22-1805a. It is unclear how the multiple recidivist penalty enhancements apply to the sex offenses, and there is no DCCA case law.

[78] One possible interpretation is that priors will only be counted if they are against different complainants. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses.

[79] D.C. Code §§ 22-1805; 22-1805a.

[80] D.C. Code § 22-3020(a)(3).

[81] It is unclear whether "the offense" refers to the sexual act or sexual contact, or the totality of the defendant's actions leading to the sexual act or sexual contact. It is also unclear how to determine whether an injury is a "result" of the sexual act or sexual contact, particularly if a significant period of time passes between the incident and the development or discovery of the serious bodily injury.

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

First, the revised sexual abuse of a minor statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[82] and sexual abuse of a minor, for complainants under the age of 18 years.[83] For clarification, the revised sexual abuse of a minor statute no longer distinguishes separate offenses for complainants who are a "child" or "minor" and instead organizes all offenses against minors as gradations of one "sexual abuse of a minor" statute. The text of the revised sexual abuse of a minor statute also specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[84] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised sexual abuse of a minor statute, by use of the phrase "in fact," clarifies that no culpable mental state is required as to the age of the complainant, the actor's own age, or the required age gap. Neither the current D.C. Code sexual abuse of a child statutes[85] nor the current D.C. Code sexual abuse of a minor statutes[86] specify culpable mental states as to the ages of the parties or the gap in their ages. However, current D.C. Code § 22-3012 states that for child sexual abuse, the government "need not prove that the defendant knew the child's age or the age difference between himself or herself and the child"[87] and current D.C. Code § 22-3011 establishes that "mistake of age" is not a defense to prosecution under the child sexual abuse and sexual abuse of a minor statutes.[88] DCCA case law further suggests that no culpable mental state

[82] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[83] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").

[84] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).

[85] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[86] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[87] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[88] D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01. D.C. Code § 22-3011(a). The current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3009.01 and 22-3009.02 and fall within the specified range of statutes. The current sexual abuse of a minor statutes were enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include them. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

whatsoever is required as to the age of the complainant or the age gap with the actor.[89] The revised sexual abuse of a minor statute, by use of the phrase "in fact," establishes strict liability as to the age of the complainant, the age of the actor, or the relevant age gap. Codifying the strict liability requirement improves the clarity and consistency of the revised statute.

Third, the revised sexual abuse of a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[90] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[91] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[92] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[93] In the revised sexual abuse of a minor statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment

[89] *See, e.g., Green v. United States*, 948 A.2d 554, 558 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instruction apparently required no culpable mental state as to the complainant's age).

[90] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[91] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[92] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[93] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse of a child and second degree sexual abuse of a child are "crimes of violence" and would have a maximum term of imprisonment of five years. First degree and second degree sexual abuse of a minor are not "crimes of violence," however, and would have a maximum term of imprisonment of 180 days.

sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fourth, the marriage and domestic partnership defense in the revised sexual abuse of a minor statute does not refer to other offenses. The current D.C. Code marriage or domestic partnership defense states that marriage or domestic partnership is a defense to sexual abuse of a minor "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[94] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[95] The marriage or domestic partnership defense in the revised sexual abuse of a minor statute applies only to prosecution for the revised sexual abuse of a minor offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses. Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[96] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised sexual abuse of a minor offense.

Fifth, the marriage and domestic partnership defense in the revised sexual abuse of a minor statute makes two clarificatory changes to the current defense.[97] First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Sixth, the revised sexual abuse of a minor statute does not codify a separate provision stating that consent is not a defense. The current D.C. Code sexual abuse statutes specify that "consent is not a defense" for the current sexual abuse of a child statutes and current sexual abuse of a minor statutes.[98] However, nothing in the RCC

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[94] D.C. Code § 22-3011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

[95] D.C. Crim. Jur. Instr. § 9.700.

[96] See Commentary to RCC § 22E-1202 (revised assault statute).

[97] D.C. Code § 22-30011(b).

[98] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."). The

sexual abuse of a minor statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

Seventh, by the use of the phrase "in fact," the revised weapon penalty enhancement for the sexual abuse of a minor statute applies strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." The current D.C. Code sex offense aggravators include that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[99] The current D.C. Code sex offense aggravators statute does not specify any culpable mental states. There is no DCCA case law regarding the aggravator, but DCCA case law for assault with a dangerous weapon[100] and the "while armed" enhancement in D.C. Code § 22-4502101 support applying strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." For clarification, the revised weapons enhancement uses the phrase "in fact" to establish that strict liability applies to this element. Strict liability for this element is also consistent with the weapons gradations in other RCC offenses against persons. This change clarifies the revised statutes.

Eighth, the revised sexual abuse of a minor penalty enhancements consistently refer to the "sexual act or sexual contact" as opposed to "the offense." Several of the current sexual abuse aggravators refer to "at the time of the offense"[102] or "as a result of the offense."[103] The revised penalty enhancements consistently refer to the sexual act or sexual contact, improving the clarity of the revised statute.

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current child sexual abuse statutes and current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3008 – 22-3009.02 and fall within the specified range of statutes in D.C. Code § 22-3011(a).

[99] D.C. Code § 22-3020(a)(6) (authorizing a possible "penalty up to 1 ½ times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse if" the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[100] *See, e.g., Perry v. United States*, 36 A.3d 799, 812 (D.C. 2011) ("[Whether the actor used the object in a dangerous manner] is an objective test, and has nothing to do with the actor's subjective intent to use the weapon dangerously."); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (rejecting appellant's argument that "unless one is possessed with the specific intent to use an object offensively, it is not a dangerous weapon.").

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

[102] D.C. Code § 22-3020(a)(1) ("The victim was under the age of 12 years at the time of the offense."); (a)(2) ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim.").

[103] D.C. Code § 22-3020(a)(3) ("The victim sustained serious bodily injury as a result of the offense.").

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

Explanatory Note. *The RCC sexual abuse by exploitation offense prohibits specified acts of sexual penetration or sexual touching with several populations of vulnerable individuals. The penalty gradations are based on the nature of the sexual conduct. The revised sexual abuse by exploitation offense replaces six distinct offenses in the current D.C. Code: first degree sexual abuse of a secondary education student,[1] second degree sexual abuse of a secondary education student,[2] first degree sexual abuse of a ward,[3] second degree sexual abuse of a ward,[4] first degree sexual abuse of a patient or client,[5] and second degree sexual abuse of a patient or client.[6] The RCC sexual abuse by exploitation offense also replaces in relevant part four distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[7] the attempt statute,[8] the limitation on prosecutorial immunity,[9] and the aggravating sentencing factors.[10]*

Paragraph (a)(1) specifies the prohibited conduct for first degree sexual abuse by exploitation—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that he or she would engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts.

Subparagraph (a)(2)(A) through subparagraph (a)(2)(E) specify the prohibited situations for an actor to engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to the "sexual act."

Subparagraph (a)(2)(A) specifies the first prohibited situation—the actor must be "a coach, not including a coach who is a secondary school student, a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school" and "working as an employee, contract employee, or volunteer." Per the rule of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to these elements in subparagraph (a)(2)(A). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she is "a coach who is a

[1] D.C. Code § 22-3009.03.
[2] D.C. Code § 22-3009.04.
[3] D.C. Code § 22-3013.
[4] D.C. Code § 22-3014.
[5] D.C. Code § 22-3015.
[6] D.C. Code § 22-3016.
[7] D.C. Code § 22-3017.
[8] D.C. Code § 22-3018.
[9] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised sexual abuse by exploitation statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[10] D.C. Code § 22-3020.

secondary school student, a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school, working as an employee, contract employee, or volunteer."

Sub-subparagraphs (a)(2)(A)(i) and its sub-subparagraphs specify several requirements for the complainant for this first type of prohibited situation. First, sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(i)(I), and (a)(2)(A)(i)(II) require that the complainant must either be "an enrolled student in the same secondary school" as the actor (sub-subparagraph (a)(2)(A)(i)(I)) or receive services or attend programming at the same secondary school as the actor (sub-subparagraph (a)(2)(A)(i)(II)).[11] Per the rule of interpretation in RCC § 22E-207, the "recklessly disregards" culpable mental state in subparagraph (a)(2)(A) applies to the requirements for the complainant in sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(i)(I), and (a)(2)(A)(i)(II). "Recklessly disregards" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the complainant is an enrolled student in the same secondary school or receives services or attend programming at the same secondary school. Sub-subparagraph (a)(2)(A)(ii) specifies a final requirement for the complainant—that he or she is under the age of 20 years. Per the rule of interpretation in RCC § 22E-207, the "recklessly disregards" culpable mental state in subparagraph (a)(2)(A) applies to this requirement and here means the actor is aware of a substantial risk that the complainant is under the age of 20 years.

Subparagraph (a)(2)(B) specifies the second prohibited situation—the actor must falsely represent that he or she is someone else who is personally known to the complainant. Subparagraph (a)(2)(B) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here requires that the actor be "practically certain" that the actor falsely represents that the actor is someone else who is personally known to the complainant.

Subparagraph (a)(2)(C) specifies the third prohibited situation—the actor is, or purports to be, a "healthcare provider," a "health professional," or a "religious leader described in D.C. Code § 14-309." The terms "healthcare provider" and "health professional" are defined terms in RCC § 22E-701, and include massage therapists, psychologists, and addiction counselors. A "religious leader described in D.C. Code § 14-309" is a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science,"[12] regardless of whether the religious leader hears confessions or receives other communications. Per the rule of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in subparagraph (a)(2)(B) applies to the elements in subparagraph (a)(2)(C), and per the definition of "knowingly" in RCC § 22E-206, the actor must be "practically certain" that he or she is, or purports to be, a "healthcare provider," "heath professional," or "a religious leader described in D.C. Code § 14-309."

Sub-subparagraphs (a)(2)(C)(i) through (a)(2)(C)(iii) specify additional requirements for an actor that is, or purports to be, a healthcare provider, heath professional, or a specified religious leader. Sub-subparagraph (a)(2)(C)(i) requires that the actor falsely represents that the sexual act is done for a bona fide medical, therapeutic,

[11] Services and programming may include, for example, sports practices, music lessons, or a required class.
[12] D.C. Code § 14-309.

or professional purpose. Sub-subparagraph (a)(2)(C)(ii) requires that the actor commit the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in subparagraph (a)(2)(B) applies to all the elements in sub-subparagraph (a)(2)(C)(i) and sub-subparagraph (a)(2)(C)(ii). Per the definition of "knowingly" in RCC § 22E-206, the actor must be "practically certain" that he or she falsely represents that the sexual act is done for a bona fide professional purpose or that he or she commits the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services.

Sub-subparagraph (a)(2)(C)(iii) requires that the actor commit the sexual act while the complainant is a patient or client of the actor. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in subparagraph (a)(2)(B) applies to these elements. "Knowingly" is a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she commits the sexual act while the complainant is a patient or client of the actor. Sub-subparagraph (a)(2)(C)(iii) further requires that the actor "recklessly disregard" that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired from declining participation in the sexual act. "Recklessly disregards" is a defined term in RCC § 22E-206 that here means that the actor must be aware of a substantial risk that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired from declining participation in the sexual act.

Subparagraph (a)(2)(D) specifies the fourth prohibited situation—the actor must "knowingly" work as "an employee, contract employee, or volunteer at or for" a specified institution, such as a hospital or treatment facility. "Knowingly" is a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she works as "an employee, contract employee, or volunteer at or for" a specified institution, such as a hospital or treatment facility.

Sub-subparagraphs (a)(2)(D)(ii)(I) through (a)(2)(D)(ii)(III) specify requirements for the complainant. The complainant must be a ward, patient, client, or prisoner at a specified institution (sub-subparagraph (a)(2)(D)(ii)(I)), awaiting admission to a specified institution (sub-subparagraph (a)(2)(D)(ii)(I)(II)), or in transport to or from a specified institution (sub-subparagraph (a)(2)(D)(ii)(III)). Sub-subparagraph (a)(2)(D)(ii) specifies a culpable mental state of "recklessly disregards," which, per the rule of interpretation in in RCC § 22E-207, applies to all the requirements in sub-subparagraphs (a)(2)(D)(ii)(I) through (a)(2)(D)(ii)(III). "Recklessly disregard" is a defined term in RCC § 22E-206 that here means that the actor must be aware of a substantial risk that the complainant is: 1) a ward, patient, client, or prisoner at that institution; 2) awaiting admission to that institution; or 3) in transport to or from that institution.

Subparagraph (a)(2)(E) specifies the final prohibited situation—the actor works as a "law enforcement officer," as that term is defined in RCC § 22E-701. Subparagraph (a)(2)(E) specifies a culpable mental state of "knowingly" for this element. "Knowingly" is a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she is a "law enforcement officer," as that term is defined in RCC § 22E-701. Subparagraph (a)(2)(E) further requires that the actor "recklessly disregards" the fact that the complainant is "in official custody," as that term is defined in RCC § 22E-701, or on probation or parole. RCC § 22E-701 defines "official custody" to include

detention following arrests and other interactions with law enforcement officers, as well custody for purposes incidental to these types of detention. "Recklessly disregard" is a defined term in RCC § 22E-206 that here means that the actor must be aware of a substantial risk that the complainant is in "official custody" or on probation or parole.

Subsection (b) specifies the required conduct for second degree sexual abuse by exploitation. The prohibited conduct is the same as first degree sexual abuse by exploitation except it requires a "sexual contact" instead of a "sexual act." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person.

Subsection (c) codifies an affirmative defense for the RCC sexual abuse by exploitation statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC. Subsection (c) establishes an affirmative defense that the actor and the complainant were in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are, "in fact," in a marriage or domestic partnership at the time of the sexual act or sexual contact.

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

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

Relation to Current District Law. *The revised sexual abuse by exploitation statute clearly changes current District law in four main ways.*

First, the RCC sexual abuse by exploitation statute limits liability to an actor who is "a healthcare provider, a health professional, or a religious leader described in D.C. Code § 14-309," or purports to be such. The current D.C. Code first and second degree sexual abuse of a patient or client statutes apply to any person who "purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature" or is "otherwise in a professional relationship of trust" with the complainant.[13] There is no DCCA case law more clearly specifying included professions. "Professional relationship of trust" is not defined in the D.C. Code and there is no DCCA case law interpreting the phrase. In contrast, the RCC sexual abuse by exploitation statute limits the offense to actors that are "a healthcare provider, a health professional, or a religious leader described in D.C. Code § 14-309," or actors that purport to be such. "Healthcare provider" and "health professional" are defined terms in RCC § 22E-701 and the D.C. Code,[14] referring to a wide array of medical and related professions, including massage therapists and addiction counselors. A "religious leader described in D.C. Code § 14-309" is a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage

[13] D.C. Code §§ 22-3015 (first degree sexual abuse of a patient or client); 22-3016 (second degree sexual abuse of a patient or client).
[14] D.C. Code §§ 3–1205.01; 16–2801.

ceremony in the District of Columbia or duly accredited practitioner of Christian Science,"[15] regardless of whether the religious leader hears confessions or receives other communications. This provision is intended to be interpreted broadly to include Christian and non-Christian religious officials. Complainants in a healthcare or spiritual setting are especially vulnerable to the conduct prohibited in the RCC sexual exploitation of an adult offense. Sexual activity in other professional settings[16] can be addressed by professional censure or civil liability. This change improves the clarity and proportionality of the RCC sexual abuse by exploitation statute.

Second, the RCC sexual abuse by exploitation statute no longer prohibits "the actor falsely represents that he or she is licensed as a particular kind of professional." The current D.C. Code first and second degree sexual abuse of a patient or client statutes prohibit an actor from "represent[ing] falsely that he or she is licensed as a particular type of professional."[17] There is no DCCA case law interpreting this provision. Other provisions in the current sexual abuse of a patient or client statutes prohibit committing a sexual act or sexual contact during the "provision of professional services," when the actor "represents falsely that the sexual… [act or contact] is for a bona fide professional purpose," or when the actor "knows or has reason to know that the patient or client is impaired from declining participation."[18] In contrast, the RCC sexual abuse by exploitation statute does not specifically criminalize sexual conduct when the actor falsely represented that he or she is licensed as a particular kind of professional. The RCC sexual abuse by exploitation offense continues to penalize sexual conduct when falsely representing the conduct is for a medical, professional, or therapeutic purpose, during the provision of professional services, or when the actor disregards the possibility that the complainant is impaired. Apart from such circumstances, criminal punishment for lying about the status of one's professional licensing may be reprehensible but is not directly related to the sexual conduct. This change improves the proportionality of the RCC sexual abuse by exploitation statute.

Third, only the general penalty enhancements in subtitle I of the RCC apply to the RCC sexual abuse by exploitation statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[19] In contrast, the revised

[15] D.C. Code § 14-309.

[16] For example, it is possible that "a professional relationship of trust" could be alleged to exist between a supervisor and employee, a contractor and contractee, and other common business relationships that involve a measure of trust.

[17] D.C. Code §§ 22-3015; 22-3016.

[18] D.C. Code §§ 22-3015 and 22-3016.

[19] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained

sexual abuse by exploitation statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[20] are not necessary in the RCC sexual abuse by exploitation statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the RCC sexual exploitation of an adult offense improves the consistency and proportionality of the revised sex offenses.

Fourth, the RCC sexual abuse by exploitation statute completely specifies persons of authority in a secondary school that are subject to the revised statute and limits liability to situations where the student has a substantial link to the secondary school where the actor works. The current D.C. Code first and second degree sexual abuse of a secondary education student statutes prohibit "[a]ny teacher, counselor, principal, coach, or other person of authority in a secondary level school" from engaging in sexual conduct with a "student under the age of 20 years enrolled in that school or school system."[21] The statute does not define the term "person of authority" and there is no case law on point. In contrast, the RCC sexual abuse by exploitation statute limits the liable persons at a secondary school to "a coach, not including a coach who is a secondary school student, a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school" and requires either that the complainant is enrolled at the same secondary school as the actor, or receives services or attends programming at the same secondary school as the actor. Categorical inclusion of all persons within a school system appears to be overbroad insofar as it would include persons who are not actually in a position to exert authority over the complainant, while limiting liability to persons within the school where the complainant is enrolled appears to be under-inclusive. The revised statute is tailored to inherently coercive roles at a secondary school where a student is enrolled or otherwise receives services or programming, including an "administrator," a "nurse," and a "security officer," which are not specified in the current statute. The revised statute requires that a "coach" is not also a secondary school student to ensure that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal. If the facts of a case fall outside the requirements of the revised statute, there may still be liability under second degree or fourth degree of the revised sexual assault statute (RCC § 22E-1301) for the use of a coercive threat or under third degree and sixth degree sexual abuse of a minor (RCC § 22E-1302) if the actor is in a "position of trust with or authority over" the complainant. This change improves the clarity, completeness, and proportionality of the RCC statute.

Beyond these four changes to current District law, nine other aspects of the revised statute may constitute substantive changes to current District law.

"serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[20] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexual abuse by exploitation, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[21] D.C. Code §§ 22-3009.03; 22-3009.04.

First, the RCC sexual abuse by exploitation statute consistently requires that the actor engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[22] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[23] In addition to case law, District practice does not appear to follow the variations in statutory language.[24] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This

[22] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[23] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[24] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the sexual abuse by exploitation an adult statute separately prohibits a sexual act or sexual contact when the actor "falsely represents that the actor is someone else who is personally known to the complainant." The current D.C. Code sexual abuse of a patient or client statutes do not contain a provision specifically addressing false identity used to engage in sexual conduct. However, the current D.C. Code misdemeanor sexual abuse (MSA) statute[25] prohibits engaging in a sexual act or sexual contact without the "permission" of the other person. "Permission" is not defined in the current D.C. Code and it is unclear whether or how "permission" differs from the defined term "consent."[26] In addition, the DCCA has used the terms "permission" and "consent" interchangeably in discussing the current MSA statute.[27] To the extent that the current MSA statute prohibits a sexual act or sexual contact without "consent," the current D.C. Code definition of "consent" appears to exclude consent that is obtained by deception because the current definition of "consent" requires that the words or actions be "freely given."[28] There is no DCCA case law on point. Resolving this ambiguity, the RCC sexual abuse by exploitation statute prohibits a specific type of deception, when the actor falsely represents that he or she is someone else who is personally known to the complainant.[29] This particular form of deception is more serious than other forms of deception that the RCC nonconsensual sexual conduct offense (RCC § 22E-1307) may prohibit. This change improves the clarity and proportionality of the RCC sexual abuse by exploitation statute.

Third, the RCC sexual abuse by exploitation statute requires a "knowingly" culpable mental state for engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. The current D.C. Code sexual abuse statutes that comprise the RCC sexual abuse by exploitation statute[30] do not specify any culpable mental state for engaging in or

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[25] D.C. Code § 22-3006.

[26] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[27] *See, e.g., Davis v. United States*, 973 A.2d 1101, 1104, 1106 (D.C. 2005) (noting in dicta that "permission" is "not specifically defined in the [MSA] statute, but in common usage, the word is a synonym for 'consent'" and holding that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense."); *Hailstock v. United States*, 85 A.3d 1277, 1280, 1281, (noting that "what was required to convict [the appellant] of the offense of attempted MSA was that he took the requisite overt steps at a time when he *should have known* that he did not have [the complainant's] consent for the acts he contemplated.") (emphasis in original).

[28] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[29] *See, e.g., People v. Morales*, 150 Cal. Rptr. 3d 920 (2013) (Defendant entered the dark bedroom of complainant after seeing her boyfriend leave late at night, and has sex with the complainant by pretending to be the boyfriend).

[30] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual

submitting to a sexual act or sexual contact. Due to the statutory definition of "sexual contact,"[31] the second degree gradations of these offenses require an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," although the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement.[32] There is no DCCA case law regarding commission of a "sexual act" in the current statutes that comprise the RCC sexual exploitation of an adult statute.[33] The RCC sexual abuse by exploitation statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[34] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[35] This change improves the clarity and consistency of the RCC sexual abuse by exploitation statute.

Fourth, the RCC sexual abuse by exploitation statute specifies that a coach, teacher, counselor, principal, administrator, nurse, or security officer at a secondary school includes employees, contract employees, and volunteers. The current D.C. Code sexual abuse of a secondary education student statutes list the prohibited actors in a secondary school and do not specify if the actors must be employees, or if contract

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abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[31] D.C. Code § 22-3001(9) (defining "sexual contact.").

[32] *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[33] The DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. *See* commentary to RCC 22E-1301, Sexual assault, above, for further discussion.

[34] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[35] *In re E.H.* is a child sexual abuse case, but the court's reasoning regarding the relationship between "sexual act" and "sexual contact" may be instructive for the general sexual abuse statutes. In *In re E.H.*, the appellant was convicted of first degree child sexual abuse, but the court reversed the conviction due to insufficient evidence. *In re E.H.*, 967 A.2d 1270, 1271, 1275 (D.C. 2009). The court declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but did note that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree)." *Id.* at 1276 n. 9. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

employees or volunteers are sufficient.[36] There is no DCCA case law on this issue. Resolving this ambiguity, the RCC statute specifies that the actor must be "working as an employee, contract employee, or volunteer," which is consistent with the requirement in subparagraphs (a)(2)(D) and (b)(2)(D) of the statute for wards, patients, clients, and prisoners, and subsection (G) of the RCC definition of "position of trust with or authority over" (RCC § 22E-701). The specified secondary school actors have positions of authority that make otherwise consensual sexual activity criminal, regardless of whether the actors are employees, contract employees, or volunteers. This revision improves the clarity, consistency, and proportionality of the revised statute and removes a possible gap in liability.

Fifth, the RCC sexual abuse by exploitation statute requires that in the specified institutions, such as hospitals and treatment facilities, the actor and the complainant be at the same institution. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes prohibit specified actors, such as hospital staff and ambulance drivers from engaging in a sexual act or sexual contact with a "ward, patient, client, or prisoner."[37] It is unclear whether a complainant must be at the same institution as the actor in order to satisfy this requirement.[38] There is no DCCA case law on this issue. Resolving this ambiguity, sub-subparagraphs (a)(2)(D)(i)(I), (a)(2)(D)(i)(II), (a)(2)(D)(i)(III), (b)(2)(D)(i)(I), (b)(2)(D)(i)(II), and (b)(2)(D)(i)(III) of the revised statute refer to "that institution"— the same institution as the actor. Limiting the statute to sexual conduct when the actor and the complainant are at the same institution tailors the statute to inherently coercive situations that make otherwise consensual sexual activity criminal. This change improves the clarity, consistency, and proportionality of the revised statute.

Sixth, the RCC sexual abuse by exploitation statute includes complainants that are "awaiting admission" to specified institutions. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes prohibit specified actors, such as hospital staff and ambulance drivers from engaging in a sexual act or sexual contact with a "ward, patient, client, or prisoner."[39] There is no DCCA case law interpreting this provision and

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[36] D.C. Code §§ 22-3009.03; 22-3009.04.

[37] D.C. Code §§ 22-3013; 22-3014. The text of first degree sexual abuse of a ward, patient, client, or prisoner (D.C. Code 22-3013) is:

> Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution; anyone who is an ambulance driver or attendant, a bus driver or attendant, or person who participates in the transportation of a ward, patient, client, or prisoner to and from such institutions; or any official custodian of a ward, patient, client, or prisoner, who engages in a sexual act with a ward, patient, client, or prisoner, or causes a ward, patient, client, or prisoner to engage in or submit to a sexual act shall be imprisoned for not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both.

The text of second degree sexual abuse of a ward, patient, client, or prisoner (D.C. Code 22-3014) is identical, differing only in requiring "sexual contact."

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[39] D.C. Code §§ 22-3013; 22-3014. The text of first degree sexual abuse of a ward, patient, client, or prisoner (D.C. Code 22-3013) is:

> Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution; anyone who is an ambulance driver or attendant, a bus driver or attendant, or person who participates in the

it is unclear whether it extends to a complainant that is awaiting admission to one of the specified institutions. Resolving this ambiguity, the revised statute specifically includes complainants that are "awaiting admission" to specified institutions. A complainant that is awaiting admission at a specified institution has a similar vulnerability as a ward, patient, client, or prisoner that has been admitted to such an institution. This change improves the clarity, consistency, and proportionality of the revised statute.

Seventh, the RCC sexual abuse by exploitation statute includes an actor that is a "law enforcement officer" and recklessly disregards that the complainant is in "official custody" or on probation or parole. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes prohibit "any official custodian of a ward, patient, client, or prisoner" from engaging in sexual activity with a "ward, patient, client, or prisoner."[40] The current D.C. Code does not define "official custodian," but does define "official custody."[41] The term "official custody" was deleted from the D.C. Code sexual abuse of a ward, patient, client or prisoner statutes in 2007.[42] The legislative history does

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> transportation of a ward, patient, client, or prisoner to and from such institutions; or any official custodian of a ward, patient, client, or prisoner, who engages in a sexual act with a ward, patient, client, or prisoner, or causes a ward, patient, client, or prisoner to engage in or submit to a sexual act shall be imprisoned for not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both.

The text of second degree sexual abuse of a ward, patient, client, or prisoner (D.C. Code 22-3014) is identical, differing only in requiring "sexual contact."

[40] D.C. Code §§ 22-3013; 22-3014.

[41] D.C. Code § 22-3001(6) (defining "official custody" as "(A) Detention following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following or pending civil commitment proceedings, or pending extradition, deportation, or exclusion; (B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; or (C) Probation or parole.").

[42] Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482) (2006 Omnibus Act). The original D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes required that the victim be in the "official custody" of certain institutions and under the "supervisory or disciplinary authority" of the defendant. The original D.C. Code first degree sexual abuse of a ward statute was:

> Whoever engages in a sexual act with another person or causes another person to engage in or submit to a sexual act when that other person:
> (1) Is in official custody, or is a ward or resident, on a permanent or temporary basis, of a hospital, treatment facility, or other institution; and
> (2) Is under the supervisory or disciplinary authority of the actor shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed $100,000.

The original D.C. Code second degree sexual abuse of a ward, patient, client, or prisoner statute was the same, differing only in penalty and requiring a "sexual contact" instead of a "sexual act."

The legislative history for the 2006 Omnibus Act stated that the "supervisory or disciplinary authority" requirement created problems "successfully prosecuting persons who take advantage of inmates, group home residents, and persons with mental retardation." *See* Statement of Robert J. Spagnoletti, Attorney for the District of Columbia, at the May 31, 2005 Public Hearing on B16-247 the Omnibus Public Safety Act of 2005, B16-172 the Criminal Code Reform Commission Establishment Act of 2005, and B16-130 the Criminal Code Modernization Amendment Act of 2005 at 23. The 2006 Omnibus Public Safety Amendment Act deleted the requirements of "official custody" and "supervisory or disciplinary authority." It expanded the sexual abuse of a ward statutes to their current D.C. Code versions, including adding the

not discuss why the definition of "official custody" was left in the D.C. Code. The legislative history does state that the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes were intended to "expand the list of individuals who are prohibited from engaging in sexual relations when the person provides care to a patient or other vulnerable population."[43] It is unclear whether the current D.C. Code definition of "official custody" is intended to apply to "official custodian" in the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes. To the extent that it does not, deleting the definition of "official custody" narrows, rather than expands, the scope of the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes as they pertain to individuals in the custody of law enforcement officers or on probation or parole. Resolving this ambiguity, the RCC sexual abuse by exploitation statute codifies as a discrete basis of liability an actor that is a "law enforcement officer" when the complainant is in "official custody" or on probation or parole. "Law enforcement officer" and "official custody are defined terms in RCC § 22E-701. Law enforcement officers have a position of authority over complainants that are in "official custody," such as detention following an arrest, or on probation or parole such that otherwise consensual sexual activity is inherently coercive and criminalized. This change improves the clarity, consistency, and proportionality of the revised statute and removes a possible gap in liability.

Eighth, the RCC sexual abuse by exploitation statute requires a "knowingly" culpable mental state for offense elements concerning the actor's own status and actions. The current D.C. Code sexual abuse statutes that comprise the RCC sexual abuse by exploitation statute[44] do not specify culpable mental states for the many facts regarding the actor's status or actions that must be proven for the offenses, apart from the "intent" required for "sexual contact."[45] There is no DCCA case law on point. Resolving this ambiguity, the RCC sexual abuse by exploitation statute requires a "knowingly" culpable mental state for the alternative facts that constitute the offense and involve the actor's own status or actions.[46] Requiring, at a minimum, a knowing culpable mental state for

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language, "any *official custodian* of a ward, patient, client, or prisoner," but did not define the term "official custodian."

[43] Chairman of the Council of the District of Columbia Committee of the Judiciary, Phil Mendelson, "Report on Bill 16-247, the 'Omnibus Public Safety Act of 2006,'" (April 28, 2006) at 11.

[44] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[45] D.C. Code § 22-3001(9).

[46] Specifically, the RCC sexual exploitation of an adult offense requires a "knowingly" culpable mental state as to the following alternative elements: the actor is a "a coach, not including a coach who is a secondary school student, a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school, working as an employee, contract employee, or volunteer"; the actor falsely represents to be someone else personally known to the complainant; the actor is a healthcare provider, a health professional, or a religious leader in D.C. Code § 14-309, or purports to be such; the actor falsely represents that sexual conduct is for a bona fide medical, therapeutic, or professional purpose; the actor commits the sexual act or sexual contact during a consultation, examination, treatment, therapy, or other provision of professional services; the actor commits the sexual act or sexual contact while the complainant is a patient or client of the actor; the actor "works as an employee, contract employee, or volunteer at or for a hospital,

the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[47] This change improves the clarity and consistency of the revised statutes.

Ninth, the RCC sexual abuse by exploitation statute requires a "recklessly" culpable mental state as to facts about the complainant's status. The current D.C. Code sexual abuse statutes that comprise the RCC sexual abuse by exploitation statute[48] do not specify culpable mental states for the many facts that must be proven for the offenses, apart from the "intent" required by the statutory definition of "sexual contact."[49] There is no DCCA case law on point. Resolving this ambiguity, the RCC sexual abuse by exploitation statute requires a "recklessly" culpable mental state for the alternative facts that constitute the offense and involve the complainant's status.[50] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[51] However, a lower culpable mental state may be justified given the heightened power, responsibilities, and training of a person of authority in a secondary school, healthcare providers, clergy, persons who work at custodial institutions, and law enforcement officers. Recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[52] This change improves the clarity and consistency of the revised statutes.

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

First, the RCC sexual abuse by exploitation offense combines in one offense the current D.C. Code sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses, with the same penalty. The current D.C. Code codifies as separate statutes sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client, but these statutes all have the same penalties—a maximum term of imprisonment of 10 years for first degree, requiring

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treatment facility, detention or correctional facility, group home, or institution housing persons who are not free to leave at will"; and the actor "works as a law enforcement officer."

[47] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[48] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[49] D.C. Code § 22-3001(9).

[50] Specifically, the RCC sexual exploitation of an adult offense requires a "recklessly" culpable mental state as to the following alternative elements: that the complainant is an enrolled student in the same secondary school as the actor or receives services or attends programming at the same secondary school as the actor; that the secondary education student complainant is under the age of 20 years; that the complainant is "impaired from declining participation" in sexual activity; that the complainant is a ward, patient, client, or prisoner at a specified institution; that the complainant is awaiting admission to a specified institution; that the complainant is in transport to or from a specified institution; that the complainant is in "official custody," as that term is defined in RCC § 22E-701, or on probation or parole.

[51] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[52] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

a "sexual act"[53] and a maximum term of imprisonment of 5 years for second degree, requiring "sexual contact."[54] Having separate statutes for these various offenses is unnecessarily confusing given that their penalties are equivalent and all pertain to sexual conduct with vulnerable adult populations. This change improves the clarity and organization of the revised statute.

Second, the RCC second degree sexual abuse by exploitation statute requires a "sexual contact" with a secondary education student. The current D.C. Code second degree sexual abuse of a secondary education student statute prohibits engaging in "sexual conduct" with specified secondary education students under the age of 20 years or causing specified secondary education students to engage in "sexual conduct."[55] "Sexual conduct" is not defined in the current sexual abuse statutes, nor does it appear in any other sexual abuse statute. In addition, the lower gradations of all the current sexual abuse statutes require "sexual contact."[56] There is no legislative history or DCCA case law for the current sexual abuse of a secondary education student statutes. For clarification, second degree of the RCC sexual abuse by exploitation statute codifies "sexual contact." This change improves the clarity and consistency of the revised statute.

Third, the RCC sexual abuse by exploitation statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[57] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[58] Otherwise

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[53] D.C. Code §§ 22-3009.03 (first degree sexual abuse of a secondary education student); 22-3013 (first degree sexual abuse of a ward; 22-3015 (first degree sexual abuse of a patient or client).

[54] D.C. Code §§ 22-3014 (second degree sexual abuse of a ward); 22-3016 (second degree sexual abuse of a patient or client). Second degree sexual abuse of a secondary education student prohibits "sexual conduct" with a student under the age of 20 years enrolled in the same school or school system and is punishable by a maximum term of imprisonment of 5 years. D.C. Code § 22-3009.04. As is discussed elsewhere in this commentary, "sexual conduct" appears to be a typo for "sexual contact."

[55] D.C. Code § 22-3009.04 (second degree sexual abuse of a secondary education student prohibiting "sexual conduct" with a student under the age of 20 years enrolled in the same school or school system as any "teacher, counselor, principal, couch, or other person of authority in a secondary school and punishable by a maximum term of imprisonment of 5 years).

[56] D.C. Code §§ 22-3004 and 22-3005 (third degree and fourth degree sexual abuse requiring "sexual contact."); 22-3009 (second degree child sexual abuse requiring "sexual contact."); 22-3009.02 (second degree sexual abuse of a minor requiring "sexual contact."); 22-3014 (second degree sexual abuse of a ward requiring "sexual contact."); 22-3016(a) (second degree sexual abuse of a patient or client requiring "sexual contact.").

[57] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[58] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[59] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[60] In the RCC sexual abuse by exploitation statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised statute.

Fourth, the marriage and domestic partnership defense in the RCC sexual abuse by exploitation statute does not refer to other offenses. The current D.C. Code marriage or domestic partnership defense states that marriage or domestic partnership is a defense to sexual abuse "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[61] There is no DCCA case law interpreting this provision. The language is not included in the current

[59] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[60] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803.

[61] As is discussed in this commentary as a clarificatory change to law, the RCC sexual abuse by exploitation statute combines into one statute several current sexual abuse statutes: sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses. It is unclear whether a marriage and domestic partnership defense applies to the current sexual abuse of a secondary education student statutes. The current sexual abuse of a secondary education student statutes are codified at D.C. Code §§ 22-3009.03 and 22-3009.04, which fall into the range of specified statutes for the marriage and domestic partnership defense codified at D.C. Code 22 § 3011(b): "Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense . . . to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor." The defense refers to a "child" or "minor," which appears to exclude a secondary education student, and although the sexual abuse of a secondary education student statutes fall within the specified range of offenses, the defense was never specifically amended to reflect the codification of the sexual abuse of a secondary education student statutes. However, this appears to be a drafting error.

The marriage and domestic partnership defense for the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014) and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016) is codified at D.C. Code § 22-3017(b): "That the defendant and victim were married or in a domestic partnership at the time of the offense is a defense, which the defendant must prove by a preponderance of the evidence, to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018."

jury instruction for the marriage or domestic partnership defense.[62] The marriage or domestic partnership defense in the revised sexual abuse by exploitation statute applies only to prosecution for the revised sexual abuse by exploitation offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses. Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[63] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the RCC sexual abuse by exploitation offense.

Fifth, the marriage and domestic partnership defense in the RCC sexual abuse by exploitation statute makes two clarificatory changes to the current defense. First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Sixth, the revised sexual abuse by exploitation statute does not codify a separate provision stating that consent is not a defense. The current sexual abuse statutes specify that "consent is not a defense" for certain sexual abuse statutes.[64] However, nothing in the RCC sexual abuse by exploitation statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

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[62] D.C. Crim. Jur. Instr. § 9.700.

[63] See Commentary to RCC § 22E-1202 (revised assault statute).

[64] As is discussed in this commentary as a clarificatory change to law, the RCC sexual abuse by exploitation statute combines into one statute several current sexual abuse statutes: sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses.

It is unclear whether a provision barring consent as a defense applies to the current sexual abuse of a secondary education student statutes. The current sexual abuse of a secondary education student statutes are codified at D.C. Code §§ 22-3009.03 and 22-3009.04, which fall into the range of specified statutes for the consent prohibition codified at D.C. Code 22 § 3011(a): "Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403." Although the sexual abuse of a secondary education student statutes fall within the specified range of offenses, the provision was never specifically amended to reflect the codification of the sexual abuse of a secondary education student statutes. Regardless, it would be inconsistent to permit a consent defense for the sexual abuse of a secondary education student statutes when it is prohibited for most of the other current sexual abuse statutes.

The prohibition on consent for the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014) and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016) is codified at D.C. Code § 22-3017(a): "Consent is not a defense to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018."

Seventh, the revised statute specifies that an actor at a specified institution, such as a hospital, must work as "an employee, contract employee, or volunteer at or for" the specified institution. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes include "[a]ny staff member, employee, contract employee, consultant, or volunteer at a" specified institution.[65] There is no DCCA case law interpreting this language. The RCC statute retains "employee," "contract employee," and "volunteer" from the current D.C. Code statutes, and deletes "staff member" as duplicative with an "employee" or "contract employee." It is unclear how a "consultant" differs from an "employee" or "contract employee." However, to the extent that a "consultant" is not an "employee, contract employee, or volunteer at or for" a specified institution, the consultant may not be in a position of authority over a complainant such that otherwise consensual sexual activity is inherently coercive and criminalized. Sexual activity between such a consultant and a complainant at an institution may be prohibited under the RCC sexual assault statute (RCC § 22E-1301) if there is a coercive threat or the complainant is incapacitated. The commentary to the RCC sexual assault statute has been updated to reflect this is a clarificatory change in law.

[65] D.C. Code §§ 22-3013; 22-3014.

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

Explanatory Note. *The RCC sexually suggestive conduct with a minor offense prohibits comparatively less serious sexual conduct with certain complainants under the age of 18 years, such as touching a complainant with intent to cause the sexual arousal or sexual gratification of any person. The offense also prohibits a sexual act or sexual contact with certain complainants, making it a lesser included offense of the RCC sexual abuse of a minor statute.[1] The offense has a single penalty gradation. The revised sexually suggestive conduct with a minor offense replaces the current misdemeanor sexual abuse of a child or minor statute.[2] The revised sexually suggestive conduct with a minor statute also replaces in relevant part four distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[3] the attempt statute,[4] the limitation on prosecutorial immunity,[5] and the aggravating sentencing factors.[6]*

Paragraph (a)(1), subparagraph (a)(1)(A), subparagraph (a)(1)(B), and sub-subparagraphs (a)(1)(B)(i) and (a)(1)(B)(ii) establish the different age and relationship requirements for the actor and the complainant in the revised sexually suggestive conduct with a minor statute. Paragraph (a)(1) requires that the actor "in fact" is at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (a)(1) applies to every element that follows until a culpable mental state is specified. In paragraph (a)(1), this means that there is no culpable mental state required for the actor's age or the required four year age gap.

In addition to the requirements in paragraph (a)(1), subparagraph (a)(1)(A) and subparagraph (a)(1)(B) specify alternative age and relationship requirements for liability. Subparagraph (a)(1)(A) requires that the actor is "reckless" as to the fact that the complainant is under the age of 16 years. "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the complainant is under the age of 16 years. In the alternative, but also in addition to the requirements in paragraph (a)(1), subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(i) require that the actor is "reckless" as to the fact that the complainant is under 18 years of age and paragraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(ii) require that the actor "knows" that he or she is in a "position of trust with or authority over" the complainant. "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the complainant is under the age of 18 years. "Knowingly" is a

[1] RCC § 22E-701.
[2] D.C. Code § 22-3010.01.
[3] D.C. Code § 22-3011.
[4] D.C. Code § 22-3018.
[5] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised sexually suggestive conduct with a minor statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[6] D.C. Code § 22-3020.

defined term in RCC § 22E-206 that here means the actor must be practically certain that the he or she is in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches.

Paragraph (a)(2), subparagraph (a)(2)(A), and sub-subparagraphs (a)(2)(A)(i) through (a)(2)(A)(iii) specify one type of prohibited conduct for the revised sexually suggestive conduct with a minor statute. The actor must "engage[] in" a "sexual act" that is visible to the complaint, a "sexual contact" that is visible to the complainant, or a "sexual or sexualized display" of the genitals, pubic area, or anus that is visible to the complainant. "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Subparagraph (a)(2)(A) specifies a culpable mental state of "purposely" and per the rule of construction in RCC § 22E-207, applies to the prohibited conduct in sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(ii), and (a)(2)(A)(iii). "Purposely" is a defined term in RCC § 22E-206 that here means the actor must "consciously desire" that he or she engages in a sexual act that is visible to the complaint, a sexual contact that is visible to the complainant, or a sexual or sexualized display of the genitals, pubic area, or anus that is visible to the complainant. To the extent that conduct commonly understood as masturbation meets the RCC definitions of "sexual act" or "sexual contact," or is a sexual or sexualized display of the genitals, pubic area, or anus, that conduct falls under subparagraph (a)(2)(A) and sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(ii), and (a)(2)(A)(iii), provided the other requirements of the offense are met.

Subparagraph (a)(2)(B) and its sub-subparagraphs specify another type of prohibited conduct for the revised sexually suggestive conduct statute. Sub-subparagraph (a)(2)(B)(i)(I) prohibits "touching or kissing any person, either directly or through the clothing"[7] and sub-sub-subparagraph (a)(2)(B)(ii)(II) prohibits "removing clothing from any person." Sub-subparagraph (a)(2)(B)(i) prohibits the actor engaging in either type of conduct with the complainant or causing the complainant to engage in or submit to either type of conduct. Subparagraph (a)(2)(B) specifies a culpable mental state of "knowingly" and, per the rules of interpretation in RCC § 22E-207, this "knowingly" culpable mental state applies to all elements in sub-subparagraphs (a)(2)(B)(i) and sub-subparagraphs (a)(2)(B)(i)(I) and (a)(2)(B)(i)(II). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she engages in with the complainant, or causes the complainant to engage in or submit to, touching or kissing any person, either directly or through the clothing, or removing clothing from any person. Sub-subparagraph (a)(2)(B)(ii) requires that the prohibited conduct under subparagraph (a)(2)(B) be done with "intent to cause the sexual arousal or sexual gratification of any person." "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would cause the sexual arousal or sexual gratification of any person. Per RCC § 22E-205, the object of the phrase "with

[7] The revised sexually suggestive conduct with a minor statute does not change the DCCA's interpretation of the scope of "touching" in the current MSACM statute in *Augustin v. United States*, discussed elsewhere in this commentary.

intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such an arousal or gratification actually occurred, just that the defendant believed to a practical certainty that such arousal or gratification would result.

Subparagraph (a)(2)(C) specifies the final type of prohibited conduct for the revised sexually suggestive conduct with a minor statute—engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to a sexual act or sexual contact. Subparagraph (a)(2)(C) specifies that the prohibited culpable mental state for this conduct is "knowingly." "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she will engage in a sexual act or sexual contact with the complainant or cause the complainant to engage in or submit to a sexual act or sexual contact. This language establishes that the revised sexually suggestive conduct with a minor statute is a lesser included offense of the RCC sexual abuse of a minor statute (RCC § 22E-1302) and is intended to have the same scope as in the RCC sexual abuse of a minor statute.

Subsection (b) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are, "in fact," in a marriage or domestic partnership at the time of the sexual act or sexual contact. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC.

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

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

Relation to Current District Law. *The revised sexually suggestive conduct with a minor statute clearly changes current District law in nine main ways.*

First, the revised sexually suggestive conduct with a minor statute replaces the prohibition on "touching one's own genitalia or that of a third person" with engaging in a "sexual act" that is visible to the complainant, a "sexual contact" that is visible to the complainant, or a specific sexualized display that is visible to the complainant. The current D.C. Code misdemeanor sexual abuse of a child or minor (MSACM) statute prohibits "engaging in" "touching one's own genitalia or that of a third person" with a child or minor.[8] The terms "touching" and "genitalia" are not statutorily defined and the only DCCA case law concerning this provision sustained an attempted MSACM conviction when the actor touched his penis "in front of" the complainant.[9] In contrast, the revised sexually suggestive conduct with a minor statute prohibits engaging in a "sexual act" that is visible to the complainant, a "sexual contact" that is visible to the

[8] D.C. Code § 22-3010.01(b), (b)(4).

[9] *Sutton v. United States*, 140 A.3d 1198, 1201, 1202 (D.C. 2016) (holding that the evidence was sufficient for attempted misdemeanor sexual abuse of a child under D.C. Code § 22-3010.01 when appellant touched his penis "in front of" the complainant).

complainant, or a sexualized display of the genitals, pubic area, or anus that is visible to the complainant. The scope of "touching one's own genitalia" in the current MSACM statute is unclear and if interpreted narrowly, there would be no liability under the current MSACM statute for showing genitalia, without touching it, or for touching sexual areas that are not "genitalia," such as the anus or pubic area more generally. The revised sexually suggestive conduct statute expands the offense to include a "sexual act" or "sexual contact," as those terms are defined in RCC § 22E-701, that is visible to the complainant, or a sexualized display of the genitals, pubic area, or anus that is visible to the complainant.[10] This change improves the clarity of the revised statute, its consistency with the requirement in the RCC sexual abuse of a minor statute of a sexual act or sexual contact, and removes gaps in liability.

Second, the revised sexually suggestive conduct with a minor statute requires a "purposely" culpable mental state for engaging in a sexual act that is visible to the complainant, a sexual contact that is visible to the complainant, or a specific sexualized display that is visible to the complainant. The current D.C. Code MSACM statute requires "engaging in . . . touching one's own genitalia or that of a third person"[11] in a way "which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[12] The current D.C. Code "reasonably causes" language may mean that the offense is a general (rather than specific) intent offense,[13] or may indicate a culpable mental state similar to negligence as defined in the RCC. There is no DCCA case law interpreting this language. In contrast, the revised sexually suggestive conduct with a minor statute requires a "purposely" culpable mental state for engaging in a sexual act that is visible to the complainant, a sexual contact that is visible to the complainant, or a specific sexualized display that is visible to the complainant. A knowledge culpable mental state would criminalize adult sexual conduct in front of a minor, particularly in a small or shared living space. The "purposely" culpable mental state requires that the defendant consciously desires that the sexual act, sexual contact, or sexualized display is visible to the complainant. This change improves the consistency and proportionality of the revised statute.

Third, the revised sexually suggestive conduct statute prohibits "touching or kissing any person, either directly or through the clothing" and "removing clothing from any person." The current D.C. Code MSACM statute prohibits: 1) "touching a child or minor inside his or her clothing"[14]; 2) "touching a child or minor inside or outside his or her clothing close to the genitalia, breast, or buttocks"[15]; and 3) "placing one's tongue in

[10] To the extent that conduct commonly understood as masturbation meets the RCC definitions of "sexual act" or "sexual contact," or is a sexual or sexualized display of the genitals, pubic area, or anus, that conduct falls under subparagraph (a)(2)(A) and sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(ii), and (a)(2)(A)(iii), provided the other requirements of the offense are met.
[11] D.C. Code § 22-3010.01(b), (b)(4).
[12] D.C. Code § 22-3010.01(b).
[13] DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. *See* commentary to RCC 22E-1301, Sexual assault, above, for further discussion.
[14] D.C. Code § 22-3010.01(b)(1).
[15] D.C. Code § 22-3010.01(b)(2).

the mouth of the child or minor."[16] The various requirements for touching in the current statute may lead to counterintuitive liability[17] and it is unclear whether the current statute includes touching a naked child or minor, or undressing a child or minor. DCCA case law has interpreted "touching a child or minor inside or outside his or her clothing close to the genitalia, breast, or buttocks" as including incidental contact with these areas during a hug with the requisite intent.[18] In contrast, the revised sexually suggestive conduct statute prohibits "touching or kissing any person, either directly or through the clothing" and "removing clothing from any person." The revised statute simplifies the requirements for liability by removing the focus on where and how the complainant was touched or undressed and instead making the defendant's intent the deciding factor. Any touching, kissing, or removal of clothing, when done with the intent to cause the sexual arousal or sexual gratification of any person, is sufficient for liability, provided the other requirements of the offense are met.[19] This change improves the clarity, consistency, and proportionality of the revised statute and removes gaps in liability.

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[16] D.C. Code § 22-3010.01(b)(3).

[17] For example, under the current misdemeanor sexual abuse of a child or minor statute, a person would not have liability for touching a minor complainant on the complainant's bare foot or licking the complainant's face with the intent to sexually arouse or gratify himself or herself.

[18] In *Augustin v. United States*, appellant was convicted of MSACM on the basis of "intimate" hugs with the minor complainant when, while clothed, their "upper bodies, stomachs, hips, and lower areas were all in contact." *Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889, at *1 (D.C. 2020). Appellant testified that, while the hugs were initially "brief and causal in nature," they became "slightly longer, up to four to five seconds in duration." *Id.* Appellant characterized three or four of these embraces as "intense" and "intimate" and like "the kind of hugs [one] would exchange with [one's] boyfriend." *Id.* The opinion discusses additional facts regarding the hugs and the relationship and communication between the actor and the appellant, which the court used in assessing the actor's intent with the hugs. *Id.* at 1-2, 6-7.

Appellant argued that the evidence was insufficient to prove that he "touch[ed]" the complainant's breast or other specified private parts in paragraph (b)(2) of the current MSACM statute (prohibiting "[t]ouching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks."). *Id.* at 3. Appellant argued that by using "touching," the legislature "must have meant to require more than merely incidental physical contact between any part of the defendant's body with the area of [a complainant's] 'genitalia, anus, breast, or buttocks.'" *Id.* at 4. Appellant argued that "touching" "requires an act of *feeling* one of those areas *with one's tactile senses*—i.e. generally speaking, with one's fingers, hands, genitals, or other sensory organs." *Id.* (emphasis in original). Appellant argued "mere hugs" do not involve such sensory touching and that the "incidental physical contact of parts of . . . bodies in [mere hugs] is not an act or sensory perception or exploration." *Id.*

The DCCA agreed with appellant that the current MSACM statute "does not sweepingly criminalize all hugging" but did not accept appellant's "somewhat restrictive construction" of the word "touching" in the MSACM statute. *Id.* at 4. Instead, the court stated that the intent requirement in the current MSACM statute ("intended to or reasonably causes the sexual arousal or sexual gratification of any person") is the "critical limiting language in the statute," as opposed to "touching." *Id.* at 5. The DCCA stated that the "statute does exclude ordinary hugging involving merely incidental contact with sensitive areas of the recipient's body from its purview" and that it does so "by prohibiting only such hugging as is 'intended to cause or reasonably causes' sexual arousal or sexual gratification." *Id.* The implication of the court's reasoning is that merely incidental contact during a hug that is intended to or reasonably causes sexual arousal or sexual gratification is sufficient for the current MSACM statute. The court found that there was sufficient evidence that the hugs were intended to derive sexual arousal or gratification, but remanded the case for the trial court to make new factual findings and render a new verdict. *Id.* at 7.

[19] The revised sexually suggestive conduct with a minor statute does not change the DCCA's interpretation of the scope of "touching" in the current MSACM statute in *Augustin v. United States*, discussed elsewhere in this commentary.

Fourth, the revised sexually suggestive conduct statute prohibits the actor from engaging in prohibited conduct with the complainant or causing the complainant to engage in or submit to prohibited conduct. The current D.C. Code MSACM statute prohibits: 1) "touching a child or minor inside his or her clothing"[20]; 2) "touching a child or minor inside or outside his or her clothing close to the genitalia, breast, or buttocks"[21]; and 3) "placing one's tongue in the mouth of the child or minor."[22] The current statute appears limited to the actor touching the complainant and would exclude, for example, the actor causing the complainant to touch the actor or a third person. This limited liability is inconsistent with other current sexual abuse statutes, as well as the RCC sex offenses that require a "sexual act" or "sexual contact."[23] There is no DCCA case law interpreting the scope of these provisions. In contrast, the revised sexually suggestive conduct statute prohibits the actor from engaging in touching, kissing, or undressing "any person" with the complainant or the actor causing the complainant to engage in or submit to touching, kissing, or undressing "any person." This change improves the consistency of the revised statute and removes gaps in liability.

Fifth, the revised sexually suggestive conduct with a minor statute requires "intent to cause the sexual arousal or sexual gratification of any person" for the prohibited touching, kissing, or undressing. The current MSACM statute requires engaging in specified conduct "which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[24] There is no DCCA case law interpreting this language. In contrast, the revised sexually suggestive conduct with a minor statute requires "with intent to cause the sexual arousal or sexual gratification of any person" for the prohibited touching, kissing, or undressing. The current "reasonably causes" alternative language may be interpreted to mean that the current MSACM offense is a general (rather than specific) intent offense,[25] or may indicate a culpable mental state similar to negligence. However, using negligence as the basis for criminal liability is disfavored for elements that distinguish otherwise non-criminal from criminal conduct.[26]

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[20] D.C. Code § 22-3010.01(b)(1).
[21] D.C. Code § 22-3010.01(b)(2).
[22] D.C. Code § 22-3010.01(b)(3).
[23] As is discussed in the commentaries to the RCC sex offenses, several of the current sexual abuse statutes specifically prohibit causing the complainant to "engage in" or "submit to" a sexual act or sexual contact, which includes liability for the actor penetrating or touching the complainant, as well as the actor causing the complaint to touch or penetrate the actor, the complainant, or a third party, or the actor causing the complainant to submit to being penetrated or touched by a third party. The RCC sex offenses that require a sexual act or sexual contact consistently prohibit the actor engaging in a sexual act or sexual contact with the complainant or the actor causing the complainant to engage in or submit to a sexual act or sexual contact.
[24] D.C. Code § 22-3010.01(b).
[25] DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC § 22E-1301, Sexual assault, above, for further discussion.
[26] *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States,* 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand").) *See also Elonis v. United States,* 135 S. Ct. 2001, 2015, 192 L. Ed. 2d 1 (2015) (J. Alito, concurring) ("Whether negligence is morally

Conduct that is not intended to but "reasonably causes" sexual arousal or sexual gratification may be criminalized by the offensive physical contact offense in RCC § 22E-1205. This change improves the proportionality of the revised offense.

Sixth, the revised sexually suggestive conduct with a minor statute requires a "recklessly" culpable mental state as to the age of the complainant. Current D.C. Code § 22-3011 states that a mistake of age is not a defense to the current MSACM statute.[27] In contrast, the revised sexually suggestive conduct with a minor statute applies a "recklessly" culpable mental state to the age of complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[28] and legal experts[29] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[30] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[31] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[32] A "recklessly" culpable mental state in the revised sexually suggestive conduct with a minor statute is consistent with the culpable mental state required in other RCC sex offenses such as the revised enticing a minor into sexual conduct statute (RCC § 22E-1305) and the nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency and proportionality of the revised offense.

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culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.").

[27] D.C. Code § 22-3011(a) (stating that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01."). The current MSACM statute is codified at D.C. Code § 22-301.01 and falls within the specified range of statutes. The current MSACM statute was enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include it. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

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

[29] *See* § 5.5(c) Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[30] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e. consensual intercourse by a male with an underage female.")

[31] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[32] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

Seventh, the revised sexually suggestive conduct with a minor statute requires at least a four-year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requires strict liability for this age gap. The current MSACM statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 16 years,[33] but does not require any age gap when the complainant is under the age of 18 years and in a "significant relationship" with the actor.[34] In contrast, the revised sexually suggestive conduct with a minor statute requires at least a four year age gap between the actor and a complainant under the age of 18 years and, by use of the phrase "in fact," requires strict liability for this age gap. The current definition of "significant relationship"[35] and the revised definition of "position of trust with or authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[36] While the special relationship between the actor and complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[37] Strict liability for the age gap matches the current sexual abuse of a child statutes[38] and the

[33] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[34] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[35] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[36] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, touches the buttocks of a 17 year old or touches the 17 year old inside his or her clothing with intent to cause the sexual arousal or sexual gratification of any person would be guilty under the current MSACM statute.

[37] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1304 provides that marriage is a defense to the revised sexually suggestive conduct with a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[38] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

revised sexual abuse of a minor statute (RCC § 22E-1302) and the revised enticing a minor into sexual conduct statute (RCC § 22E-1305). This change improves the consistency and proportionality of the revised statute.

Eighth, only the general penalty enhancements in subtitle I of the RCC apply to the revised sexually suggestive conduct with a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[39] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[40] In contrast, the revised sexually suggestive conduct with a minor statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[41] are not necessary in the revised sexually suggestive conduct with a minor statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised sexually suggestive conduct with a minor statute improves the consistency and proportionality of the revised sex offenses.

Ninth, the revised sexually suggestive conduct statute is a lesser included offense of the RCC sexual abuse of a minor statute (RCC § 22E-1302). The current D.C. Code MSACM statute does not appear to be a lesser included offense of the current child

[39] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[40] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging for sexual conduct with a real or fictitious child statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.* assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[41] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

sexual abuse statutes[42] or sexual abuse of a minor statutes[43] because it has different conduct requirements and requires that the defendant "intended to cause or reasonably causes the sexual arousal or sexual gratification of any person." There is no DCCA case law that addresses the relationship between the current MSACM statute and the current child sexual abuse statutes or sexual abuse of a minor statute. In contrast, the revised sexually suggestive conduct with a minor statute is a lesser included offense of the RCC sexual abuse of a minor statute under paragraph (a)(2)(C) if the other requirements of the offense are met. This change improves the consistency and proportionality of the revised statute.

Beyond these nine changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised sexually suggestive conduct with a minor statute requires a "knowingly" culpable mental state for the fact that the actor is in a position of trust with or authority over the complainant. The current MSACM statute requires that an actor 18 years of age or older be in a "significant relationship" with a complainant under the age of 18 years,[44] but it does not specify a culpable mental state and there is no DCCA case law on point. The revised sexually suggestive conduct with a minor statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[45] This change improves the clarity and consistency of the revised statute.

Second, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the revised sexually suggestive conduct with a minor statute may differ as compared to the current MSACM statute. The current MSACM statute requires that the actor be in a "significant relationship" with the complainant[46] and "significant relationship" is defined in D.C. Code § 22-3001.[47] The current definition of "significant relationship" is open-ended and defines "significant relationship" as

[42] D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").
[43] D.C. Code §§ 22-3009.01, 22-3009.02, 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").
[44] D.C. Code §§ 22-3010.01(a) ("Whoever . . . being 18 years of age or older and being in a significant relationship with a minor."); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[45] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).
[46] D.C. Code § 22-3010.01(a).
[47] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

"includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[48] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

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

First, the revised sexually suggestive conduct with a minor statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[49] and sexual abuse of a minor, for complainants under the age of 18 years.[50] The current MSACM statute has the same distinction in one statute, applying to complainants under the age of 16 years[51] and complainants under the age of 18 years.[52] For clarification, the revised sexually suggestive conduct with a minor statute no longer distinguishes specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[53] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised sexually suggestive conduct with a minor statute, by use of the phrase "in fact," requires no culpable mental state as to the actor's own age or the required age gap. The current MSACM statute does not specify any culpable mental states for the age of the actor or the required age gap.[54] However, current D.C. Code §

[48] D.C. Code § 22-3001(10).
[49] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[50] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").
[51] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[52] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[53] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).
[54] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3), (5A) (defining "child" as a "person who has not yet attained the age of 16 years" and "minor" as a "person who has not yet attained the age of 18 years.").

22-3011 states that a mistake of age is not a defense to the current MSACM statute.[55] For clarification, the revised sexually suggestive conduct with a minor statute uses the phrase "in fact," establishing strict liability as to the ages of the actor and the relevant age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[56] Strict liability for these elements also is consistent with the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the clarity and consistency of the revised offense.

Third, for a complainant under the age of 16 years, the revised sexually suggestive conduct with a minor statute requires an age gap between the complainant and the actor of "at least four years." The current MSACM statute requires that an actor 18 years of age or older be "more than 4 years older" than a complainant under the age of 16 years.[57] The current child sexual abuse statutes, in contrast, are worded to require that the complainant be "at least four years older" than the complainant.[58] Consequently, there is a difference of a day in liability between the two offenses due to the different required age gaps.[59] For clarification, the revised sexually suggestive conduct with a minor statute uses the language "at least four years older," the same as in the revised sexual abuse of a minor statute (RCC § 22E-1302) for complainants that are under the age of 16 years. The change improves the consistency of the revised offense.

Fourth, the revised sexually suggestive conduct with a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[60] Under the statute, if the maximum term of imprisonment for

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[55] D.C. Code § 22-3011(a) (stating that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01."). The current MSACM statute is codified at D.C. Code § 22-301.01 and falls within the specified range of statutes. The current MSACM statute was enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include it. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

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

[57] D.C. Code §§ 22-3010.01(a) ("Whoever, being 18 years of age or older and more than 4 years older than a child."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[58] D.C. Code §§ 22-3008 (first degree child sexual abuse prohibiting "[w]hoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."); 22-3009 (second degree child sexual abuse statute prohibiting "[w]hoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[59] For a complainant that is 15 years and 364 days old, an actor that is 19 years and 364 days old would be liable under the current child sexual abuse statutes because the complainant is under 16 years of age and the actor is "at least four years older" than the complainant. However, the actor would not be liable under the current MSACM statute because, while the actor is over the age of 18, the actor is not "more than four years older" than the complainant.

[60] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a

the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[61] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[62] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[63] In the revised sexually suggestive conduct with a minor statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexually suggestive conduct, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexually suggestive conduct with a minor offense.

Fifth, the marriage and domestic partnership defense in the revised sexually suggestive conduct with a minor statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to MSACM "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[64] There is

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ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor).

[61] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[62] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[63] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current MSACM statute would have a maximum term of imprisonment of 180 days, which is the same penalty as the completed offense.

[64] D.C. Code § 22-3011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[65] The marriage or domestic partnership defense in the revised sexually suggestive conduct with a minor statute applies only to prosecution for the revised sexually suggestive conduct with a minor offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses. Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[66] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised sexually suggestive conduct with a minor offense.

Sixth, the marriage and domestic partnership defense in the revised sexually suggestive conduct with a minor statute makes two clarificatory changes to the current defense.[67] First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Seventh, the revised sexually suggestive conduct statute does not codify a separate provision stating that consent is not a defense. The current sexual abuse statutes specify that "consent is not a defense" for the current MSACM statute.[68] However, nothing in the RCC sexually suggestive conduct statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

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[65] D.C. Crim. Jur. Instr. § 9.700.

[66] See Commentary to RCC § 22E-1202 (revised assault statute).

[67] D.C. Code § 22-30011(b).

[68] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."). The current child sexual abuse statutes and current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3008 – 22-3009.02 and fall within the specified range of statutes in D.C. Code § 22-3011(a).

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

Explanatory Note. *The RCC enticing a minor offense prohibits commanding, requesting, or trying to persuade certain complainants under the age of 18 years to engage in sexual conduct. The revised enticing a minor offense replaces the current enticing a child statute[1] and the current indecent sexual proposal to a minor offense.[2] The revised enticing a minor statute also replaces in relevant part five[3] [4] [5] [6] [7]*

Paragraph (a)(1) specifies the prohibited conduct—commanding, requesting, or trying to persuade the complainant to engage in or submit to a sexual act or sexual contact. "Commands, requests, or tries to persuade" matches the language in the RCC solicitation statute (RCC § 22E-302). "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (a)(1) specifies a culpable mental state of "knowingly" for the prohibited conduct. "Knowingly" is a defined term in RCC § 22E-206 that means the actor must be practically certain that he or she will command, request, or try to persuade the complainant to engage in or submit to a sexual act or sexual contact.

The RCC enticing statute generally has two bases for liability. Paragraph (a)(2), subparagraph (a)(2)(A), subparagraph (a)(2)(B), and sub-subparagraphs (a)(2)(B)(i) and (a)(2)(B)(ii) establish the requirements for the actor and the complainant when the complainant is a "real," i.e. not fictitious, person. Paragraph (a)(3), subparagraph (a)(3)(A), and subparagraph (a)(3)(B) establish the requirements for the actor and the complainant when the complainant is a fictitious person—specifically, a law enforcement officer purporting to be a person under the age of 16 years.

For a "real," i.e. not fictitious complainant, paragraph (a)(2) requires that the actor "in fact" is at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term in RCC § 22E-207 that means no culpable mental state is required for a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to each element that follows the phrase until a culpable mental state is specified. In paragraph (a)(2), there is no culpable mental state requirement for the age of the actor or the required four year age gap with the complainant.

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[1] D.C. Code § 22-3010.

[2] D.C. Code § 22-1312 ("It is unlawful for a person to make an obscene or indecent sexual proposal to a minor.").

[3] D.C. Code § 22-3011.

[4] D.C. Code § 22-3012.

[5] D.C. Code § 22-3018.

[6] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised enticing a minor into sexual conduct statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.

[7] D.C. Code § 22-3020.

When an actor satisfies the requirements of paragraph (a)(2) (at least 18 years of age and at least four years older than the complainant), there are two alternative bases for liability. First, under subparagraph (a)(2)(A), there is liability if the actor is "reckless" as to the fact that the complainant is under 16 years of age. "Reckless" is a defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant was under 16 years of age. Second, and in the alternative, there is liability if the actor is "reckless" as to the fact that the complainant is under 18 years of age (sub-subparagraph (a)(2)(B)(i)) and the actor "knows" that he or she is in a "position of trust with or authority over" the complainant (sub-subparagraph (a)(2)(B)(ii)). "Reckless" is a defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant was under 18 years of age. Knowledge is a defined term in RCC § 22E-206 that means the accused must be practically certain that he or she is in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches.

Paragraph (a)(3) requires that the actor "in fact" is at least 18 years of age and at least four years older than the "purported age" of the complainant. "In fact" is a defined term in RCC § 22E-207 that means no culpable mental state is required for a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to each element that follows the phrase until another culpable mental state is specified. In paragraph (a)(3), there is no culpable mental state requirement for the age of the actor or the required age gap. Per subparagraph (a)(3)(A), the complainant must be a "law enforcement officer," as that term is defined in RCC § 22E-701, who purports to be a person under the age of 16 years. Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" in paragraph (a)(3) applies to subparagraph (a)(3)(A) and there is no culpable mental state requirement for the fact that the complainant is a "law enforcement officer," as that term is defined in RCC § 22E-701, who purports to be a person under 16 years of age. Per subparagraph (a)(3)(B), the actor must be "reckless" as to the fact that the purported age of the complainant is under 16 years. "Reckless" is a defined term in RCC § 22E-206 that means the actor was aware of a substantial risk that purported age of the complainant was under 16 years of age. The references to the "purported age" of the complainant in paragraph (a)(3) and subparagraph (a)(3)(B), and the reference to the law enforcement officer "purport[ing]" to be a person under 16 years of age in subparagraph (a)(3)(A) do not require the law enforcement officer to state a specific age.

Subsection (b) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are, "in fact," in a marriage or domestic partnership at the time of the sexual act or sexual contact. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC.

Subsection (c) specifies the penalty for the offense. [*See* Fourth Draft of Report #41.]

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

Relation to Current District Law. *The revised enticing a minor statute clearly changes current District law in eight main ways.*

First, the revised enticing statute no longer prohibits taking or attempting to take the complainant to a location for the purpose of committing a specified sex offense. The current D.C. Code enticing statute prohibits in D.C. Code § 22-3010(a)(1) "tak[ing] that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02,"; and in D.C. Code § 22-3010(b)(2) "attempt[ing] . . . to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact." The enticing provision in paragraph (a)(1) that prohibits taking a complainant overlaps with the current D.C. Code kidnapping statute, which has a significantly higher maximum penalty (30 years)[8] than the current enticing statute (5 years).[9] The scope of the provision in paragraph (b)(2) for attempting to entice, etc. a person that represents himself or herself to be a child to go to any place also is unclear.[10] In contrast, the RCC relies upon the RCC kidnapping offense (RCC § 22E-1401) to criminalize when the actor successfully takes the complainant to a location with the intent to commit a sex offense. When the actor attempts to entice, etc., a complainant to go to any place for the ultimate purpose of engaging in a sexual act or sexual contact provision, but is unsuccessful, that conduct is now criminalized as attempted kidnapping under the general RCC attempt statute (RCC § 22E-301). Any enticing conduct that fails to satisfy either the RCC kidnapping or RCC attempted kidnapping offenses may still result in liability for the RCC enticing offense if the defendant "command[ed], request[ed], or trie[d] to persuade the complainant" to engage in or submit to a sexual act or sexual contact. This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised enticing statute requires a "reckless" culpable mental state for the age or purported age of the complainant. The current D.C. Code enticing a child statute[11] does not specify any culpable mental states and there is no DCCA case law on this issue. However, current D.C. Code § 22-3012 and current D.C. § 22-3011 establish strict liability for the age of the complainant, real or fictitious, in the current enticing statute.[12] In contrast, the revised enticing statute applies a "reckless" culpable mental

[8] D.C. Code § 22-2001.
[9] D.C. Code § 22-3010(a), (b).
[10] D.C. Code § 22-3010(b)(2) states: "Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts . . . (2) to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact . . . ."). It is unclear if the "attempt" provision is intended to include situations where the actor engages in persuading or enticing and is ultimately unsuccessful, or where the actor is prevented from engaging in enticing the complainant at all, or if the "attempt" language is limited to providing liability in situations when the complainant is an individual falsely representing to be under the age of 16 years.
[11] D.C. Code § 22-3010.
[12] D.C. Code § 22-3012 states that "[i]n a prosecution under §§ 22-3008 to 22-3010 . . . the government need not prove that the defendant knew the child's age." D.C. Code § 22-3012. The current enticing

state to the age or purported age of the complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[13] and legal experts[14] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[15] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[16] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[17] A "reckless" culpable mental state in the revised enticing statute is consistent with the culpable mental state required in parts of the sexually suggestive conduct with a minor statute (RCC § 22E-1304), sexual abuse by exploitation statute (RCC § 22E-1303), and the nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency and proportionality of the revised offense.

Third, the revised enticing statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict lability for this element. The

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statute is codified at D.C Code § 22-3010 and falls within the specified range of statutes, but D.C. Code § 22-3012 does not apply to the entire enticing statute. D.C. Code § 22-3012 and the enticing statute were part of the original 1994 Anti-Sexual Abuse Act. Crimes—Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385). At that time, the enticing statute was limited to "real" complainants under the age of 16 years. The enticing statute was amended in 2007 to include "real" complainants under the age of 18 years when the actor is in a significant relationship with the complainant (D.C. Code § 22-3010(a)) and to include fictitious complainants (D.C. Code § 22-3010(b)). D.C. Code § 22-3012 was not amended in 2007, thus limiting its application to the original enticing statute, although this was likely a drafting error.

D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01." D.C. Code § 22-3011(a). Unlike D.C. Code § 22-3012, D.C. Code § 22-3011 was amended in 2007 to expand the specified range of statutes to § 22-3010.01 (the current misdemeanor sexual abuse of a child or minor statute, also enacted in 2007). Given this amendment, it likely that the entire enticing statute is included.

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

[14] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[15] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e. consensual intercourse by a male with an underage female.")

[16] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[17] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

current D.C. Code enticing statute[18] does not specify any requirements for the age of the actor. DCCA case law does not address the point. In contrast, the revised enticing statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict liability for this element. Requiring the actor to be 18 years of age or older ensures that the enticing offense is reserved for adults to who engage in predatory behavior of complainants under the age of 18 years.[19] While an actor presumably will know his or her own age, it is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[20] Requiring that the actor be 18 years of age or older and applying strict liability to this element also is consistent with this element in the revised sexually suggestive contact with a minor statute (RCC § 22E-1304), and third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the consistency and proportionality of the revised offense.

Fourth, the revised enticing statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requires strict liability for this age gap. The current enticing statute requires a four year age gap between the actor and a complainant under the age of 16 years,[21] but does not have an age gap requirement when the complainant is under the age of 18 years.[22] In contrast, the revised enticing statute requires at least a four year age gap between the actor and a complainant under the age of 18 years and, by use of the phrase "in fact," requires strict liability for this age gap. The current definition of "significant relationship"[23] and the revised definition of "position of trust with or

[18] D.C. Code §§ 22-3010(a), (b) ("Whoever, being at least four years older than a child, or being in a significant relationship with a minor" and "Whoever, being at least four years older than the purported age of a person who represents himself or herself to be a child."); 22-3001(3), (5A) (defining "child" as "a person who has not yet attained the age of 16 years" and "minor" as "a person who has not yet attained the age of 18 years.").

[19] For example, under the revised enticing statute, a 17 year old actor would not be guilty of enticing a 12 year old complainant to engage in sexual intercourse. However, depending on the facts of the case, the 17 year old could be guilty of attempted second degree sexual abuse of a minor (RCC § 22E-1302) and if sexual intercourse actually occurs, the 17 year old actor could be guilty of second degree sexual abuse of a minor unless there was a reasonable mistake of age defense.

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

[21] D.C. Code §§ 22-3010(a), (b); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[22] D.C. Code §§ 22-3010(a); 22-3001(5A) (defining a "minor" as "a person who has not yet attained the age of 18 years."). The current arranging statute is limited to complainants under the age of 16 years and requires at least a four year age gap. D.C. Code §§ 22-3010.02(a); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[23] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other

authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[24] While the special relationship between the actor and complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[25] Strict liability for the age gap matches the current sexual abuse of a child statutes[26] and third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22E-1302), and the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the consistency and proportionality of the revised statute.

Fifth, the revised enticing statute limits the offense to fictitious complainants that are law enforcement officers. The current D.C. Code enticing statute applies to any fictitious complainant,[27] while the closely-related statute for arranging sexual conduct with a real or fictitious child is limited to fictitious complainants that are law enforcement officers.[28] The legislative history for the current D.C. Code arranging for sexual conduct with a minor statute states that the statute was limited to law enforcement officers because otherwise the statute could "enable mischief, such as blackmail, between adults where they are acting out fantasies with no real child involved or intended to involved (the thrill such as it is, being in the salacious banter)."[29] In contrast, the revised enticing

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religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[24] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, texts his 17 year old girlfriend that he wants to touch her buttocks may be guilty of enticing a minor under current District law.

[25] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1305 provides that marriage is a defense to the revised enticing a minor into sexual conduct statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[26] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[27] D.C. Code § 22-3010(b) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child.").

[28] D.C. Code § 22-3010.02(a) ("For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer.").

[29] Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary, Bill 18-963, the "Criminal Code Amendment Act" at 7 (internal quotation marks omitted) (quoting written testimony of Richard Gilbert, District of Columbia Association of Criminal Defense Lawyers). The current arranging contact statute was enacted in 2011 as part of the "Criminal Code Amendment Act of 2010, 2010 District of Columbia Laws 18-377 (Act 18-722)."

statute is limited to fictitious complainants who actually are law enforcement officers. The same legislative rationales that underlie the current arranging statute's limitation to fictitious persons who are really police officers also apply to enticement-type conduct. This change improves the consistency and proportionality of the revised offense.

Sixth, only the general penalty enhancements in subtitle I of the RCC apply to the revised enticing statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[30] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[31] In contrast, the revised enticing statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[32] are not necessary in the revised enticing statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. This change improves the consistency and proportionality of the revised sex offenses.

Seventh, the revised enticing statute relies on the RCC general attempt statute to define what conduct constitutes an attempt and set the punishment for an attempt. The current D.C. Code enticing statute explicitly includes an attempt in the offense definition.[33] As is discussed elsewhere in this commentary, the scope of "attempt" in the current D.C. Code enticing statute is unclear, but the current statute treats an "attempt" to

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[30] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[31] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.* assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[32] However, an actor that merely possesses a dangerous weapon or a firearm while committing enticing, without using or displaying it, may face may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[33] D.C. Code § 22-3010.

commit enticing the same as the completed offense. The current D.C. Code enticing offense does not describe the elements necessary to prove an attempt, however, and there is no case law on point.[34] In contrast, in the RCC, an attempt to commit enticing is no longer punished the same as the completed offense. The RCC relies on the General Part's attempt provision (RCC § 22E-301) to describe the requirements to prove an attempt and set the penalty at ½ the maximum imprisonment sentence, consistent with other RCC sex offenses. This change improves the consistency and completeness of the revised sexual abuse of a minor offense.

Eighth, the revised enticing statute replaces the indecent sexual proposal to a minor offense in current D.C. Code § 22-1312 ("It is unlawful for a person to make an obscene or indecent sexual proposal to a minor."). The offense has a maximum term of imprisonment of 90 days.[35] The current D.C. Code indecent sexual proposal to a minor offense appears to overlap[36] with the prohibition in the current D.C. Code enticing a minor statute for enticing certain complainants under the age of 18 years to engage in a sexual act or sexual contact. The current D.C. Code enticing offense has a maximum term of imprisonment of five years.[37] In contrast, the revised enticing statute replaces the indecent sexual proposal to a minor offense in current D.C. Code § 22-1312. It is disproportionate to penalize the same conduct under a separate 90 day offense. To the extent that the current D.C. Code indecent sexual proposal to a minor offense does not overlap with the current D.C. Code enticing a minor offense, it may criminalize non-obscene speech to a minor in a content-based manner that raises both vagueness and First

[34] In addition to the "attempt" language in the current enticing statute, the current enticing statute is subject to current D.C. Code § 22-3018, which provides an attempt penalty applicable to all current sex offenses, including enticing. D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense." It is unclear how the attempt statute in D.C. Code § 22-3018 applies to the current enticing statute, which includes an "attempt" in the definition of the offense.

[35] D.C. Code § 22-1312.

[36] The DCCA has not interpreted the current D.C. Code indecent sexual proposal to a minor offense. However, the DCCA did interpret an earlier, substantively similar, version of the offense that prohibited making "any lewd, obscene, or indecent sexual proposal." The DCCA stated that in this earlier version, a "sexual proposal . . . connotes virtually the same conduct or speech-conduct as a sexual solicitation; the term clearly implies a personal importunity addressed to a particular individual to do some sexual act.... [G]iven the nature of the common law offense of solicitation, it is appropriate to construe the sexual proposal clause . . . as limited to solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime." *Pinckney v. United States*, 906 A.2d 301, 307 (D.C. 2006) (quoting *District of Columbia v. Garcia*, 335 A.2d 217, 219 (D.C. 1975)).

It seems likely that the DCCA would similarly interpret the prohibition in current D.C. Code § 22-1312 on making "an obscene or indecent sexual proposal" to a minor as limited to solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime. The earlier version of the offense differed from the current D.C. Code version of the offense only in that it: 1) included "any lewd, obscene, or indecent sexual proposal," as opposed to any "obscene or indecent sexual proposal" in the current D.C. Code offense; and 2) did not require that the proposal be "to a minor" like the current D.C. Code offense Under this interpretation, there is substantial overlap with the current D.C. Code enticing a minor statute, which prohibits soliciting certain minors to engage in a "sexual act" or "sexual contact."

[37] D.C. Code § 22-1310(a).

Amendment issues. This change improves the clarity, consistency, and proportionality of the revised statutes.

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

First, the RCC enticing statute prohibits the conduct: "commands, requests, or tries to persuade the complainant" instead of relying on references to attempts. The current D.C. Code enticing statute prohibits, in D.C. Code § 22-3010(a)(2) "attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact," and in D.C. Code § 22-3010(b)(1) "attempts . . . to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact." There is no DCCA case law interpreting this language and the scope of "attempts" to "seduce, entice, allure, convince, or persuade" is unclear.[38] Resolving this ambiguity, the revised enticing statute requires "commands, requests, or tries to persuade the complainant." With this change, the revised enticing statute uses language identical to the RCC solicitation statute (RCC § 22E-302), and the RCC enticing statute differs from solicitation liability primarily in the required culpable mental state—enticing requires "knowingly" and solicitation requires "purposely." This change rephrases "attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact" in the current enticing statute as "tries to persuade" in the revised offense. To the extent the language in the current D.C. Code enticing statute prohibits an actor knowingly enticing a complainant when the actor is ultimately unsuccessful in persuading the complainant, this remains criminalized as a completed offense under the "tries to persuade" language of the revised statute. However, to the extent that the current D.C. Code enticing statute's "attempts" provision includes in the completed enticing offense conduct that is not covered by the "tries to persuade" language of the revised offense, there would remain liability for attempted enticing under the RCC attempt offense. This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised enticing statute requires a "knowingly" culpable mental state for commanding, requesting, or trying to persuade. The current enticing statute does not specify any culpable mental states, and there is no DCCA case law on this issue. The revised enticing statute resolves these ambiguities by requiring a "knowingly" culpable mental state for commanding, requesting, or trying to persuade. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make

[38] Paragraph (a)(2) of the current enticing statute is for a "real," i.e. not fictitious minor, and has "attempt" language. D.C. Code § 22-3010(a)(2) ("(a) Whoever, being at least 4 years older than a child or being in a significant relationship with a minor . . . (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact."). Paragraph (b)(1) of the current enticing statute is for a "fake" minor, i.e. an individual that "represents himself or herself to be a child," and also has "attempt" language. It is unclear if the "attempt" provisions are intended to include situations where the actor engages in persuading or enticing, but is prevented from engaging in enticing the complainant at all, or if the "attempt" language is limited to providing liability in situations when the complainant is an individual falsely representing to be under the age of 16 years.

otherwise legal conduct illegal is a generally accepted legal principle.[39] This change improves the clarity and consistency of the revised statutes.

Third, the revised enticing statute consistently requires that the actor commands, requests, or tries to persuade the complainant "to engage in or submit to a sexual act or sexual contact." While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[40] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[41] In addition to case law, District practice does not appear to follow the variations in statutory language.[42] Instead of these variations in language, the revised sex offenses consistently require that the actor "engages" in a sexual act or sexual contact with the complainant or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Given the unique requirements of the revised enticing statute, it requires that the actor commands, requests, or tries to persuade the complainant "to engage in or submit to" the sexual act or sexual

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[39] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[40] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[41] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[42] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

contact. The language clearly establishes that the actor is liable for commanding, requesting, or trying to persuade the complainant to engage in or submit to a sexual act or sexual contact with the actor, with a third party, or with the complainant. Differentiating liability based on whether an actor entices the complainant to engage in the sexual conduct with the actor, or whether the actor entices the complainant to engage in or submit to the sexual conduct with the complainant or a third party, may lead to disproportionate outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Fourth, the revised enticing statute requires a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. The current enticing statute requires that the actor be "in a significant relationship with a minor,"[43] but it does not specify a culpable mental state and there is no DCCA case law for this issue. The revised enticing statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[44] This change improves the clarity and consistency of the revised statute.

Fifth, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the revised enticing statute may differ as compared to the current enticing statute. The current enticing statute requires that the actor be in a "significant relationship" with the complainant[45] and "significant relationship" is defined in D.C. Code § 22-3001.[46] The current definition of "significant relationship" is open-ended and defines "significant relationship" as "includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[47] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the

[43] D.C. Code §§ 22-3010; 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[44] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).
[45] D.C. Code § 22-3010.01(a).
[46] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").
[47] D.C. Code § 22-3001(10).

commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

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

First, the revised enticing statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[48] and sexual abuse of a minor, for complainants under the age of 18 years.[49] The current enticing statute[50] makes the same distinctions. For clarification, the revised enticing statute specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[51] These changes improve the clarity and consistency of the revised statute.

Second, the revised enticing statute, by use of the phrase "in fact," requires strict liability for the age gap between the actor and complainants under the age of 16 years, or the purported age gap between the actor and a complainant that is a law enforcement officer. Current D.C. Code § 22-3012 and current D.C. § 22-3011 establish strict liability for the required age gap between the actor and a complainant, real or fictitious, under the age of 16 years in the current enticing statute.[52] For clarification, the revised enticing statute uses the phrase "in fact," establishing strict liability as to the relevant age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[53] Strict liability for the required age

[48] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[49] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").

[50] D.C. Code § 22-3010.

[51] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).

[52] D.C. Code § 22-3012 states that "[i]n a prosecution under §§ 22-3008 to 22-3010 . . . the government need not prove that the defendant knew the child's age." D.C. Code § 22-3012. The current enticing statute is codified at D.C Code § 22-3010 and falls within the specified range of statutes, but D.C. Code § 22-3012 does not apply to the entire enticing statute. D.C. Code § 22-3012 and the enticing statute were part of the original 1994 Anti-Sexual Abuse Act. Crimes—Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385). At that time, the enticing statute was limited to "real" complainants under the age of 16 years. The enticing statute was amended in 2007 to include "real" complainants under the age of 18 years when the actor is in a significant relationship with the complainant (D.C. Code § 22-3010(a)) and to include fictitious complainants (D.C. Code § 22-3010(b)). D.C. Code § 22-3012 was not amended in 2007, thus limiting its application to the original enticing statute, although this was likely a drafting error. However, D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01." D.C. Code § 22-3011(a). Unlike D.C. Code § 22-3012, D.C. Code § 22-3011 was amended in 2007 to expand the specified range of statutes to § 22-3010.01 (the current misdemeanor sexual abuse of a child or minor statute, also enacted in 2007). Given this amendment, it likely that the entire enticing statute was meant to be included in D.C. Code § 22-3011.

[53] *See Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea

gap also is consistent with the revised sexual abuse of a minor statute (RCC § 22E-1302) and the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the clarity and consistency of the revised offense.

Third, the marriage and domestic partnership defense in the revised enticing statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to enticing "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[54] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[55] The marriage or domestic partnership defense in the revised enticing statute applies only to prosecution for the revised enticing offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses. Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[56] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised enticing offense.

Fourth, the marriage and domestic partnership defense in the revised enticing statute makes two clarificatory changes to the current defense.[57] First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Fifth, the revised enticing statute does not codify a separate provision stating that consent is not a defense. The current sexual abuse statutes specify that "consent is not a

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which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).")

[54] D.C. Code § 22-3011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

[55] D.C. Crim. Jur. Instr. § 9.700.

[56] *See* Commentary to RCC § 22E-1202 (revised assault statute).

[57] D.C. Code § 22-3011(b).

defense" for the current enticing statute.[58] However, nothing in the RCC enticing statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

[58] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."). The current enticing statute is codified at D.C. Code §§ 22-3010 and falls within the specified range of statutes in D.C. Code § 22-3011(a).

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

Explanatory Note. *The RCC arranging for sexual conduct with a minor or person incapable of consenting offense ("revised arranging for sexual conduct" offense) prohibits an actor with a responsibility under civil law for the health, welfare, or supervision of the complainant from giving effective consent to sexual activity in specific situations. The offense applies to specified complainants that are under the age of 18 years or to complainants of any age that satisfy the offense requirements for incapacitation or intoxication. The offense has a single penalty gradation. The revised arranging for sexual conduct offense replaces the current arranging for a sexual contact with a real or fictitious child statute.*[1] *The revised arranging for sexual conduct offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the attempt statute,*[2] *the limitation on prosecutorial immunity,*[3] *and the aggravating sentencing factors.*[4]

Subsection (a) specifies the prohibited conduct for the revised arranging for sexual conduct offense. Subparagraph (a)(1)(A) specifies the first requirement for the revised offense—the actor must have a "responsibility under civil law for the health, welfare, or supervision of the complainant."[5] Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state applies to the elements in subparagraph (a)(1)(A). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant."

Subparagraph (a)(1)(B) and sub-subparagraphs (a)(1)(B)(i) and (a)(1)(B)(ii) specify the two alternate types of prohibited conduct for the revised offense. First, per subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(i), the actor must give effective consent to a third party to engage in or submit to a sexual act or sexual contact with or for[6] the complainant. "Effective consent, "sexual act," and "sexual contact" are defined terms in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to the elements in subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(i). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that the

[1] D.C. Code § 22-3010.02.
[2] D.C. Code § 22-3018.
[3] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised arranging for sexual conduct with a minor person incapable of consenting statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[4] D.C. Code § 22-3020.
[5] Such a duty of care to the complainant may arise, for example, from the actor being a parent, guardian, teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.
[6] The words "or for" clarify that the offense includes the third party engaging in masturbatory conduct for the complainant.

actor gives effective consent to a third party to engage in or submit to a sexual act or sexual contact with or for the complainant.

Subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(ii) specify the alternate type of prohibited conduct in the revised arranging for sexual conduct statute—the actor must give effective consent to a third party to cause the complainant to engage in or submit to a sexual act or sexual contact with or for[7] the third party or any other person. "Effective consent, "sexual act," and "sexual contact" are defined terms in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to the elements in subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(ii). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must give effective consent to a third party to cause the complainant to engage in or submit to a sexual act or sexual contact with or for the third party or any other person.

Paragraph (a)(2) and its subparagraphs and sub-subparagraphs specify the various alternate requirements for the complainant in the revised arranging for sexual conduct statute. The requirements under subparagraph (a)(2)(A) and subparagraph (a)(2)(B) ensure that the complainant and the third party or the complainant and another person satisfy the age, age gap, and relationship requirements in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Subparagraph (a)(2)(A) and sub-subparagraphs (a)(2)(A)(i) and (a)(2)(A)(ii) specify the requirements when the complainant is under 16 years of age. Per the rule of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in subparagraph (a)(2)(A) applies to all the elements in sub-subparagraphs (a)(2)(A)(i) and (a)(2)(A)(ii). Under subparagraph (a)(2)(A) and sub-subparagraph (a)(2)(A)(i), the actor must be reckless as to the fact that the complainant is under 16 years of age. Under subparagraph (a)(2)(A) and sub-subparagraph (a)(2)(A)(ii), the actor must also be reckless as to the fact that the third party or any other person is at last four years older than the complainant. "Reckless" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the complainant is under 16 years of age and that the third party or other person is at least four years older than the complainant.

Subparagraph (a)(2)(B) and its sub-subparagraphs specify requirements when the complainant is under the age of 18 years. Subparagraph (a)(2)(B), sub-subparagraph (a)(2)(B)(i), sub-subparagraph (a)(2)(B)(i)(a), and sub-subparagraph (a)(2)(B)(b) require that the complainant is under 18 years of age and that the third party or other person is at least 18 years of age and at least four years older than the complainant. Per the rule of interpretation in RCC § 22E-207, the "reckless" culpable mental state in sub-subparagraph (a)(2)(B)(i) applies to the elements in sub-subparagraph (a)(2)(B)(i)(a) and sub-subparagraph (a)(2)(B)(i)(b). "Reckless" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the complainant is under 18 years of age and that the third party or other person is at least 18 years of age and at least four years older than the complainant. Sub-subparagraph (a)(2)(B)(ii) further requires that the actor knows that the third party or other person is in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined

[7] The words "or for" clarify that the offense includes the complainant engaging in masturbatory conduct for the a third party or any other person.

term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. "Knows" is a defined term in RCC § 22E-206 that here means the actor is practically certain that the third party or other person is in a position of trust with or authority over the complainant.

Subparagraph (a)(2)(C) and its sub-subparagraphs specify the requirements when the complainant is incapacitated. Subparagraph (a)(2)(C) and sub-subparagraph (a)(2)(C)(i) require that the actor is reckless as to the fact that the complainant is incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. Per the rules of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (a)(2)(C) applies to the elements in sub-subparagraph (a)(2)(C)(i). "Reckless" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the complainant is the complainant is incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness.

Subparagraph (a)(2)(C) and sub-subparagraph (a)(2)(C)(ii) require that the actor is reckless as to the fact that the complainant is incapable of communicating willingness or unwillingness to engage in the sexual act or sexual contact. Sub-subparagraph (a)(2)(C)(ii) includes paralyzed individuals who are able to appraise the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent under sub-subparagraph (a)(2)(C)(i), but are unable to communicate. Per the rules of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (a)(2)(C) applies to the elements in sub-subparagraph (a)(2)(C)(ii). "Reckless" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the complainant is incapable of communicating willingness or unwillingness to engage in the sexual act or sexual contact.

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

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

Relation to Current District Law. *The revised arranging for sexual conduct with a minor or person incapable of consenting statute clearly changes current District law in seven main ways.*

First, the revised arranging for sexual conduct statute no longer prohibits the actor "arrang[ing]" to engage in sexual activity with the complainant. The current D.C. Code arranging for a sexual contact statute prohibits, in relevant part, the actor "arrangi[ng] to engage in a sexual act or sexual contact with the complainant."[8] The term "arrange" is not statutorily defined and there is no DCCA case law interpreting it. In contrast, the revised arranging for sexual conduct statute requires that the actor "give[] effective consent to a third party" to engage in or cause sexual activity with the complainant and

[8] D.C. Code § 22-3010.02(a).

excludes an actor engaging in, arranging for, or attempting to engage in sexual activity with the complainant. An actor that arranges to engage in sexual activity with a minor complainant may have liability for an attempted RCC sex offense under the RCC general attempt provision (RCC § 22E-302), and if the sexual activity takes place, liability for the completed offense. This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised arranging for sexual conduct statute prohibits the actor from giving "effective consent to a third party" for the third party to engage in sexual activity with the complainant or cause the complainant to engage in sexual activity. The current D.C. Code arranging for a sexual contact statute prohibits, in relevant part, the actor "arrangi[ng] for another person to engage in a sexual act or sexual contact" with the complainant.[9] The term "arrange" is not statutorily defined and there is no DCCA case law interpreting it. In contrast, the revised arranging for sexual conduct statute requires that the actor "give[] effective consent to a third party" to engage in sexual activity with the complainant or cause the complainant to engage in sexual activity. Giving "effective consent" encompasses arranging, but is clearer, and "effective consent" is a defined term used consistently in the RCC. The revised language categorically excludes from the offense a parent or other responsible individual giving effective consent to the minor to engage in sexual activity, regardless of whether the sexual activity is legal or illegal (e.g.., violates the RCC sexual abuse of a minor statute (RCC § 22E-1302)). The RCC arranging for sexual conduct statute requires a "knowingly" culpable mental state and does not require that sexual activity actually occur. While the revised statute does not criminalize a parent or other responsible individual "knowingly" giving a minor effective consent to engage in sexual activity that is illegal (i.e. giving a 14 year old complainant effective consent to have sex with the complainant's 19 year old boyfriend), there may be liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor (RCC § 22E-1502) statutes if there is harm or a risk of harm to the minor. In addition, if the parent or other individual "purposely" gives a minor effective consent to engage in sexual activity that is illegal, the person may be charged (and it is more proportionate to charge this conduct) as an accomplice under other provisions in the RCC that have more severe penalties than the RCC arranging for sexual conduct offense. This change improves the consistency and proportionality of the revised statutes.

Third, the revised arranging for sexual conduct statute replaces the various age requirements for a minor complainant and any third party in the current D.C. Code arranging statute with the requirements that: 1) the actor is "a person with a responsibility under civil law for the health, welfare, or supervision of the complainant"; and 2) that the consented-to sexual activity would violate, or does violate, the RCC sexual abuse of a minor statute. The current D.C. Code arranging statute requires, in relevant part, that the complainant be under the age of 16 years,[10] but it is unclear whether a four year age gap is required between the actor and the complainant, as well as between the complainant

[9] D.C. Code § 22-3010.02(a) ("It is unlawful for a person . . . to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger than the person.").

[10] Current D.C. Code § 22-3001 defines "child" for the current D.C. Code sexual abuse statutes, including the arranging statute, as "a person who has not yet attained the age of 16 years." D.C. Code § 22-3001(3).

and any third party with whom the sexual conduct is arranged.[11] There is no DCCA case law on this issue. There is also no liability in the current D.C. Code arranging statute when the complainant is 16 years of age or older, but under the age of 18 years, which is inconsistent with other current D.C. Code sex offenses.[12] In contrast, the revised arranging for sexual conduct statute requires that the actor is "a person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and that the consented-to sexual activity would violate the RCC sexual abuse of a minor statute. These requirements justify the comparatively low culpable mental state of "knowingly" and the less stringent requirements for liability in the RCC arranging for sexual conduct statute as compared to the RCC general provisions for inchoate liability, such as the RCC soliciting provision (RCC § 22E-302) or accomplice liability (RCC § 22E-210). The phrase a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" is used consistently throughout the RCC. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the revised arranging for sexual conduct statute applies a culpable mental state of "reckless" as to the age of the complainant. The current D.C. Code arranging statute does not specify any culpable mental states[13] and there is no DCCA case law on this issue. In contrast, the revised arranging for sexual conduct statute applies a "reckless" culpable mental state to the age of the complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[14] and legal experts[15] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[16] Requiring, at a minimum, a knowing culpable mental

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[11] The ambiguity arises from the multiple references to a "person" in the current arranging statute. D.C. Code § 22-3010.02(a) ("It is unlawful *for a person* to arrange to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child at least 4 years younger than the person, or to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger *than the person*.") (emphasis added).

[12] For example, the current D.C. Code, closely-related enticing a child statute includes "real" complainants under the age of 18 years when the actor is in a "significant relationship" with the complainant. D.C. Code §§ 22-3010(a); 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").

[13] D.C. Code § 22-3010.02.

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

[15] *See* § 5.5(c) Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[16] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant

state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[17] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[18] A "reckless" culpable mental state for the age of the complainant in the revised arranging for sexual conduct statute is consistent with the culpable mental state for the age of certain complainants in the sexual abuse by exploitation statute (RCC § 22E-1303), the sexually suggestive conduct with a minor statute (RCC § 22E-1304), and the enticing a minor into sexual conduct statute (RCC § 22E-1305). This change improves the consistency and proportionality of the revised offense.

Fifth, the revised arranging for sexual conduct statute no longer applies when the "arrangement is done with or by a law enforcement officer." The current D.C. Code arranging statute states that it is unlawful for a "person" to arrange to engage in a sexual act or sexual contact "with an individual (whether real or fictitious) . . . who is represented to be a child at least 4 years younger than the person" or "to arrange for another person" to engage in a sexual act or sexual contact "with an individual (whether real or fictitious) . . . who is represented to be a child at least 4 years younger than the person."[19] This statutory language seems to limit the role of a fictitious person to the complainant, but the current statute further provides that "arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer."[20] There is no DCCA case law interpreting the provisions in the current D.C. Code arranging statute for fictitious complainants. In contrast, the revised arranging for sexual conduct statute is limited to real complainants under the age of 18 years and real actors that are responsible under civil law for them. The revised arranging for sexual conduct statute is limited to such an actor "knowingly" giving effective consent to a third party and it is disproportionate to include law enforcement officers in the scope of the offense. The RCC enticing a minor into sexual conduct statute (RCC § 22E-1305) specifically includes law enforcement officers that purport to be a complainant under the age of 16 years, which is proportionate given that the offense requires that the actor must entice the minor. This change improves the clarity and consistency of the revised statute.

Sixth, the revised arranging for sexual conduct statute prohibits giving effective consent to a third party to engage in sexual activity with an incapacitated complainant or to cause an incapacitated complainant to engage in sexual activity. The language in sub-subparagraphs (2)(C)(i) and (2)(C)(ii) of the revised statute is identical to requirements in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301). The current D.C. Code arranging statute is limited to certain complainants under the age

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possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e. consensual intercourse by a male with an underage female.")

[17] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[18] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[19] D.C. Code § 22-3010.02(a).

[20] D.C. Code § 22-3010.02(a).

of 16 years[21] and there is no current D.C. Code offense that specifically prohibits arranging for sexual activity with incapacitated complainants. In contrast, the RCC arranging for sexual conduct statute prohibits giving effective consent to a third party to engage in sexual activity with an incapacitated complainant or to cause an incapacitated complainant to engage in sexual activity. Without such a provision in the RCC, an actor that is civilly responsible for such an incapacitated complainant that "knowingly" gives effective consent to a third party to engage in or cause sexual activity with that incapacitated complainant would not have liability unless there were a harm or risk of harm that satisfies the RCC criminal abuse of a minor (RCC § 22E-1501), RCC criminal neglect of a minor (RCC § 22E-1502), RCC criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503), or RCC criminal neglect of a vulnerable adult or elderly person statute (RCC § 22E-1504). An actor that "purposely" engages in this conduct may have liability under an RCC inchoate offense such as solicitation (RCC § 22E-302), but providing liability in the RCC arranging statute when there is a lower culpable mental state of "knowingly" is proportionate given that the actor must have a responsibility under civil law for the complainant's health, welfare, or supervision. This change improves the clarity, consistency, and proportionality of the revised statute, and removes a possible gap in liability.

Seventh, only the general penalty enhancements in subtitle I of the RCC apply to the revised arranging for sexual conduct statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current D.C. Code sex offense statutes.[22] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[23] In contrast, the revised

[21] D.C. Code §§ 22-3010.02(a) (" It is unlawful for a person to arrange to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child at least 4 years younger than the person, or to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger than the person. For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer."); 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

[22] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[23] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging statute because they overlap with elements

arranging for sexual conduct statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[24] are not necessary in the arranging statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. This change improves the consistency and proportionality of the revised sex offenses.

Beyond these seven changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The revised arranging for sexual conduct statute requires a "knowingly" culpable mental state for the actor being a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and for giving effective consent to a third party to engage in sexual activity with the complainant or to cause the complainant to engage in sexual activity. The current D.C. Code arranging statute[25] does not specify any culpable mental state and there is no DCCA case law on this issue. The revised arranging for sexual conduct statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the actor being a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and for giving the required effective consent. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[26] This change improves the clarity and consistency of the revised statutes.

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

First, the revised arranging for sexual conduct statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[27] Under the statute, if the maximum term of imprisonment for the underlying

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of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.* assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[24] However, an actor that merely possesses a dangerous weapon or a firearm while committing the revised arranging for sexual conduct offense, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[25] D.C. Code § 22-3010.02.

[26] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[27] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a

offense is life, an attempt has a maximum term of imprisonment of 15 years.[28] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[29] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[30] In the revised arranging for sexual conduct statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for the arranging offense, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised arranging for sexual conduct offense.

Second, the revised arranging for sexual conduct statute codifies as a discrete basis of liability giving effective consent to a third party to "cause the complainant to engage in or submit to a sexual act or sexual contact with or for a third party." The current D.C. Code arranging for a sexual contact statute prohibits, in relevant part, the actor "arrangi[ng] for another person to engage in a sexual act or sexual contact" with the complainant.[31] The term "arrange" is not statutorily defined and there is no DCCA case law interpreting it. The revised language is consistent with the other RCC sex offenses that prohibit causing the complainant to engage in or submit to conduct. This change improve the clarity of the revised statutes.

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ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[28] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[29] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[30] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current arranging statute would have a maximum term of imprisonment of 180 days.

[31] D.C. Code § 22-3010.02(a) ("It is unlawful for a person . . . to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger than the person.").

RCC § 22E-1307. Nonconsensual Sexual Conduct.

Explanatory Note. *The RCC nonconsensual sexual conduct offense prohibits engaging in a sexual act or sexual contact with the complainant or causing a complainant to engage in or submit to a sexual act or sexual contact without the complainant's effective consent. The penalty gradations are based on the nature of the sexual conduct. The revised nonconsensual sexual conduct offense replaces the current misdemeanor sexual abuse statute.[1] The revised nonconsensual sexual conduct offense also replaces in relevant part four distinct provisions for the sexual abuse offenses: the consent defense,[2] the attempt statute,[3] the limitation on prosecutorial immunity,[4] and the aggravating sentencing factors.[5]*

Subsection (a) specifies the prohibited conduct for first degree nonconsensual sexual conduct. Paragraph (a)(1) requires that the actor engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. Paragraph (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that his or her conduct will engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." Paragraph (a)(2) requires that the actor be "reckless" as to the fact that the actor lacks the complainant's "effective consent." "Recklessly" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the actor lacks the complainant's effective consent. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Subsection (b) specifies the prohibited conduct for second degree nonconsensual sexual conduct. Paragraph (b)(1) requires that the actor engage in a "sexual contact" with the complainant or cause the complainant to engage in or submit to a "sexual contact." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (b)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that he or she engages in a "sexual contact" with the complainant or cause the complainant to engage in or submit to a "sexual contact." Paragraph (b)(2) requires that the actor be "reckless" as to the fact that the actor lacks the complainant's "effective consent." "Recklessly" is a defined term

[1] D.C. Code § 22-3006.
[2] D.C. Code § 22-3007.
[3] D.C. Code § 22-3018.
[4] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised nonconsensual sexual conduct statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[5] D.C. Code § 22-3020.

in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the actor lacks the complainant's effective consent. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Subsection (c) excludes from liability an actor's use of deception, unless it is deception as to the nature[6] of the sexual act or sexual contact. Under the exclusion, there is no liability for deception that induces[7] the complainant to consent, notwithstanding the fact that such deception may negate the complainant's effective consent as is required for liability. "Deception" is a defined term in RCC § 22E-701. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here that the actor used to deception, unless it was deception as to the nature of the sexual act or sexual contact.

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

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

Relation to Current District Law. *The revised nonconsensual sexual conduct statute clearly changes current District law in six main ways.*

First, the revised nonconsensual sexual conduct statute is comprised of two gradations, based on whether a "sexual act" or "sexual contact" was committed. The current D.C. Code misdemeanor sexual abuse (MSA) statute prohibits committing either a "sexual act" or "sexual contact" without distinction in penalty, with both types of conduct subject to the same maximum imprisonment of 180 days.[8] In contrast, first degree of the nonconsensual sexual conduct statute prohibits a "sexual act" without effective consent and second degree prohibits "sexual contact" without effective consent. Differentiating the penalties for a "sexual act" and "sexual contact" is consistent with the

[6] Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to the object or body part that is used to penetrate the other person and deceptions as to a person's health status (e.g., having a sexually transmitted disease). In addition, deception as to the nature of the sexual act or sexual contact includes a practice known as "stealthing," generally understood as removing a condom without the consent of the sexual partner. *See, e.g.*, https://www.newsweek.com/what-stealthing-lawmakers-california-and-wisconsin-want-answer-be-rape-61098. In the RCC, "stealthing" is sufficient for nonconsensual sexual conduct, if the other requirements of the offense are met. It should be noted that in addition to liability for nonconsensual sexual conduct, deception as to the nature of the sexual act or sexual contact that results in a sexually transmitted disease may by sufficient for assault liability (RCC § 22E-1202).

In addition to the RCC nonconsensual sexual conduct offense, the RCC sexual abuse by exploitation statute (RCC § 22E-1303) specifically prohibits a sexual act or sexual contact when the actor falsely represents that he or she is someone else who is personally known to the complainant. This particular form of deception is more serious than other forms of deception that the RCC nonconsensual sexual conduct offense may prohibit.

[7] Examples of deception to induce a sexual act or sexual contact include: a false statement about one's feelings for the complainant; a false assertion that one is a celebrity; and a false promise to perform a future action in return for the sexual conduct.

[8] D.C. Code § 22-3006.

grading in other current D.C. Code and RCC sex offenses.[9] This change improves the consistency and proportionality of the revised offense.

Second, the second degree of the revised nonconsensual sexual conduct statute partially replaces non-violent sexual touching forms of assault. The District's current assault offense, D.C. Code § 22-404, does not specifically refer to nonconsensual sexual touching. However the DCCA has held that a simple assault per D.C. Code § 22-404(a)(1) includes non-violent sexual touching,[10] and that such an assault is a lesser included offense of the current MSA statute.[11] DCCA case law also suggests that a simple assault in D.C. Code § 22-404(a)(1) also likely requires a culpable mental state of recklessness.[12] In contrast, in the RCC, second degree nonconsensual sexual conduct

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[9] The other current sexual abuse statutes grade offenses involving a "sexual act" more severely than offense involving a "sexual contact." *Compare* D.C. Code §§ 22-3002, 22-3003, 22-3008, 22-3009.01, 22-3013, 22-3015 (first degree sexual abuse offenses prohibiting a "sexual act") *with* §§ 22-3004, 22-3006, 22-3009, 22-3009.02, 22-3014, 22-3016 (second degree sexual abuse offenses prohibiting "sexual contact.").

[10] The District's current assault statute does not state the elements of the offense. D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both."). DCCA case law, however, recognizes that assault includes non-violent touching. "Where the assault involves a nonviolent sexual touching the court has held that there is an assault . . . because 'the sexual nature [of the conduct] suppl[ies] the element of violence or threat of violence.'" *Matter of A.B.*, 556 A.2d 645, 646 (D.C. 1989) (quoting *Goudy v. United States*, 495 A.2d 744, 746 (D.C.1985), *modified*, 505 A.2d 461 (D.C.), *cert. denied*, 479 U.S. 832, 107 S.Ct. 120, 93 L.Ed.2d 66 (1986)). The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)); *see also Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted).

[11] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act."). However, the sexual conduct at issue in *Mungo* was a "sexual contact." *Mungo*, 772 A.2d at 242. Consequently, the *Mungo* decision that non-consensual sexual touching forms of assault are a lesser included of MSA may only be *dicta* with respect to sexual acts, even though the DCCA's holding in *Mungo* did not differentiate between an MSA conviction based on a "sexual act" and an MSA conviction based on "sexual contact." *Id.* at 246 ("[W]e conclude that non-violent sexual touching assault is a lesser included offense" of MSA). Instead, the court was focused on the parts of the current definitions of "sexual act" and "sexual contact" that require an extra intent to gratify or arouse that simple assault does not. *Id.* ("When prosecuting MSA based on an alleged sexual contact or an alleged sexual act [based on subsection (C) of the current definition], the government must therefore prove an element of intent, i.e. the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[12] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667,

generally replaces the non-violent sexual touching form of assault, although, depending on the facts, a non-consensual sexual touching may satisfy the elements of more serious RCC sex offenses[13] or the comparatively less serious sexually suggestive conduct with a minor offense (RCC § 22E-1304).[14] The RCC offensive physical contact offense (RCC § 22E-1205) provides even more general liability for offensive touching (regardless whether there is a sexual intent).[15] The RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law.[16] This change reduces unnecessary overlap between offenses and improves the proportionality and consistency of the revised offense.

Third, the revised nonconsensual sexual conduct offense requires a culpable mental state of "recklessly" as to the fact that the actor lacked effective consent from the complainant. The current MSA statute requires that an actor "should have knowledge or reason to know that the act was committed without that other person's permission."[17] There is no case law describing the meaning of these mental state terms.[18] However,

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668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone.").

[13] For example, a non-consensual sexual touching of a person who is unconscious may constitute fourth degree sexual assault in the RCC.

[14] The RCC sexually suggestive conduct with a minor statute prohibits various types of sexual touching that do not satisfy the RCC definitions of "sexual act" or "sexual contact" and is limited to certain complainants under the age of 18 years.

[15] However, the general merger provision in RCC § 22E-214 would likely prohibit an actor from receiving a conviction for both offensive physical contact and nonconsensual sexual conduct based on the same course of conduct, which would be consistent with current case law on assault and MSA. *See, e.g.*, *Mattete v. United States*, 902 A.2d 113, 117-18 (D.C. 2006) (agreeing with appellant and the government that appellant's assault conviction merges into the conviction for MSA and remanding the case to the trial court for the purpose of vacating the assault conviction).

[16] *See, e.g.*, *Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020).

[17] D.C. Code § 22-3006.

[18] The current "should have knowledge or reason to know" language may suggest a culpable mental state akin to negligence. However, negligence is disfavored as a basis for criminal liability. *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand"). In addition, with respect to the similar phrase "knowing or having reason to believe" in the District's current receiving stolen property offense, D.C. Code § 22-3232, the DCCA held that the culpable mental state still required a subjective awareness by the defendant as to the offense element. *See Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge"). However, in *Coleman v. United States*, the DCCA recently held that in the District's stalking statute, a culpable mental state of "should have known" is an "objective standard" that allows for a stalking conviction "based on what an objectively reasonable person would have known." *Coleman v. United States*, 202 A.3d 1127, 1143, 1144 (D.C. 2019). In *Coleman*, the DCCA distinguished the *Owens* opinion as "merely reflect[ing] courts' longstanding reluctance to read a negligence standard into a criminal statute in the absence of a 'clear statement from the legislature.'" *Coleman*, 202 A.2d at 1143 (internal citations omitted). The DCCA stated that the "should

District case law[19] and District practice[20] have consistently construed the culpable mental state regarding the lack of permission in the current MSA statute as "know or should have known," without discussion of the discrepancy with the statutory language. In contrast, the RCC nonconsensual sexual conduct offense requires a "recklessly" culpable mental state as to the lack of effective consent. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[21] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[22] It would be disproportionate to allow a conviction, particularly a felony conviction that requires sex offender registry, on the basis of negligence. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the revised nonconsensual sexual conduct offense requires proof that the actor lacked "effective consent" and does not provide for a separate consent defense. The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission."[23] "Permission," unlike "consent,"[24] is undefined in the current sexual abuse statutes. DCCA case law has not specifically addressed the definition of "permission," although it has used the terms "permission" and "consent" interchangeably in discussing the MSA statute.[25] The current MSA statute, however, is

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have known" language in the current stalking statute represents "the type of clear legislative statement not present in *Owens*." *Id.* at 1143-1144.
It should be noted, however, that the current mental state language in the MSA statute does not fit neatly into either category of mental state discussed in *Owens* ("reason to believe") or *Coleman* ("should have known."). The current MSA statute requires "*should* have knowledge or reason to know that the act was committed without that other person's permission.

[19] *See, e.g., Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001) (stating that the "essential elements" of MSA are "(1) that the defendant committed a 'sexual act' or 'sexual contact' . . . and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact.") (citing the Criminal Jury Instructions for the District of Columbia, No. 460A (4th ed. 1993 & Supp. 1996)); *Harkins v. United States*, 810 A.2d 895, 900 (D.C. 2002) (stating that MSA "occurs when an individual 'engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission," citing the MSA statute, but also stating that "there are two essential elements to [MSA]: "'(1) that the defendant committed a 'sexual act' or 'sexual contact' . . . and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact." (quoting *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001)).

[20] D.C. Crim. Jur. Instr.§ 4.400 at 4-116 (jury instruction stating the culpable mental state in the MSA statute as "knew or should have known.")

[21] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[22] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[23] D.C. Code § 22-3006.

[24] D.C. Code § 22-3001(4) ("'Consent" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[25] *See, e.g., Davis v. United States*, 973 A.2d 1101, 1104, 1106 (D.C. 2005) (noting in dicta that "permission" is "not specifically defined in the [MSA] statute, but in common usage, the word is a synonym for 'consent'" and holding that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense."); *Hailstock v. United*

subject to the same consent defense applicable to other sexual abuse statutes.[26] In contrast, the nonconsensual sexual conduct offense requires proof of lack of "effective consent" and eliminates the consent defense for the MSA statute. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" appears to be consistent with the current definition of "consent" for sex abuse offenses.[27] Elimination of a separate consent defense to the RCC nonconsensual sexual conduct offense does not change the scope of the statute because if a complainant gives effective consent, that negates an element of the offense, and the actor is not guilty. The elimination of a consent defense, moreover, avoids unconstitutionally shifting the burden of proof for an element of the offense to the actor.[28] These changes improve the clarity, consistency and legality of the revised offense.

Fifth, only the general penalty enhancements in subtitle I of the RCC apply to the revised nonconsensual sexual conduct statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[29] In contrast, the revised nonconsensual sexual conduct statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[30] are not necessary in the revised nonconsensual sexual conduct statute because

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States, 85 A.3d 1277, 1280, 1281, (noting that "what was required to convict [the appellant] of the offense of attempted MSA was that he took the requisite overt steps at a time when he *should have known* that he did not have [the complainant's] consent for the acts he contemplated.") (emphasis in original).

[26] D.C. Code § 22-3007.

[27] D.C. Code § 22-3001(4), defining consent, requires that there be "words or overt actions indicating a *freely* given agreement" (emphasis added). There is no DCCA case law interpreting the "freely given" requirement in the current definition of "consent." However, the RCC definition of "effective consent" in RCC § 22E-701 appears to cover this requirement insofar as it requires consent that is obtained by means other than physical force, a coercive threat, or deception.

[28] *In re Winship*, 397 U.S. 358, 364 (1970) ("[The] Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). To the extent that "permission" in the current MSA statute is the same as "consent," (see commentary above) the current consent defense may unconstitutionally shift the burden of proof to the defendant.

[29] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[30] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised nonconsensual sexual conduct statute improves the consistency and proportionality of the revised sex offenses.

Sixth, to the extent that the protection of District public officials statute,[31] various offense-specific penalty enhancements,[32] and certain statutory minimum penalties[33] apply to the current assault statute and related assault offenses, the RCC second degree nonconsensual sexual conduct offense partially replaces them. These statutes are silent as to whether the provisions are intended to apply to low-level assaultive conduct and there is no DCCA case law on the issue. In contrast, in the RCC, non-violent sexual touching that is criminalized in the RCC nonconsensual sexual conduct statute no longer is subject to these provisions. This change improves the proportionality of the revised offense. For further discussion of how these enhancements and provisions apply to the District's current assault statutes, see the commentary to the revised assault statute (RCC § 22E-1202).

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

First, the revised nonconsensual sexual conduct statute consistently requires that the actor "engages in" a sexual act or sexual contact with the complainant or "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[34] This

[31] D.C. Code § 22-851.

[32] The enhancement for committing an offense while armed (D.C. Code § 22-4502); the enhancement for senior citizens (D.C. Code § 22-3601); the enhancement for citizen patrols (D.C. Code § 22-3602); the enhancement for minors (D.C. Code § 22-3611); the enhancement for taxicab drivers (D.C. Code §§ 22-3751; 22-3752); and the enhancement for transit operators and Metrorail station managers (D.C. Code §§ 22-3751.01; 22-3752).

[33] D.C. Code §§ 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[34] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[35] In addition to case law, District practice does not appear to follow the variations in statutory language.[36] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the revised nonconsensual sexual conduct offense requires a culpable mental state of "knowingly" as to engaging in the sexual act or contact. The current MSA statute does not specify any culpable mental state for engaging in a sexual act or sexual contact, although the current statutory definition of "sexual contact" requires an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[37] The DCCA has characterized the current first degree and third degree sexual

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[35] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[36] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

[37] D.C. Code § 22-3001(9) (defining "sexual contact."). Despite this additional intent element the definition of "sexual contact" requires, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted "with intent to abuse, humiliate, harass, degrade, or arouse or gratify." *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual

abuse statutes, which concern a "sexual act," as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness.[38] In addition, the current assault statute,[39] which has been interpreted by the DCCA to include liability for nonconsensual sexual touching,[40] likely requires a culpable mental state of recklessness.[41] Resolving this ambiguity, the revised nonconsensual sexual conduct statute requires a "knowingly" culpable mental state in each gradation for causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[42] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[43] This change improves the clarity and consistency of the revised statutes.

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desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[38] See commentary to RCC § 22E-1301, Sexual assault, for further discussion.

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

[40] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act.").

[41] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[42] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[43] *In re E.H.* is a child sexual abuse case, but the court's reasoning regarding the relationship between "sexual act" and "sexual contact" may be instructive for the general sexual abuse statutes. In *In re E.H.*, the appellant was convicted of first degree child sexual abuse, but the court reversed the conviction due to insufficient evidence. *In re E.H.*, 967 A.2d 1270, 1271, 1275 (D.C. 2009). The court declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but did note that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree)." *Id.* at 1276 n. 9. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of

Third, notwithstanding the requirement for liability that the defendant lack "effective consent," subsection (c) of the RCC nonconsensual sexual conduct statute excludes from liability the use of deception to induce the sexual conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." As is discussed earlier in this commentary, the RCC definition of "effective consent" appears to be consistent with the current definition of "consent" for sex offenses,[44] which requires that the agreement be "freely given." However, there is no DCCA case law interpreting the current definition of "consent" for the sex offense statutes and it is not clear whether deception, or what kind of deception, prevents consent from being "freely given." Resolving this ambiguity, the RCC excludes from liability deception as to the inducement of the sexual act or sexual contact. The use of deception to induce the sexual act or sexual contact is not of the same gravity as deception as to the nature of the sexual conduct. Criminalizing sexual conduct by deception is largely disfavored in current American criminal law,[45] with the exceptions of falsely represented medical procedures and impersonation of a woman's husband.[46] This exclusion from liability is discussed further in the explanatory note to this offense. This change improves the consistency and proportionality of the revised statute.

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

The revised nonconsensual sexual conduct statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[47] Under the statute, if the maximum term of imprisonment for the underlying

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the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

[44] The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission." "Permission," unlike "consent," is undefined in the current sexual abuse statutes, but, as is discussed elsewhere in this commentary, DCCA case law has used the terms "permission" and "consent" interchangeably in discussing the MSA statute.

[45] *See, e.g.,* Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1372, (2013) (stating that "[r]ape-by-deception" is almost universally rejected in American criminal law.").

[46] *See, e.g.,* Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1397 (2013) (noting that "sex falsely represented as a medical procedure, and impersonation of a woman's husband--have been for over a hundred years the only generally recognized situations in which Anglo-American courts convict for rape-by-deception.") (citing Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 119 (1998).

[47] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

offense is life, an attempt has a maximum term of imprisonment of 15 years.[48] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[49] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[50] In the revised nonconsensual sexual conduct statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised nonconsensual sexual conduct offense.

[48] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[49] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[50] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current MSA statute would have a maximum term of imprisonment of 180 days, which is the same as the current penalty for the completed offense. D.C. Code § 22-3010.01.

RCC § 22E-1308. Incest.

Explanatory Note. *This section establishes the incest offense and penalty for the Revised Criminal Code (RCC). The offense prohibits knowingly engaging in a sexual act or a sexual contact with a specified family member when the consent of that family member is obtained by undue influence. The offense has two gradations that are based on the nature of the sexual conduct. The incest offense replaces the incest offense[1] in the current D.C. Code.*

Subsection (a) establishes the requirements for first degree incest, the most serious gradation of the offense. First, per paragraph (a)(1), the actor must, "in fact," be at least 16 years of age. "In fact," a defined term in RCC § 22E-207, is used here to indicate that there is no culpable mental state requirement as to the age of the actor.

Paragraph (a)(2) specifies the prohibited conduct for first degree incest — engaging in a "sexual act" with another person. "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. Paragraph (a)(2) specifies that the required culpable mental state for this conduct is "knowingly." "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that he or she engages in a "sexual act" with another person. "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts.

Subparagraph (a)(2)(A), sub-subparagraphs (a)(2)(A)(i) and (a)(2)(A)(ii), and subparagraph (a)(2)(B) specify the family members that are included in the scope of the revised incest statute. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (a)(2) applies to subparagraph (a)(2)(A), sub-subparagraphs (a)(2)(A)(i) and (a)(2)(A)(ii), and subparagraph (a)(2)(B). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that the other person is a family member in one of the specified relationships—for example, a parent related by blood or adoption.

Paragraph (a)(3) specifies the final requirement for first degree of the revised incest statute. The actor must obtain the consent of the other person by undue influence. "Consent" is a defined term in RCC § 22E-701 that requires some indication (by word or action) of agreement given by a person generally competent to do so. "Undue influence" is defined in RCC § 22E-701 as "mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes that person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being." Whether the coercion causes a person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being is a fact-specific determination. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (a)(2) applies to the requirements in paragraph (a)(3). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that the consent of the other person is obtained by "undue influence," as that term is defined in RCC § 22E-701.

Subsection (b) specifies the prohibited conduct for second degree of the revised incest statute. The requirements for second degree incest are the same as the

[1] D.C. Code § 22-1901.

requirements under subsection (a), the only difference being that second degree incest requires a "sexual contact" as opposed to a "sexual act." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person.

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

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

Relation to Current District Law. *The revised incest statute clearly changes current District law in eleven main ways.*

First, the revised incest statute no longer prohibits marriage or cohabitation. The current D.C. Code incest statute states that no person "shall marry or cohabit with" specified family members.[2] The statute does not define "marry" or "cohabit" and there is no DCCA case law on the issue. In contrast, the revised incest statute is limited to engaging in a "sexual act" or a "sexual contact" as those terms are defined in RCC § 22E-701, and does not prohibit marriage or cohabitation. Marriage between several of the specified individuals may be precluded under District or other jurisdictions' civil law. Cohabitation with a relative, absent engaging in a sexual act or sexual contact with consent obtained by undue influence, is decriminalized. This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised incest statute includes adoptive parents, grandparents, and great-grandparents, and adopted children, grandchildren, and great-grandchildren. The current D.C. Code incest statute[3] includes these relationships by blood, but not by adoption. In contrast, the revised incest statute includes adoptive parents, grandparents, and great-grandparents, and adopted children, grandchildren, and great-grandchildren, when consent is obtained by undue influence. Including these adoptive relationships in incest is consistent with the scope of several current D.C. Code[4] sex offenses and the

[2] D.C. Code § 22-1901.

[3] The current incest statute prohibits relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

[4] Current District law includes adoptive parents and adoptive grandparents in the definition of "significant relationship." D.C. Code § 22-3001(10) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). Whether a defendant is in a "significant relationship" with a minor complainant determines liability for several of the current D.C. Code sex offenses, such as sexual abuse of a minor. D.C. Code §§ 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). However, if the adoptive parent or grandparent satisfies the age requirements of the current sexual abuse of a child statutes, then the fact that there is a "significant relationship" is irrelevant to liability. D.C. Code §§ 22-3008 and 22-3009 (first degree and second degree sexual abuse of a child), 22-3001(3) (defining a "child" as a "person who has not yet attained the age of 16 years.").

RCC definition of "position of trust with or authority over,"[5] and recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Third, the revised incest statute includes specified relationships by marriage or domestic partnership, both during the marriage or domestic partnership and after the marriage or domestic partnership ends. The current D.C. Code incest statute[6] includes several of these relationships by blood, but not by marriage or domestic partnership. In contrast, the revised incest statute includes these relationships by marriage or domestic partnership, both during the marriage or domestic partnership and after the marriage or domestic partnership ends, when consent is obtained by undue influence. Including these relationships by marriage or domestic partnership in incest is consistent with the scope of several current D.C. Code[7] sex offenses and the RCC definition of "position of trust with or authority over,"[8] and recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Fourth, the revised incest statute includes siblings by adoption. The current D.C. Code incest statute[9] includes siblings related by blood, but not by adoption. In contrast, the revised incest statute prohibits sexual activity between adopted siblings, when consent is obtained by undue influence. Including siblings by adoption in incest is consistent

[5] RCC § 22E-701 defines "position of trust with or authority over" to include "A parent, grandparent, great-grandparent . . . whether related by: (i) Blood or adoption; or (ii) Marriage, domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends."

[6] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

[7] Current District law defines "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by . . . marriage [or] domestic partnership. . .". D.C. Code § 22-3001(10). Whether a defendant is in a "significant relationship" with a minor complainant determines liability for several of the current D.C. Code sex offenses, such as sexual abuse of a minor. D.C. Code §§ 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). However, if the adoptive parent or grandparent satisfies the age requirements of the current sexual abuse of a child statutes, then the fact that there is a "significant relationship" is irrelevant to liability. D.C. Code §§ 22-3008 and 22-3009 (first degree and second degree sexual abuse of a child), 22-3001(3) (defining a "child" as a "person who has not yet attained the age of 16 years.").

[8] RCC § 22E-701 defines "position of trust with or authority over" to include "A parent, grandparent, great-grandparent, sibling, parent's sibling, or a child of a parent's sibling, or an individual with whom such a person is in a romantic, dating, or sexual relationship; whether related by: (i) Blood or adoption; or (ii) Marriage, domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends."

[9] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

with the scope of several current D.C. Code[10] sex offenses and the RCC definition of "position of trust with or authority over,"[11] and recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Fifth, the revised incest statute includes a "parent's sibling," whether related by blood, adoption, marriage, or domestic partnership. The current D.C. Code incest statute[12] includes a parent's sibling related by blood, but not by adoption, marriage, or domestic partnership. In contrast, the revised incest statute includes a parent's sibling, whether related by blood, adoption, marriage, or domestic partnership, when consent is obtained by undue influence. Including these relationships in incest is consistent with the scope of several current D.C. Code[13] sex offenses and the RCC definition of "position of trust with or authority over,"[14] and recognizes their importance to the family unit. This

[10] Current District law includes adoptive siblings in the definition of "significant relationship." D.C. Code § 22-3001(10) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). Whether a defendant is in a "significant relationship" with a minor complainant determines liability for several of the current D.C. Code sex offenses, such as sexual abuse of a minor. D.C. Code §§ 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). However, if the adoptive parent or grandparent satisfies the age requirements of the current sexual abuse of a child statutes, then the fact that there is a "significant relationship" is irrelevant to liability. D.C. Code §§ 22-3008 and 22-3009 (first degree and second degree sexual abuse of a child), 22-3001(3) (defining a "child" as a "person who has not yet attained the age of 16 years.").

[11] RCC § 22E-701 defines "position of trust with or authority over" to include "A parent, grandparent, great-grandparent, sibling, parent's sibling, or a child of a parent's sibling, or an individual with whom such a person is in a romantic, dating, or sexual relationship; whether related by: (i) Blood or adoption; or (ii) Marriage, domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends."

[12] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

[13] Current District law includes a parent's sibling (aunt or uncle) whether related by blood, adoption, marriage, or domestic partnership in the definition of "significant relationship." D.C. Code § 22-3001(10) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). Whether a defendant is in a "significant relationship" with a minor complainant determines liability for several of the current D.C. Code sex offenses, such as sexual abuse of a minor. D.C. Code §§ 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). However, if the adoptive parent or grandparent satisfies the age requirements of the current sexual abuse of a child statutes, then the fact that there is a "significant relationship" is irrelevant to liability. D.C. Code §§ 22-3008 and 22-3009 (first degree and second degree sexual abuse of a child), 22-3001(3) (defining a "child" as a "person who has not yet attained the age of 16 years.").

[14] RCC § 22E-701 defines "position of trust with or authority over" to include "A parent, grandparent, great-grandparent, sibling, parent's sibling, or a child of a parent's sibling, or an individual with whom such a person is in a romantic, dating, or sexual relationship; whether related by: (i) Blood or adoption; or (ii) Marriage, domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends."

change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Sixth, the revised incest statute includes a "sibling's child," whether related by blood, adoption, marriage, or domestic partnership. The current D.C. Code incest statute[15] includes a sibling's child related by blood, but not by adoption, marriage, or domestic partnership. In contrast, the revised incest statute includes a sibling's child, whether related by blood, adoption, marriage, or domestic partnership, when consent is obtained by undue influence. Including these relationships in incest recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Seventh, the revised incest statute includes first cousins (child of a parent's sibling), whether related by blood, adoption, marriage, or domestic partnership. The current D.C. Code incest statute does not include first cousins because first cousins are within the fourth degree of consanguinity.[16] In contrast, the revised incest statute includes a first cousin, whether related by blood, adoption, marriage, or domestic partnership, when consent is obtained by undue influence. Including these relationships in incest is consistent with the RCC definition of "position of trust with or authority over,"[17] and recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Eighth, the revised incest statute requires that the actor obtains the consent of the specified relative "by undue influence," as defined in RCC § 22E-701,[18] and applies a "knowingly" culpable mental state to this element. The current D.C. Code incest statute does not have any such element[19] and criminalizes consensual sexual activity between specified relatives due to the familial relationship. In contrast, the revised incest statute requires that the actor obtains the consent of the specified relative "by undue influence," as defined in RCC § 22E-701, and applies a "knowingly" culpable mental state to this element. These requirements, in conjunction with the requirement that the defendant in an incest case be at least 16 years old, ensure that the revised incest statute does not

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[15] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

[16] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

[17] RCC § 22E-701 defines "position of trust with or authority over" to include "A parent, grandparent, great-grandparent, sibling, parent's sibling, or a child of a parent's sibling, or an individual with whom such a person is in a romantic, dating, or sexual relationship; whether related by: (i) Blood or adoption; or (ii) Marriage, domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends."

[18] RCC § 22E-701 defines "undue influence" as "mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes that person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being."

[19] D.C. Code § 22-1901.

criminalize consensual sexual activity between adults or minors that are close in age. When the defendant in an incest case is at least four years older than a specified relative that is a minor, there will be liability under the RCC sexual abuse of a minor statute, with higher penalties, regardless of whether there was apparent consent.[20] This change improves the clarity, consistency, and proportionality of the revised statutes. The commentary to this offense has been updated to reflect that this is a change in law.

Ninth, the revised incest statute codifies two degrees of incest, based on whether there is a "sexual act" or "sexual contact." The current D.C. Code incest statute is limited to one degree.[21] In contrast, the revised incest statute has two degrees—first degree requires a "sexual act" and second degree incest requires a "sexual contact." This is consistent with RCC sex offenses that differentiate gradations based on whether there is a "sexual act" or "sexual contact." This change improves the clarity, consistency, and proportionality of the revised statutes.

Tenth, the revised incest statute requires that the actor be at least 16 years of age and, by use of the phrase "in fact," requires strict liability for this element. The current D.C. Code incest statute, D.C. Code § 22-1901, does not address whether an actor must be a certain age and there is no DCCA case law on this issue. However, absent an age requirement for the actor, the current D.C. Code incest statute includes a person under the age of 16 years who engages in sexual activity with an older family member, as well as a person under 16 years of age who engages in consensual sexual activity with a younger family member that is close in age. This differs from current D.C. Code sexual abuse statutes and the RCC which criminalize otherwise consensual sexual acts between persons under the age of 16 only when the actor is at least four years older than the complainant.[22] In contrast, the revised incest statute requires that the actor be at least 16 years of age and applies strict liability to this element.[23] This change clearly and categorically removes criminal liability for incest for persons under 16 years of age, although there may still be liability under the RCC sexual assault statute (RCC § 22E-

[20] If the specified relative is under the age of 16 years, a defendant that is at least 16 years of age and at least four years older will have liability for first degree, second degree, fourth degree, or fifth degree of the RCC sexual abuse of a minor statute (RCC § 22E-1302). If the specified relative is at least 16 years of age, but under 18 years of age, and the defendant is at least 18 years of age and at least 4 years older, there will be liability under third degree or sixth degree of the RCC sexual abuse of a minor statute (RCC § 22E-1302). Third degree and sixth degree of the RCC sexual abuse of a minor statute require that the defendant know that the defendant is in a "position of trust with or authority over" the complainant, and the specified relatives in that definition overlap with the relatives included in the RCC incest statute.

[21] D.C. Code § 22-1901.

[22] The current D.C. Code child sexual abuse statute requires that the complainant be under the age of 16 years and that the defendant be at least four years older. D.C. Code §§ 22-3008 and 22-3009; 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). First degree, second degree, fourth degree, and fifth degree of the RCC sexual abuse of a minor statute have the same requirements. RCC § 22E-1302.

[23] It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct. *See Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464)."). Strict liability for the age of the actor also is consistent with several of the RCC sex offenses.

1301) or the RCC sexual abuse of a minor statute (RCC § 22E-1302). This change improves the clarity, consistency, and proportionality of the revised statute.

Eleventh, the revised incest statute is subject to the RCC duty to report a sex crime and the related civil infraction and civil provisions (RCC § 22E-1309), and the RCC evidentiary provisions for RCC sex offenses (RCC § 22E-1310). The current D.C. Code incest statute is codified in D.C. Code § 22-1901. As a result, it is not subject to the current D.C. Code equivalents of these provisions.[24] In contrast, the revised incest statute is subject to the RCC duty to report a sex crime and the related civil infraction and civil provisions (RCC § 22E-1309), and the RCC admission of evidence in sexual assault and related cases statute (RCC § 22E-1310). Given the overlap between the current D.C. Code sexual abuse statutes and the RCC sexual abuse statutes discussed elsewhere in this commentary, it is inconsistent for the duty to report and related civil provisions and sex offense evidentiary provisions to not apply to incest. This change improves the clarity and consistency of the revised statute.

Beyond these eleven substantive changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised incest statute requires a "knowingly" culpable mental state for engaging in the sexual act or sexual contact. The current D.C. Code incest statute requires that the defendant know that he or she is related to the other person within one of the specified degrees of consanguinity,[25] but does not specify any culpable mental state for marrying, cohabiting, or engaging in sexual intercourse. There is no DCCA case law regarding the required mental state, if any, for this conduct. Resolving these ambiguities, the revised incest statute requires a "knowingly" culpable mental state for engaging in a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[26] Requiring a "knowingly" culpable mental state is also consistent with the RCC sex offenses, which require that the defendant "knowingly" engage in the prohibited conduct. This change improves the clarity and consistency of the revised statutes.

Second, the revised incest statute prohibits engaging in a "sexual act" or "sexual contact," as those terms are defined in RCC § 22E-701. The current incest statute, D.C. Code § 22-1901, prohibits "sexual intercourse," but does not define the term. However, DCCA case law states that incest "involves the same bodily invasion, *i.e.* sexual intercourse, as that of rape,"[27] and some District case law appears to limit "sexual

[24] Incest is not included in the current D.C. Code duty to report a sex crime statute and failing to report incest is not included in the related civil infraction. D.C. Code §§ 22-3020.51(4) (defining "sexual abuse" for the purposes of the duty to report a sex crime and related statutes as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102."). Similarly, incest is not included in the current D.C. Code evidence provisions for the current D.C. Code sexual abuse offenses in Chapter 30 of Title 22. *See* D.C. Code §§ 22-3021 through 22-3024.

[25] D.C. Code § 22-1901 ("knowing him or her to be within said degree of relationship.").

[26] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[27] *Robinson v. United States*, 452 A.2d 354, 359 (D.C. 1982); *Pounds v. United States*, 529 A.2d 791, 797 (D.C. 1987) (citing *Robinson v. United States*, 452 A.2d 354, 359 (D.C. 1982)).

intercourse" in that context to penile penetration of the vagina.[28] In 1995, the District's sexual assault laws were significantly amended to specifically prohibit means of sexual penetration besides penile penetration of the vagina,[29] but the incest statute was not revised. Resolving this ambiguity, through the definitions of "sexual act" and "sexual contact" in RCC § 22E-701, the revised incest statute prohibits additional forms of sexual penetration other than penile penetration of the vagina and sexual touching. Prohibiting a "sexual act" or "sexual contact" is also consistent with the scope of other RCC sex offenses. This change improves the clarity, consistency, and proportionality of the revised statute.

Third, the revised incest statute specifies that half-siblings by blood are included. The current incest statute, D.C. Code § 22-1901, prohibits marriage, cohabitation, or sexual intercourse with a person related "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." The statute does not specify whether a half-sibling is included, and there is no DCCA case law on this issue. Resolving this ambiguity, the revised incest statute specifies that half-siblings are included. Including half-siblings in incest is consistent with the RCC definition of "position of trust with or authority over,"[30] and recognizes their importance to the family unit. This change improves the clarity and consistency of the revised statutes, and removes a possible gap in current law.

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

First, the revised incest statute replaces the language "related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law" in the current statute with the specific relatives related by blood.[31] This change improves the clarity of the revised statute without changing current District law.

Second, the revised incest statute no longer specifies that the actor must be "in the District." The language is surplusage, particularly since the revised statute is limited to sexual intercourse, and no longer prohibits marriage. Deleting it does not change the scope of the offense.

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[28] *United States v. Bryant*, 420 F.2d 1327, 1334 (D.C. Cir. 1969) ("In a rape case the prosecution must establish the fact of sexual intercourse (that is, penetration of the female sexual organ by the sexual organ of the male) . . . .").

[29] Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385) (1995).

[30] RCC § 22E-701 defines "position of trust with or authority over" to include "A half-sibling related by blood, or an individual with whom such a person is in a romantic, dating, or sexual relationship."

[31] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

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

Explanatory Note. *The RCC Civil Provisions on the Duty to Report a Sex Crime statute establishes a duty for persons 18 years of age or older to report known or suspected specified sex crimes involving persons under 16 years of age. The revised statute establishes several exclusions from the duty to report, as well as immunity from liability and employment discrimination for good-faith reports made pursuant to this statute. The revised statute establishes a civil violation for failing to report a sex crime as required. The civil violation has a single penalty gradation. The revised statute replaces five distinct provisions in the current D.C. Code: the child sexual abuse reporting requirements and privileges statute,[1] the defense to non-reporting statute,[2] the penalties for failing to report statute,[3] immunity from liability for good-faith reporting statute,[4] and definitions for these provisions.[5]*

Subsection (a) of the revised statute establishes the duty to report specified sex crimes. To be subject to the duty to report, a person must "in fact" be at least 18 years of age. "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element, here the required age for a person to be subject to the duty to report. Subsection (a) further requires that, in order to be subject to the duty to report the person "in fact . . . is aware of a substantial risk that a person under 16 years of age is being subjected to, or has been subjected to, a predicate crime." Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in subsection (a) applies to these requirements and no culpable mental state, as defined in RCC § 22E-205 applies to them. However, to be subject to the duty to report, a person must be aware of a substantial risk both that the other person is under 16 years of age and that this person is being subjected to, or has been subjected to, a predicate crime. Subparagraph (i)(2)(B) defines the term "predicate crime" for the revised statute.

If a person is, in fact, at least 18 years of age and is aware of a substantial risk that a person under 16 years of age is being subjected to, or has been subjected to, a predicate crime, subsection (a) requires that person shall "shall immediately report such information or belief in a call to 911, a report to the Child and Family Services Agency, or a report to the Metropolitan Police Department." Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in subsection (a) applies to the required ways of reporting information or belief of a suspected predicate crime, and no culpable mental state applies.

Subsection (b) establishes several exclusions to the duty to report a predicate crime established in subsection (a). Paragraph (b)(1) specifies "in fact," a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (b)(1) applies to the requirements of all the exclusions from the

[1] D.C. Code § 22-3020.52.
[2] D.C. Code § 22-3020.53.
[3] D.C. Code § 22-3020.54.
[4] D.C. Code § 22-3020.55.
[5] D.C. Code § 22-3020.51.

duty to report specified in the subparagraphs and sub-subparagraphs under paragraph (b)(1).

The first exclusion from the duty to report is in subparagraph (b)(1)(A)—a person that is subjected to a predicate crime by the same person alleged to have committed a predicate crime against the person under 16 years of age. The second exclusion from the duty to report is in subparagraph (b)(1)(B)—a lawyer or a person employed by a lawyer if certain requirements are met. The third exclusion to the duty to report is in subparagraph (b)(1)(C)—a "religious leader described in D.C. Code § 14-309, when the information or basis for the belief is the result of a confession or penitential communication made by a penitent directly to the minister" and satisfies the requirements in sub-subparagraphs (b)(1)(C)(i) through (b)(1)(C)(iv). A "religious leader described in D.C. Code § 14-309" is a priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science, regardless of whether the religious leader hears confessions or receives other communications. The final exclusion to the duty to report is in subparagraph (b)(1)(D)—"a sexual assault counselor, when the information or basis for the belief is disclosed in a confidential communication" unless the sexual assault counselor is "aware of a substantial risk" of specified situations in sub-subparagraphs (b)(1)(D)(i) through (b)(1)(D)(iii),[6] such as the sexual assault victim is under 13 years of age. "Sexual assault counselor" and "confidential communication" are defined terms in subsection (i).

Paragraph (b)(2) states that no legal privilege, other than those established in subsection (b), applies to the duty to report established in subsection (a).

Subsection (c) establishes that RCC § 22E-1309 does not alter the mandatory reporting requirements for certain individuals, such as teachers, that are required in D.C. Code § 4-1321.02(b).

Subsection (d) establishes the requirements for the civil violation. First, per paragraph (d)(1), the person must, "in fact," be at least 18 years of age. "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element, here the required age of the person committing the civil violation. Paragraph (a)(2) requires that the person "knows" that he or she has a duty to report the predicate crime involving a person under 16 years of age as required by subsection (a). "Knows" is a defined term in RCC § 22E-206 that here means the person must be practically certain that he or she has a duty to report a predicate crime as required by subsection (a). Paragraph (a)(3) requires that the person fails to carry out the duty required in subsection (a). Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state specified in paragraph (d)(2) applies to the elements in paragraph (d)(3) and the person must be practically certain that he or she fails to carry out the duty specified in subsection (a).

[6] Per the rules of interpretation in in RCC § 22E-207, the "in fact" specified in paragraph (b)(1) applies to all the requirements of the exclusion in subparagraph (b)(1)(D) and sub-subparagraphs (b)(1)(D)(i) through (b)(1)(D)(i)(iii), and no culpable mental state, as defined in RCC § 22E-205, applies to them. However, a sexual assault counselor must be "aware of a substantial risk" that the specified situations in sub-subparagraphs (b)(1)(D)(i) through (b)(1)(D)(i)(iii) exist, such as the sexual assault victim is under 13 years of age.

Subsection (e) establishes a defense to the civil violation. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all defenses in the RCC. The defense applies if the person, "in fact," reasonably believes that they are a survivor of either intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9). Subsection (e) specifies "in fact," a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Although no culpable mental state, as defined in RCC § 22E-205, applies to the defense, the actor must subjectively believe, and that belief must be reasonable, that they are a survivor of either intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9). Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[7] There is no defense when the person makes an unreasonable mistake that they are a survivor of either intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9).

Subsection (f) establishes the penalty for the civil violation. Paragraph (f)(1) establishes that the penalty for the civil violation is a civil fine of $300. Paragraph (f)(2) establishes that a civil violation under subsection (d) "shall not" constitute a criminal offense or a delinquent act as defined in D.C. Official Code § 16-2301(7).

Subsection (g) establishes that the Office of Administrative Hearings has jurisdiction to adjudicate civil infractions under this statute, pursuant to D.C. Code § 2-1831.03(b-6).

Subsection (h) establishes immunity for persons who make good-faith reports pursuant to this statute. In particular, paragraph (h)(1) is specific to immunity from civil or criminal liability with respect to making the report or any participation in any judicial proceeding involving the report. In all relevant civil or criminal proceedings, paragraph (h)(1) establishes that good faith shall be presumed unless rebutted. Paragraph (h)(2) states that in the event of employment discrimination due to a good-faith report made pursuant to this statute, a person may commence a civil action for appropriate relief and the Superior Court for the District of Columbia may grant appropriate relief. Paragraph (h)(2) also states that the District may intervene in any action commenced under paragraph (h)(2).

Subsection (i) cross-references applicable definitions located elsewhere in the RCC and D.C. Code.

Relation to Current District Law. *The revised civil provisions on the duty to report a sex crime statute clearly changes current District law in five main ways.*

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[7] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

First, the revised duty to report statute includes incest as a predicate crime. The current D.C. Code duty to report statute applies to a violation of the sexual abuse offenses in Chapter 30 of Title 22 of the D.C. Code.[8] The current D.C. Code incest statute is codified at D.C. Code § 22-1901 and is not included in the current D.C. Code duty to report statute. In contrast, the revised duty to report statute includes any RCC sex offense in RCC Chapter 13 as a predicate crime, which includes incest (RCC § 22E-1308). This change improves clarity and consistency of the revised duty to report statute and removes a possible gap in liability.

Second, the revised duty to report statute includes several human trafficking statutes as predicate crimes. The current D.C. Code duty to report statute applies to a violation of D.C. Code § 22-1834 (sex trafficking of children),[9] but does not include any other human trafficking offenses. In contrast, the revised duty to report statute includes the RCC statute that is equivalent to D.C. Code § 22-1834 (§ 22E-1605; sex trafficking of a minor or adult incapable of consenting), as well as three additional RCC trafficking statutes: 1) forced commercial sex (RCC § 22E-1602); 2) trafficking in forced commercial sex (RCC § 22E-1604); and 3) commercial sex with a trafficked person (RCC § 22E-1608). These human trafficking crimes generally do not require the complainant to be a minor, but could apply when the complainant is a minor, and should be included as predicate crimes in the duty to report a known or suspected sex crime. This change improves clarity and consistency of the revised duty to report statute and removes a possible gap in liability.

Third, the revised statute includes the RCC trafficking in commercial sex statute (RCC § 22E-4403) as a predicate crime, which broadly prohibits causing an individual to engage in consensual commercial sex acts. The current D.C. Code duty to report statute only includes one prostitution-related offense as a predicate crime—D.C. Code § 22-2704, abducting or enticing a child from his or her home for the purposes of prostitution. However, prostitution may fall under one of the other predicate crimes included in the current D.C. Code duty to report statute: 1) D.C. Code § 22-1834, sex trafficking of children; or 2) a sexual abuse offense in Chapter 30 of Title 22.[10] In contrast, the revised duty to report statute specifically includes the RCC trafficking in commercial sex statute (RCC § 22E-4403). This offense broadly prohibits causing an individual to engage in consensual commercial sex acts and should be included in the list of predicate offenses for a duty to report when the complainant is under the age of 16 years. This change improves clarity and consistency of the revised duty to report statute and removes a possible gap in liability.

Fourth, the revised statute no longer includes abduction for the purposes of prostitution as a predicate offense. The current D.C. Code duty to report statute applies to a violation of D.C. Code § 22-2704, abducting or enticing a child from his or her home

[8] D.C. Code § 22-3020.51(4) (defining "sexual abuse" as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").
[9] D.C. Code § 22-3020.51(4) (defining "sexual abuse" as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").
[10] D.C. Code § 22-3020.51(4) (defining "sexual abuse" as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").

for the purposes of prostitution.[11] In contrast, the revised duty to report statute no longer includes abduction for the purposes of prostitution as a predicate offense. To the extent that abducting or enticing a minor for purposes of prostitution satisfies the other offenses included in the definition of "predicate crime" under subparagraph (i)(2)(B), such as the RCC trafficking in commercial sex statute (RCC § 22E-4403), the RCC duty to report statute still applies. However, for conduct that falls outside these offenses, the RCC duty to report statute does not apply. This change improves the consistency of the revised statute.

Fifth, the predicate crimes that give rise to the duty to report in the revised statute differ as compared to current law. The current D.C. Code duty to report statute applies to a violation of: 1) D.C. Code § 22-1834 (sex trafficking of children); 2) D.C. Code § 22-2704 (abducting or enticing a child from his or her home for the purposes of prostitution; harboring such child); 3) Chapter 30 of Title 22 of the D.C. Code (sexual abuse offenses); and 4) D.C. Code § 22-3102 (sexual performance using minors).[12] These offenses have been revised and the scope of the RCC offenses may differ as compared to current law. For example, the RCC obscenity offenses included as predicate crimes in the revised duty to report statute (Creating or Trafficking an Obscene Image of a Minor under RCC § 22E-1807, Possession of an Obscene Image of a Minor under RCC § 22E-1808, Arranging a Live Sexual Performance of a Minor under RCC § 22E-1809, or Attending or Viewing a Live Sexual Performance of a Minor under RCC § 22E-1810) include a wider scope of prohibited images as compared to the current D.C. Code sexual performance using a minors statute (D.C. Code § 22-3102). The RCC commentaries to the revised offenses discuss the difference with the current D.C. Code statutes in detail.

Beyond these five changes to current District law, nine other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised duty to report statute requires that a person 18 years of age or older is "aware of a substantial risk" that a person under 16 years of age is being, or has been subjected to, specified sex crimes. The current D.C. Code reporting statute requires such a person "knows" or "has reasonable cause to believe."[13] There is no DCCA case law interpreting these terms in the current statute. Resolving these ambiguities, the revised duty to report statute requires the person is "aware of a substantial risk." This language requires that the person have subjective awareness of a substantial risk, as opposed to negligence—that the person merely should have known that there was a substantial risk of abuse. An objective (negligence) standard that applies even when a person had no subjective awareness of misconduct would be inconsistent with the Council's stated intent to encourage persons to report behavior.[14] This change improves the clarity and completeness of the revised statute.

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[11] D.C. Code § 22-3020.51(4) (defining "sexual abuse" to include "any act that is a violation of . . . (B) Section 22-2704.").

[12] D.C. Code § 22-3020.51(4) (defining "sexual abuse" as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").

[13] D.C. Code § 22-3020.52(a).

[14] *See, e.g.*, Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 6 ("Requiring everyone to report simplifies the reporting requirement,

Second, the revised duty to report statute applies to situations where a person is aware of a substantial risk that a person under 16 years of age "is being," currently, or "has been subjected to," in the past, specified sexual crimes. The current D.C. Code reporting statute applies to a child that "is a victim" of specified sexual crimes. "Victim" is defined for the current D.C. Code reporting statute and all of Chapter 30 of Title 22 of the D.C. Code as "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter [Chapter 30].[15] However, as applied in the reporting statute, this definition of "victim" conflicts with the definition of "sexual abuse," which includes sex crimes that are not in Chapter 30 of Title 22 of the D.C. Code.[16] Moreover, it is unclear whether the current D.C. Code reporting statute includes both current and past instances of known or suspected sexual abuse, or if it is limited to current instances. There is no DCCA case law interpreting the scope of the current statute and the legislative history is ambiguous.[17] Resolving this ambiguity, the revised duty to report statute applies to a child under 16 years of age that is being, or has been subjected to, a predicate crime. This requirement is consistent with the scope of the mandatory reporters statute in current D.C. Code § 4-1321.02.[18] This change improves the clarity, completeness, and consistency of the revised statute.

Third, the revised duty to report statute replaces the reference to a "priest, clergyman, rabbi, or other duly appointed, licensed, ordained, or consecrated minister of a given religion in the District of Columbia, or a duly accredited practitioner of Christian Science in the District of Columbia"[19] in the current D.C. Code duty to report statute with "a religious leader described in D.C. Code § 14-309." The language in the current D.C.

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eliminates the need to analyze whether one is a mandatory reporter, and may overcome the reluctance of many . . . to get involved.").

[15] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter." D.C. Code § 22-3001(11). The current reporting statute is codified in D.C. Code § 22-3020.52 and is included in Chapter 30. The definition of "victim" in D.C. Code § 22-3001(11) applies to the current reporting statute.

[16] *See* D.C. Code §§ 22-3020.51(4) (defining "sexual abuse" to include D.C. Code § 22-1834, § 22-2704, and § 22-3102, as well as all offenses in Chapter 30 of Title 22); 22-3020.52(a) ("Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report…").

[17] The Committee Report for the current reporting statute frequently refers to a child that "is a victim of sexual abuse," which raises the same ambiguity that is in the statute. *See, e.g.*, Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 1, 6. There are at least two references to "is being sexually abused," which may indicate a legislative intent to limit the reporting statute to current sexual abuse. Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 4, 13. However, there is no discussion in the legislative history regarding the required time frame or the meaning of the term "victim."

[18] D.C. Code § 4-1321.02(a) ("Notwithstanding § 14-307, any person specified in subsection (b) of this section who knows or has reasonable cause to suspect that a child known to him or her in his or her professional or official capacity *has been or is in immediate danger of* being a mentally or physically abused or neglected child, as defined in § 16-2301(9), shall immediately report or have a report made of such knowledge or suspicion to either the Metropolitan Police Department of the District of Columbia or the Child and Family Services Agency.") (emphasis added).

[19] D.C. Code § 22-3020.52(c)(2)(A).

Code duty to report statute and the religious leaders described in D.C. Code § 14-309[20] differ primarily in that D.C. Code § 14-309 refers to specified religious leaders that are "authorized to perform a marriage ceremony" in the District, and the current D.C. Code duty to report statute refers to a duly appointed, licensed, ordained, or consecrated minister "of a given religion" in the District. It is unclear whether this is a substantive difference and there is no DCCA case law. Resolving this ambiguity, the RCC duty to report statute refers to a "religious leader in D.C. Code § 14-309," which is consistent with the inclusion of this language in the RCC sexual abuse by exploitation statute (RCC § 22E-1303). A "religious leader described in D.C. Code § 14-309" is a 'priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science,' regardless of whether the religious leader hears confessions or receives other communications." This change improves the clarity and consistency of the revised statute.

Fourth, the revised defense in subsection (e) requires that the person "reasonably believes" that he or is a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9)." The defense in current D.C. Code § 22-3020.53[21] does not specify any such subjective awareness, and it is unclear whether such subjective awareness, or strict liability, applies. There is no DCCA case law on this issue. Resolving this ambiguity, the revised defense requires that the person "reasonably believes" that he or she is a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9). This is consistent with the "reasonably believes" requirement in other defenses in the RCC. This change improves the clarity, consistency, and proportionality of the revised statutes.

Fifth, the revised defense in subsection (e) requires that the person fail to report known or suspected sexual abuse as required by subsection (a) "because" he or she is a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9). The current D.C. Code defense states that "[a]ny survivor of [intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9)] may use such . . . violence as a defense to his or her failure to report."[22] The current defense does not appear to require any causal link between the violence and the failure to report, meaning that the specified types of violence are a defense even if they are unrelated to the known or suspected child sexual abuse or the failure to report is part of a purposeful criminal scheme. However, the legislative history for the current D.C. Code reporting statute and related provisions suggests that a causal link was intended.[23] Resolving this

[20] D.C. Code § 14-309 refers to a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science."

[21] D.C. Code § 22-3020.53(a) ("Any survivor of domestic violence may use such domestic violence as a defense to his or her failure to report under this subchapter.").

[22] D.C. Code § 22-3020.53(a).

[23] Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 4-5 (stating that the legislation "[p]rovides a defense to any survivor of

ambiguity, the revised in subsection (e) requires that the failure to report be "because" the person is a survivor of intimate partner violence or intrafamily violence. This change improves the clarity and completeness of the revised statute.

Sixth, the revised civil violation for failing to report a sex crime (subsection (d)) requires that a person "knows" that he or she has a duty to report a known or suspected specified sexual crime pursuant to subsection (a). The current D.C. Code civil infraction statute prohibits "willfully fail[ing]" to make the required report.[24] "Willfully" is not defined in the current D.C. Code civil infraction statute and there is no DCCA case law for this statute. It is unclear whether "willfully" requires that a person know that he or she has a duty to report as required by D.C. Code § 22-3020.52. Resolving this ambiguity, the revised civil violation in subsection (d) requires that a person "knows" that he or she has a duty to report pursuant to RCC § 22E-1309(a). Supreme Court case law commonly interprets "willfully" in a criminal statute as requiring that the defendant act with a purpose to disobey or disregard the law,[25] and in the case of highly complex laws such as federal tax laws, may require that the defendant know of the specific law that his or her conduct is violating.[26] In addition, Supreme Court case law recognizes due process limits on criminal convictions for the mere failure to act if there is no reason for the person to believe he or she had a legal duty to act or that his or her failure to act was blameworthy. [27] This case law supports requiring at least a "knowing" culpable mental

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domestic violence who, due to the domestic violence, failed to report as required by this bill."). In addition, the legislative history indicates that the defense should be narrowly interpreted:

> Although victims will now have an opportunity to reach safety before reporting, the defense should not be used as a reason to never notify authorities about the known or suspected sexual abuse. Once a victim and his or her family are safely away from their abuser, the Committee intends that authorities be notified in order to report the abuse and to ensure that the abuser is not able to prey upon other children.

Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 11.

[24] D.C. Code § 22-3020.54(a) ("Any person required to make a report under this subchapter who willfully fails to make such a report shall be subject to a civil fine of $300.").

[25] *See, e.g., Bryan v. United States*, 524 U.S. 184, 191–92 (1998) ("The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we explained in *United States v. Murdock*, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), a variety of phrases have been used to describe that concept. As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'") (internal citations and footnotes omitted); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (holding that "[t]o establish that a defendant willfully violated the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.").

[26] *See, e.g., Bryan v. United States*, 524 U.S. 184, 194 (1991) ("In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating. See, *e.g., Cheek v. United States,* 498 U.S. 192, 201, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991).").

[27] Former D.C. Code § 22-2511 stated in relevant part, "It is unlawful for a person to be voluntarily in a motor vehicle if that person knows that a firearm is in the vehicle, unless the firearm is being lawfully carried or lawfully transported." D.C. Code § 22-2511(a) (Repl. 2015). The statute was repealed in 2015. Prior to its repeal, however, the DCCA in *Conley v. United States* held that the statute was unconstitutional for two reasons. Pertinent to the present discussion, the second reason was that:

state for the duty to report as required in subsection (a). This change improves the clarity and completeness of the revised statute.

Seventh, the revised civil violation for failure to report a sex crime (subsection d)) requires that the person knowingly fail to carry out his or her duty to report specified sex crimes to the authorities per subsection (a). The current D.C. Code civil infraction statute prohibits "willfully fail[ing]" to make the required report.[28] It is unclear what is required for a person to "willfully" fail to make the required report and there is no DCCA case law on this issue. Resolving this ambiguity, the civil violation for failure to report a sex crime (subsection d)) requires a "knowingly" culpable mental state for failing "to carry out his or her duty to report" as required by subsection (a). The current and revised duty to report statutes have specific reporting requirements and requiring a "knowing" culpable mental state for the failure to report is proportional to the specificity of these requirements. This change improves the clarity and completeness of the revised infraction.

Eighth, the exclusion to the duty to report for sexual assault counselors requires that the sexual assault counselor is "aware of a substantial risk" that the situations specified in sub-subparagraphs (b)(1)(D)(i), (b)(1)(D)(ii), and (b)(1)(D)(iii) exist, such as the sexual assault victim is under 13 years of age. The exclusion in the current D.C. Code reporting statute requires that the sexual assault counselor have "actual knowledge"

> [I]t is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy. The fundamental constitutional vice of § 22–2511 is that it criminalizes entirely innocent behavior—merely remaining in the vicinity of a firearm in a vehicle, which the average citizen would not suppose to be wrongful (let alone felonious)—without requiring the government to prove that the defendant had notice of any legal duty to behave otherwise."

Conley v. United States, 79 A.3d 270, 273 (D.C. 2013) (citing *Lambert v. California*, 355 U.S. 225 (1957)).

The DCCA acknowledged that *Lambert* "applies only when an unusual statute is 'triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations.'" *Conley*, 79 A.3d at 283 (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 547 (1982) (Brennan, J., dissenting)). The DCCA stated that courts have typically rejected *Lambert* challenges for "public welfare offenses" that involve dangerous articles like drugs and dangerous weapons and for statutes "imposing legal obligations on persons with other particular reasons to be on notice of them, as in prosecutions for violating [statutes that prohibit the possession of firearms by persons who have been convicted of misdemeanor domestic violence offenses or who are subject to a judicial anti-harassment or anti-stalking order] and for failing to register as required by the Sex Offender Registration and Notification Act." *Conley*, 79 A.3d at 283-84.

However, despite these limitations, the DCCA found that D.C. Code § 22-2511 was similar to the statute held unconstitutional in *Lambert* because it criminalized mere presence and did not require proof of any conduct "that would traditionally and foreseeably subject a person to criminal sanction, such as handling or concealing the firearm, constructively possessing it, or aiding and abetting someone else's possession or use of it." *Id*. at 285. In addition, the statute targeted individuals "who are not engaged in [firearm ownership, possession, transportation, or dealing] and who therefore have no reason to be familiar with the firearms laws or to investigate whether those laws impose any duties on *them*." *Id.* at 286 (emphasis in original).

[28] D.C. Code § 22-3020.54(a) ("Any person required to make a report under this subchapter who willfully fails to make such a report shall be subject to a civil fine of $300.").

of these situations.[29] The meaning of "actual knowledge" is unclear and is inconsistent with the "knows, or has reasonable cause to believe" requirement for the duty to report in the current D.C. Code duty to report statute.[30] There is no DCCA case law interpreting these terms in the current statute. Resolving these ambiguities, the revised duty to report statute requires that a sexual assault counselor is "aware of a substantial risk" that the situations specified in sub-subparagraphs (b)(1)(D)(i), (b)(1)(D)(ii), and (b)(1)(D)(iii) exist. This language requires that the person have subjective awareness of a substantial risk, as opposed to negligence—that the person merely should have known that there was a substantial risk—and is consistent with the duty to report in subsection (a) of the revised statute. This change improves the clarity and consistency of the revised statute.

Ninth, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the exclusion to the duty to report for sexual assault counselors (subparagraph (b)(1)(D)) may differ as compared to the current D.C. Code reporting statute. The current D.C. Code duty to report statute establishes an exclusion to the duty to report for a sexual assault counselor that is limited when a perpetrator or alleged perpetrator of the predicate crime has a "significant relationship" with the sexual assault victim."[31] "Significant relationship" is defined in D.C. Code § 22-3001[32] as "includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[33] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

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

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[29] D.C. Code § 22-3020.52(c)(3).

[30] D.C. Code § 22-3020.52(a) ("Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report such knowledge or belief to the police. For the purposes of this subchapter, a call to 911, or a report to the Child and Family Services Agency, shall be deemed a report to the police.").

[31] D.C. Code § 22-3020.52(c)(3)(B).

[32] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[33] D.C. Code § 22-3001(10).

First, paragraph (b)(2) states that "No legal privilege, except the privileges set forth in subsection (b) of this section, shall apply to the duty to report in subsection (a) of this section." Paragraph (b)(2) accounts for the language in the current D.C. Code duty to report statute that "[n]o other legally recognized privilege, except the following [applies to the duty to report a sex crime]"[34] and is not intended to change current District law.

Second, the revised reporting statute revises and deletes the separate definitions for "child," "person," and "police" that apply to the current D.C. Code reporting statute and related provisions.[35] Instead of having separate defined terms, the revised definitions are incorporated directly into the revised statute. The revised definitions are intended to be clarificatory and not change current District law.[36]

Third, subsection (b) of revised duty to report statute deletes the provision in the current D.C. Code duty to report statute that states "A confession or communication made under any other circumstances does not fall under this exemption."[37] Nothing in the revised duty to report statute suggests that confessions or communications that do not satisfy the requirements under paragraph (b)(1) would be privileged, and paragraph (b)(2) of the revised statute clearly establishes that no other privileges than those described in subsection (b) apply. Codifying a provision that explicitly states other confessions or communications are *not* privileged is potentially confusing for other provisions that do not similarly list what is "not" included. Deleting this provision from the current statute is a clarificatory change in law.

Fourth, the revised duty to report statute refers to a violation of the prohibited conduct "as a civil violation." The current D.C. Code duty to report statute refers to an offense as an "infraction"[38] subject to a "civil fine."[39] Referring to a violation of the prohibited conduct as a "civil violation" is consistent with marijuana decriminalization in current D.C. Code § 48-1201[40] and is not intended to change current District law.

Fifth, subparagraph (e)(2) of the revised duty to report statute states that "A violation of subsection (c) of this section shall not constitute a criminal offense or a delinquent act as defined in § 16-2301(7)."[41] The marijuana decriminalization in current

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[34] D.C. Code § 22-3020.52(c).

[35] D.C. Code § 22-3020.51(1), (2), (3) ("For the purposes of this subchapter, the term: (1) "Child" means an individual who has not yet attained the age of 16 years. (2) "Person" means an individual 18 years of age or older. (3) "Police" means the Metropolitan Police Department.").

[36] D.C. Code § 22-3020.51 currently defines "child" as "an individual who has not yet attained the age of 16 years." D.C. Code § 22-3020.51(1). Consistent with other RCC offenses and provisions, the revied statute instead codifies "a person under 16 years of age" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 currently defines "person" as "an individual 18 years of age or older." D.C. Code § 22-3020.51(2). Consistent with other RCC offenses and provisions, the revised statute refers to "a person at least 18 years of age" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 defines "police" as "the Metropolitan Police Department." RCC § 22-1310 refers to "the Metropolitan Police Department" as necessary.

[37] D.C. Code § 22-3020.52(c)(2)(B).

[38] D.C. Code § 22-3020.54(b) ("Adjudication of any infraction of this subchapter shall be handled by the Office of Administrative Hearings pursuant to § 2-1831.03(b-6).").

[39] D.C. Code § 22-3020.54(a) ("Any person required to make a report under this subchapter who willfully fails to make such a report shall be subject to a civil fine of $300.").

[40] D.C. Code § 48-1201(a) ("Notwithstanding any other District law, the possession or transfer without remuneration of marijuana weighing one ounce or less shall constitute a civil violation.").

[41] D.C. Code § 48-1201(b).

D.C. Code § 48-1201[42] has an identical provision and including it in the revised statute is not intended to change current District law.

Sixth, the revised duty to report statute, by use of the phrase "in fact" in subsection (a) specifies that strict liability applies to the requirements of the duty to report a sex crime: 1) the age of the person with the duty to report (at least 18 years); 2) the fact that the person with a duty to report is aware of a substantial risk[43] that a person under 16 years of age is being subjected to, or has been subjected to, a predicate crime; and 3) the required method of reporting known or suspected abuse. The current D.C. Code duty to report statute[44] does not specify any culpable mental states for these requirements. This change improves the clarity of the revised statute.

Seventh, the revised duty to report statute, by use of the phrase "in fact" in paragraph (b)(1) specifies that strict liability applies to the requirements of the exclusions from the duty to report under paragraph (b)(1).[45] The current D.C. Code duty to report statute does not specify any culpable mental states for the exclusions to the duty to report.[46] This change improves the clarity of the revised statute.

Eighth, the revised duty to report statute defines "confidential communication" as having "the meaning specified in D.C. Code § 14-312(a)(1), and is subject to the protections in D.C. Code § 14-312(b)(3)." Section 6 of the Sexual Assault Victims' Rights Amendment Act of 2019 (the Act) added an exclusion for sexual assault counselors to the current D.C. Code duty to report a sex crime statute[47] (subparagraph (b)(1)(D)) in the revised statute). Section 6 of the Act did not codify a definition for the term "confidential communication." However, Section 5 of the Act added an identical exclusion to current D.C. Code § 14-312[48] for mandatory reporting and codified a

[42] D.C. Code § 48-1201(b) ("A violation of subsection (a) of this section shall not constitute a criminal offense or a delinquent act as defined in § 16-2301(7).").

[43] "Aware of a substantial risk" in subsection (a) is not a culpable mental state as defined in RCC § 22E-205.

[44] D.C. Code §§ 22-3020.52(a) ("(a) Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report such knowledge or belief to the police. For the purposes of this subchapter, a call to 911, or a report to the Child and Family Services Agency, shall be deemed a report to the police."); § 22-3020.51(a)((defining "person" as "an individual 18 years of age or older.").

[45] "Aware of a substantial risk" in subparagraph (b)(1)(D) is not a culpable mental state as defined in RCC § 22E-205.

[46] D.C. Code §§ 22-3020.52(a) ("(a) Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report such knowledge or belief to the police. For the purposes of this subchapter, a call to 911, or a report to the Child and Family Services Agency, shall be deemed a report to the police."); § 22-3020.51(a)((defining "person" as "an individual 18 years of age or older.").

[47] D.C. Code § 22-3020.52(c), (c)(3) ((c) No legally recognized privilege, except for the following, shall apply to this subchapter: (3 "Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves: (A) A victim under the age of 13; (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.").

[48] Section 5 of the Act added a new paragraph (b)(5) to current D.C. Code § 14-312:

definition of "confidential communication"[49] applicable to that exclusion. The revised duty to report statute incorporates this definition of "confidential communication," as well as the protections for a "confidential communication" that Section 5 of the Act added to current D.C. Code § 14-312.[50] This change improves the clarity of the revised statutes.

Ninth, the revised duty to report statute defines "sexual assault counselor" as having "the meaning specified in D.C. Code § 23-1907(10). Section 6 of the Sexual Assault Victims' Rights Amendment Act of 2019 (the Act) added an exclusion for sexual assault counselors to the current D.C. Code duty to report a sex crime statute[51] (subparagraph (b)(1)(D)) in the revised statute). Section 6 of the Act did not codify a definition for the term "sexual assault counselor." However, Section 5 of the Act added an identical exclusion to current D.C. Code § 14-312[52] for mandatory reporting and

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(5) Notwithstanding § 4-1321.02, sexual assault counselors shall be exempt from mandatory reporting of any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves:

(A) A victim under the age of 13;

(B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or

(C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.

D.C. Code § 14-312(b)(5).

[49] D.C. Code § 14-312(a), (a)(1):

(a) For the purposes of this section, the term:

(1) "Confidential communication" means:

(A) Information exchanged between a sexual assault victim 13 years of age or older and a sexual assault counselor during the course of the sexual assault counselor providing counseling, support, and assistance to the victim; and

(B) Records kept by a community-based organization in the course of providing victim advocacy services pursuant to § 23-1909 for sexual assault victim 13 years of age or older.

[50] D.C. Code § 14-312(b)(3):

(3) The confidentiality of a confidential communication shall not be waived by the presence of, or disclosure to a:

(A) Sign language or foreign language interpreter; provided, that a sign language or foreign language interpreter shall be subject to the limitations and exceptions set forth in paragraph (1) of this subsection and the same privileges set forth in subsection (c) of this section;

(B) Third party participating in group counseling with the sexual assault victim; or

(C) Third party with the consent of the victim where reasonably necessary to accomplish the purpose for which the sexual assault counselor is consulted.

[51] D.C. Code § 22-3020.52(c), (c)(3) ((c) No legally recognized privilege, except for the following, shall apply to this subchapter: (3 "Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves: (A) A victim under the age of 13; (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.").

[52] Section 5 of the Act added a new paragraph (b)(5) to current D.C. Code § 14-312:

codified a definition of "sexual assault counselor"[53] applicable to that exclusion. The revised duty to report statute incorporates this definition of "sexual assault counselor." This change improves the clarity of the revised statutes.

Tenth, the exclusion for sexual assault counselors in the revised statute consistently uses the term "sexual assault victim" and adopts the definition of that term in D.C. Code § 23-1907(11). The sexual assault counselor exclusion in the current D.C. Code duty to report statute is limited when the predicate crime involves "(A) A *victim* under the age of 13; (B) A perpetrator or alleged perpetrator with whom the *sexual assault victim* has a significant relationship, as that term is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than *the sexual assault victim*."[54] It is unclear why subparagraph (A) uses the term "victim" instead of "sexual assault victim" as in subparagraphs (B) and (C).

Section 6 of the Sexual Assault Victims' Rights Amendment Act of 2019 (the Act) added this exclusion to current D.C. Code § 22-3020.52 and does not define the term "victim"[55] or "sexual assault victim." However, Section 5 of the Act added an identical exclusion to D.C. Code § 14-312 for mandatory reporting. D.C. Code § 14-312 does not define the term "victim," but does define "sexual assault victim" as "any individual against whom a sexual assault has been committed or is alleged to have been committed, including: (A) Deceased individuals; and (B) Representatives appointed by the court to exercise the rights and receive services on behalf of sexual assault victims who are under 18 years of age, incompetent, incapacitated, or deceased."[56] The exclusion for sexual assault counselors in the RCC duty to report statute consistently uses the term "sexual assault victim" because this definition is consistent with the use of that term in sub-subparagraphs (b)(1)(D)(i) and (b)(1)(D)(ii). The definition of "sexual assault victim" in D.C. Code § 14-312 is identical to the definition of that term in D.C. Code § 23-1907(11)E and the revised statute refers to that definition for consistency with the definition of "sexual assault counselor," also in Title 23 of the current D.C. Code. This change improves the clarity of the revised statute.

> (5) Notwithstanding § 4-1321.02, sexual assault counselors shall be exempt from mandatory reporting of any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves:
>
> (A) A victim under the age of 13;
>
> (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or
>
> (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.

D.C. Code § 14-312(b)(5).

[53] D.C. Code § 14-312(a)(5A): "(a) For the purposes of this section, the term: (5) 'Sexual assault counselor' shall have the same meaning as provided in § 23-1907(10).").

[54] D.C. Code § 22-3020.52(c)(3) (emphasis added).

[55] It seems unlikely that the Act intended to adopt the definition of "victim" in D.C. Code § 22-3001 that would otherwise apply in D.C. Code § 22-3001(11) ("victim" is "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter."). Section 5 of the Act added an identical exclusion for sexual assault counselors to D.C. Code § 14-312 for mandatory reporting and also uses the undefined term "victim," as opposed to "sexual assault victim."

[56] D.C. Code § 14-312(a)(6).

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

Explanatory Note. *The RCC admission of evidence in sexual assault and related cases statute (revised admission of evidence statute) establishes limitations on the use of evidence pertaining to a complainant's past sexual behavior in criminal cases for sex offenses under RCC Chapter 13. The revised admission of evidence statute replaces four distinct provisions in the current D.C. Code: the statute prohibiting the use of reputation or opinion evidence of a complainant's past sexual behavior,[1] the statute governing admissibility of other evidence of a complainant's past sexual behavior,[2] the prompt reporting statute,[3] and the statute prohibiting privilege between spouses or domestic partners.[4]*

Subsection (a) states that notwithstanding any other provision of law, in a criminal case under RCC Chapter 13, reputation or opinion evidence of the past sexual behavior of the complainant is not admissible. Subsection (e) defines "past sexual behavior" for this statute.

Subsection (b) governs the admissibility of evidence of a complainant's past sexual behavior, other than reputation or opinion evidence, in criminal cases under RCC Chapter 13. Paragraph (1) states the standards for when such evidence is admissible. Paragraph (2) establishes the procedural requirements an actor must follow if the actor intends to offer such evidence. Paragraph (3) and paragraph (4) establish court procedures for determining the admissibility, as well as the use of such evidence.

Subsection (c) states that evidence of delay in reporting an offense under RCC Chapter 13 to a public authority shall not raise any presumption concerning the credibility or veracity of a charge under RCC Chapter 13.

Subsection (d) states that laws attaching a privilege against disclosure of communications between spouses or domestic partners are inapplicable in prosecutions under RCC Chapter 13 in specified situations.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC and also provides a definition of "past sexual behavior" applicable to this statute.

Relation to Current District Law. *The changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.*

First, the revised admission of evidence statute refers to a "complainant" instead of "victim" or "alleged victim." "Victim" is defined for the current admissibility of evidence statutes and related provisions as "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter [Chapter 30].[5] RCC § 22E-701

[1] D.C. Code § 22-3021.
[2] D.C. Code § 22-3022.
[3] D.C. Code § 22-3023.
[4] D.C. Code § 22-3024.
[5] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter." D.C. Code § 22-3001(11). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "victim" in D.C. Code § 22-3001(11) applies to these statutes.

defines "complainant" as "person who is alleged to have been subjected to a criminal offense." Consistently using the defined term "complainant" instead of "victim" or "alleged victim" improves the clarity and consistency of the revised admission of evidence statute.

Second, the revised admission of evidence statute refers to the "actor" instead of the "person accused of an offense under subchapter II of this chapter,"[6] the "accused"[7] or the "defendant."[8] RCC § 22E-701 defines "actor" as "person accused of a criminal offense." Consistently using the defined term "actor" improves the clarity and consistency of the revised admission of evidence statute.

Third, subsection (b)(1)(B)(ii) refers to the "effective consent" of the complainant. The current admission of evidence statute refers to the "consent" of the complainant.[9] "Consent" is currently defined, in part, as "words or overt actions indicating a freely given agreement to the sexual act or contact in question."[10] The RCC breaks the current sex offense definition of "consent" into two terms. The RCC definition of "consent" in RCC § 22E-701 refers to the bare fact of an agreement between parties obtained by any means, while the RCC definition of "effective consent" in RCC § 22E-701 refers to "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." RCC sex offenses refer to "effective consent" instead of "consent," but they continue to incorporate the concept of "consent," as defined by RCC § 22E-701. The revised admission of evidence statute refers to "effective consent" to match the terminology of the RCC sex offenses. As is discussed in the commentaries to the definitions of "consent" and "effective consent," these terms may substantively change parts of current District law for the sex offenses to which they apply. However, the use of these terms in the revised admission of evidence statute is not intended to affect the procedures established in current D.C. Code § 22-3022. This change improves the clarity and consistency of the revised statute.

Fourth, the revised admission of evidence statute incorporates the RCC definitions of "domestic partner" and "bodily injury" in RCC § 22E-701. The RCC definition of "domestic partner" is the same as it is for the current admission of evidence statute.[11] As is discussed to the commentary for the revised definition of "bodily injury" in RCC § 22E-701, the RCC definition of "bodily injury" is changed from the definition that applies to the current admission of evidence statute.[12] Although the revised

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[6] *See, e.g.*, D.C. Code §§ 22-3021(a); 22-3022(a).

[7] *See, e.g.*, D. C. Code § 22-3022(a)(2)(A), (b)(1).

[8] D.C. Code § 22-3024.

[9] D.C. Code § 22-3022(a)(2)(B) ("Past sexual behavior with the accused where consent of the alleged victim is at issue and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.").

[10] D.C. Code § 22-3001(4).

[11] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'domestic partner' shall have the same meaning as provided in § 32-701(3)." D.C. Code § 22-3001(4A). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "domestic partner" in D.C. Code § 22-3001(4A) applies to these statutes and is unchanged in RCC § 22E-701.

[12] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'bodily injury' means injury

definition may substantively change parts of current District law for the sex offenses to which they apply, the use of these terms in the revised admission of evidence statute is not intended to affect the procedures established in current D.C. Code § 22-3022. This change improves the clarity and consistency of the revised statute.

involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain." D.C. Code § 22-3001(2). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "bodily injury" in D.C. Code § 22-3001(2) applies to these statutes.

RCC § 22E-1401. Kidnapping.

Explanatory Note. *This subsection establishes the kidnapping offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly interfering with another person's freedom of movement, and with intent: to hold that person for ransom; to hold that person as a hostage or shield; to facilitate commission of any felony or flight thereafter; to inflict bodily injury or commit a sexual assault; to cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense; or to permanently deprive a parent who is responsible for the general care and supervision of the complainant, or a court appointed guardian, of custody of the complainant. Along with criminal restraint statute,[1] the revised kidnapping statute replaces the kidnapping[2] statute in the current D.C. Code. The kidnapping offense is divided into two penalty grades, based on the actor's intent in moving or confining the complainant. The statute also includes an penalty enhancements, which require that the accused commits kidnapping with recklessness as to the fact that the complainant is a protected person; with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official; or by knowingly displaying or using a dangerous weapon or imitation dangerous weapon.*

Subsection (a) specifies the elements of first degree kidnapping. Paragraph (a)(1) specifies that first degree kidnapping requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving another person can include either moving a person against his or her will, such as by tying up and carrying away a person, or by causing the person to move by means of a threat or deception. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor's intervention. Confining or moving a person need not involve force, threats, or other forms of coercion.

Subparagraph (a)(2)(A) requires that the actor move or confine the complainant without effective consent of the complainant. The term "effective consent" is defined under RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain the he or she lacked effective consent to confine or move the complainant.

Subparagraph (a)(2)(B) specifies two additional means of committing first degree kidnapping, when the complainant is an incapacitated individual or under the age of 16. Sub-subparagraph (a)(2)(B)(i) requires that the actor was reckless as to the fact that the complainant is an incapacitated individual, and that a person with legal authority over the complainant who is acting consistent with that authority[3] has not given effective consent

[1] RCC § 22E-1404.
[2] D.C. Code § 22-2001.
[3] If the person with legal authority over the complainant provides effective consent, but is not acting consistent with that authority, kidnapping liability may apply. For example, if a person with legal authority

to the confinement or movement. "Person with authority over the complainant" is a defined term in RCC § 22E-701 which means, in relevant part, "[w]hen the complainant is an incapacitated individual, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian."[4] The sub-subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused consciously disregarded a substantial risk that the complainant is incapacitated, and that a person with authority has not consented to the confinement or movement.[5] Under this sub-subparagraph, it is immaterial if the complainant consents to the movement or confinement.

Sub-subparagraph (a)(2)(B)(ii) requires that the actor was, in fact, 18 years of age or older, and was reckless as to the fact that the complainant is under 16 years of age and four years younger than the actor, and that a person with legal authority over the complainant has not given effective consent to the confinement or movement. "Person with authority over the complainant" is a defined term in RCC § 22E-701 which means, in relevant part, "[w]hen the complainant is incapacitated, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian."[6] The sub-subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused consciously disregarded a substantial risk that the complainant is under the age of 16, and that a person with authority has not consented to the confinement or movement.[7] Under this sub-subparagraph, it is immaterial if the complainant consents to the movement or confinement.

Paragraph (a)(3) specifies that the accused must confine or move another person "with intent to" accomplish one of the goals listed in subparagraphs (a)(3)(A)-(H). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause one of the goals listed in subparagraphs (a)(3)(A)-(H). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that one of the goals actually occurred, just that the defendant believed to a practical certainty that one of the goals would occur.[8]

Subparagraph (a)(3)(A) specifies that first degree kidnapping includes acting "with intent to" hold the complainant for ransom or reward. Holding a person for ransom

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over the complainant consents to the complainant being taken and held for ransom, kidnapping liability may still apply notwithstanding the effective consent.

[4] RCC § 22E-701.

[5] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct was clearly blameworthy is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

[6] RCC § 22E-701.

[7] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct was clearly blameworthy is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

[8] For example, an actor who confines another with intent to commit a sexual offense against that person may be convicted of kidnapping even if the actor does not actually commit the sexual offense.

or reward requires demanding anything of value in exchange for release of the complainant.

Subparagraph (a)(3)(B) specifies that first degree kidnapping includes acting "with intent to" use the complainant as a shield or hostage. Holding a person as a shield or for hostage requires using the person's body as defense against potential attack, or to demand fulfillment of any condition in exchange for the person's release.

Subparagraph (a)(3)(C) specifies that first degree kidnapping includes acting "with intent to" facilitate the commission of a felony or the flight thereafter. The confinement or movement of the person must aid the commission or flight from the felony.[9] Many offenses, such as robbery or sexual assaults, often involve confining or moving a person with intent to facilitate that offense. Although confinement or movement in the course of another offense may satisfy the elements of kidnapping per subparagraph (a)(3)(C), liability in these cases is limited by subsection (e), discussed below.

Subparagraph (a)(3)(D) specifies that first degree kidnapping includes acting "with intent to" inflict serious bodily injury. "Serious bodily injury" is a defined term under RCC § 22E-701 and means a bodily injury that involves: a risk of death; protracted and obvious disfigurement; protracted loss or impairment of the function of a bodily member or organ; or protracted loss of consciousness.

Subparagraph (a)(3)(E) specifies that first degree kidnapping includes acting "with intent to" commit a sexual offense, as defined under Chapter 13 of Title 22E, against the complainant.[10]

Subparagraph (a)(3)(F) specifies that first degree kidnapping includes acting "with intent to" cause any person to believe that the complainant will not be released without suffering serious bodily injury[11] or a sex offense as defined in Chapter 13 of Title 22E. This element may be satisfied if any person believes the complainant will not be released at all, or will only be released after having suffered serious physical injury or being subjected to a sex offense. This element does not require that the actor actually intends to inflict significant bodily injury or to commit a sex offense.

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[9] For example, a bank robber who seizes and drives off with a security guard to prevent the guard from calling for help may be convicted of kidnapping.

[10] There is some overlap between subsection (b)(4)(C) and subsection (b)(4)(E). For example, a defendant who interferes with another person's freedom of movement in order to commit a felony sexual offense could be prosecuted for kidnapping under both subsections. However, subsection (b)(4)(E) is both broader and narrower than subsection (b)(4)(C). It is broader in that intent to facilitate misdemeanor assault or sexual assaults would not suffice under (a)(3)(C). It is narrower however in that it requires intent to commit a sexual offense, but other means of facilitating misdemeanor assaults or sexual assaults would not be covered.

[11] The seeming discrepancy between subsection (a)(3)(C) which requires intent to cause bodily injury and subsection (a)(3)(D) which requires intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is due to the different interests addressed in each subsection. Subsection (a)(3)(C) criminalizes cases in which the defendant had intent to inflict actual injury, whereas subsection (a)(3)(D) criminalizes cases in which the defendant merely had intent to *put another person in fear*, regardless of whether the defendant actually intended to inflict any injury on the complainant. Since subsection (a)(3)(D) only requires intent to cause another to be in fear, a more stringent requirement of intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is appropriate.

Subparagraph (a)(3)(G) specifies that first degree kidnapping includes acting "with intent to" permanently deprive a deprive a person with legal authority over the complainant of custody of the complainant.[12] The term "person with legal authority over the complainant" is defined in RCC § 22E-701. Intent to temporarily interfere with lawful custody is insufficient.

Subparagraph (a)(3)(H) specifies that first degree kidnapping includes acing "with intent to" confine or move the complainant for 72 hours or more. This element may be satisfied if the actor actually confines or moves the complainant for 72 hours or more, or is practically certain that he or she will confine or move the complainant for 72 hours or more.

Subsection (b) defines the elements of second degree kidnapping. The elements of second degree kidnapping specified in paragraphs (b)(1) and (b)(2) are identical to the elements of first degree kidnapping that are specified in paragraphs (a)(1) and (a)(2).

Paragraph (b)(3) specifies that the accused must confine or move another person "with intent to" accomplish one of the goals listed in subparagraphs (b)(3)(A) or (b)(3)(B). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause one of the goals listed in subparagraphs (b)(3)(A) or (b)(3)(B). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that one of the goals actually occurred, just that the defendant believed to a practical certainty that one of the goals would occur.[13]

Subparagraph (b)(3)(A) specifies that second degree kidnapping includes acting "with intent to" inflict bodily injury. "Bodily injury" is a defined term under RCC § 22E-701, and means "physical pain, physical injury, illness, or impairment of physical condition."

Subparagraph (a)(3)(B) specifies that second degree kidnapping includes acting "with intent to" cause any person to believe that the complainant will not be released without suffering bodily injury.[14] This element may be satisfied if any person believes

[12] The seeming discrepancy between subsection (a)(3)(C) which requires intent to cause bodily injury and subsection (a)(3)(D) which requires intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is due to the different interests addressed in each subsection. Subsection (a)(3)(C) criminalizes cases in which the defendant had intent to inflict actual injury, whereas subsection (a)(3)(D) criminalizes cases in which the defendant merely had intent to *put another person in fear*, regardless of whether the defendant actually intended to inflict any injury on the complainant. Since subsection (a)(3)(D) only requires intent to cause another to be in fear, a more stringent requirement of intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is appropriate.

[13] For example, an actor who confines another with intent to commit a sexual offense against that person may be convicted of kidnapping even if the actor does not actually commit the sexual offense.

[14] The seeming discrepancy between subsection (a)(3)(C) which requires intent to cause bodily injury and subsection (a)(3)(D) which requires intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is due to the different interests addressed in each subsection. Subsection (a)(3)(C) criminalizes cases in which the defendant had intent to inflict actual injury, whereas subsection (a)(3)(D) criminalizes cases in which the defendant merely had intent to *put another person in fear*, regardless of whether the defendant actually intended to inflict any injury on the complainant. Since subsection (a)(3)(D) only requires intent to cause another to be in fear, a more stringent

the complainant will not be released at all, or will only be released after having suffered physical injury. This element does not require that the actor actually intends to inflict bodily injury.

Subsection (c) provides a defense to prosecution for under paragraphs (a)(3)(G) and (a)(3)(H) when complainant is under the age of 18, and the actor is either: a "close relative" of the complainant, who acts with intent[15] to assume full responsibility for the care and supervision of the complainant; or a person who reasonably believes he or she is acting at the direction of a close relative who acts with the intent that the close relative will assume full responsibility for the care and supervision of the complainant. In addition, subparagraphs (c)(1)(B) and (c)(2)(B) require that the actor did not cause bodily injury or threaten to cause bodily injury to the complainant, or cause or threaten to cause the complainant to engage in a sexual act or sexual contact. The term "close relative" is defined in RCC §22E-701 to mean the complainant's parents, grandparents, siblings, children, cousins, aunts, or uncles. More distant relatives are not included within the definition, and cannot rely on this exception to liability.

Subsection (d) specifies relevant penalties for first and second degree kidnapping. [*See* Fourth Draft of Report #41.] Paragraph (d)(3) specifies three penalty enhancements. If the government proves at least one of the penalty enhancements listed under paragraph (d)(3), the penalty classification for first and second degree kidnapping may be increased in severity by one penalty class. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6.

Subparagraph (d)(3)(A) requires that the actor was reckless as to the complainant being a protected person. The term "protected person" is defined under RCC § 22E-701, which includes a person who is "under 18 years of age, when, in fact the actor is 18 years of age or older and at least 4 years older than the other person," "65 years or older, when, in fact, the actor is under 65 years of age," "a vulnerable adult," "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of official duties," or "a District official." Under subparagraph (d)(3)(A), the actor must have been reckless as to the complainant being a protected person, a culpable mental state defined in RCC § 22E-206, meaning the accused must consciously disregard a substantial risk that the complainant is a "protected person," and that disregard of that risk is clearly blameworthy.

Subparagraph (d)(3)(B) requires that the accused commits kidnapping by recklessly causing the confinement or movement by displaying or using a dangerous weapon or imitation weapon. The phrase "by displaying or using a dangerous weapon or

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requirement of intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is appropriate.

[15] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain he or she would assume full responsibility for the care and supervision of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor assumed full responsibility for the care and supervision of the complainant, only that he or she believed to a practical certainty that he or she would do so.

Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase.

imitation dangerous weapon" should be broadly construed to include kidnappings in which the accused only momentarily displays such a weapon, or slightly touches the complainant with such a weapon.[16] The term "use" is intended to include making physical contact with the weapon, and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[17] The terms "dangerous weapon" or "imitation weapon," are defined in RCC § 22E-701. Subparagraph (d)(3)(C) specifies that a "recklessly" mental state applies to this enhancement, which requires that the actor consciously disregarded that the display or use of the weapon or imitation weapon caused the confinement or movement. However, the subparagraph also uses the term "in fact,"[18] to specify that no culpable mental state required as to whether the implement used or displayed was a dangerous weapon or imitation dangerous weapon.

Subparagraph (d)(3)(C) requires that the actor has the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official. This requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[19] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[20] "Law enforcement officer," "public safety employee," and "public official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor consciously desired to harm a person of such a status.

Subsection (e) provides that a person may not be convicted of first or second degree kidnapping and a separate offense if the confinement or movement was incidental to the commission of the other offense. Confinement or movement is incidental to another offense when the actor's primary purpose in confining or moving the other person was to commit the other offense, provided that the movement or confinement did not exceed what is normally associated with the other offense.[21] The subsection specifies

[16] For example, assuming the other elements of the offense are proven, rearranging one's coat to provide a momentary glimpse of part of a knife, or holding a sharp object to someone's back without actually causing injury, may be sufficient for liability under paragraph (a)(3).

[17] For further detail on what conduct constitutes "using" a dangerous weapon, see Commentary to criminal threats, RCC § 22E-1204.

[18] RCC § 22E-207.

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

[20] For example, confining or moving a person without consent may constitute harm, even if no bodily injury occurs, because it is an interference with the person's freedom of movement.

[21] This provision is intended to re-instate D.C. Court of Appeals (DCCA) case law prior to *Parker v. United States*, 692 A.2d 913 (D.C. 1997). Prior to *Parker*, District courts employed a fact-based inquiry to determine whether convictions for kidnapping and other offenses that arise from a single act or course of conduct should merge. In *Parker*, the DCCA held that instead of a fact-based inquiry, courts should only use a *Blockburger* elements test to determine if convictions for kidnapping and separate offenses should

that, consistent with RCC § 22E-214, multiple convictions are barred only after the time for judgment for appeal has expired, or after the appeal from the judgment of conviction has been decided.

Subsection (f) cross-references definitions found elsewhere in the RCC.

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

First, the revised kidnapping offense requires that the actor confines or moves another person with intent to hold the person for ransom, inflict bodily injury, or commit other particularly harmful or dangerous acts. The current kidnapping statute requires that the defendant hold a person "for ransom, reward, *or otherwise*[.]"[22] The D.C. Court of Appeals (DCCA) has interpreted the "or otherwise" language broadly and held that "[t]he motive behind the kidnapping is unimportant, so long as the act was done with the expectation of benefit to the transgressor."[23] By contrast, the RCC divides the current kidnapping offense into two primary offenses, with criminal constraint providing liability for confining or moving a person, while the revised kidnapping requires an added wrongful intent that makes the confinement or movement especially dangerous, harmful, or terrifying. Under the revised kidnapping statute, confining or moving another with intent to enact revenge or to seek companionship, or other purpose would not constitute kidnapping, unless the actor had intent to achieve one of the goals listed in subparagraphs (a)(3)(A)-(H) or (b)(3)(A)-(B).[24] Codifying a new kidnapping offense based on the actor's intent improves the proportionality of the RCC by separately labeling and penalizing more harmful and dangerous forms confinement or movement.[25]

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merge. The restraint need not be necessarily associated with commission of the other offense. For example, a person who commits robbery by forcing a person to walk into an adjacent room to locate valuables would not be guilty of kidnapping because the movement was incidental to the robbery. However, a person who confines another for a full day in order to facilitate commission of a robbery may still be convicted of kidnapping because the duration of the confinement far exceeded what would normally be associated with a robbery. *See e.g., Sinclair v. United States*, 388 A.2d 1201 (D.C. 1978) (kidnapping was not incidental to robbery when the defendant held a person at gunpoint in a car and drove 25 blocks away); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978) (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[22] D.C. Code § 22-2001;

[23] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (quoting *United States v. Wolford,* 144 U.S.App.D.C. 1, 5-6, 444 F.2d 876, 880-81 (1971) (internal quotations omitted). For example, restraining another person in order to enact revenge, or out of a desire for companionship could sustain a kidnapping conviction under current law. *See Walker*, 617 A.2d at 527.

[24] For example, a person who confines another with intent to enact revenge may have intent to cause bodily injury, or intent to cause another person to believe that the complainant will not be released without suffering significant bodily injury.

[25] For example, a person who in the heat of the moment blocks a door to prevent his significant other to leave in the midst of an argument may be guilty of kidnapping under current law, and subject to the same penalty as a person who, after substantial planning, forcibly seizes a person, transports them to another location, and holds them for ransom on fear of death. Under the RCC, these two types of conduct would be penalized differently, as a criminal restraint and kidnapping.

Second, the RCC kidnapping offense is divided into two penalty gradations based on the actor's intent in confining or moving the complainant. The current kidnapping statute has only one penalty grade. By contrast, the revised statute differentiates between intents which present a lower degree of harm or risk, from those that create a greater degree of harm or risk of more serious injury. This change improves the proportionality of the revised offense.

Third, the RCC kidnapping offense provides a defense under subsection (c) if the actor is a "close relative" of a complainant and had intent to assume full responsibility for the care and supervision of the complainant, or if the actor reasonably believed he or she was acting at the direction of a close relative, with intent that the close relative would assume full responsibility for care and supervision of the complainant. In addition, the defense requires that the actor did not cause or threaten to cause bodily injury to the complainant, or cause or threaten to cause the complainant to engage in a sexual act or sexual contact. The current kidnapping statute provides an exception to liability if the victim is a minor, and the defendant is the victim's parent. However, the current statute does not specify any further conditions for the exception, and it is unclear whether the current statute's parental exception applies in all kidnapping cases or is inapplicable if the parent uses force or threats to restrain the child. Case law has not resolved this ambiguity.[26] By contrast, the revised kidnapping statute's defense applies to close relatives[27] not just parents of the complainant. However, the defense requires that the actor had intent to assume full responsibility for the care and supervision of the complainant and that the actor did not cause bodily injury or threaten to cause bodily injury. The defense does not apply if the actor confined or moved another person without that person's consent, by causing or threatening to cause bodily injury.[28] The defense also does not apply if the actor had any intent other than to assume full responsibility for the care and supervision of the complainant.[29] The defense under subsection (c) recognizes the diminished culpability and risk to the complainant in cases where the actor is related to the complainant, and no force or threats were used.[30] However, the District's parental kidnapping statute[31] may still provide liability in such conduct by a relative. Changing the parental defense to include a broader array of relatives but limiting the defense to cases in which the actor did not cause bodily injury or threaten to cause bodily injury, improves the proportionality of the revised offenses.

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[26] In *Byrd v. United States*, 705 A.2d 629, 633 (D.C. 1997), the DCCA held that a person acting *in loco parentis* may not rely on the parental exception if "the defendant has engaged in separate felonious conduct during the kidnapping which exposes the child to a serious risk of death or bodily injury." However, the DCCA explicitly declined to decide "whether a biological parent may similarly forfeit the protection of the exception." *Id*. at 634 n. 7.

[27] As defined in RCC § 22E-701, which includes a parent, grandparent, sibling, child cousin, aunt, or uncle.

[28] For example, a non-custodial parent that uses force to restrain a child with intent to assume custody of that child may still be convicted of kidnapping under the revised statute.

[29] For example, a parent who holds his own child for ransom may still be convicted of kidnapping under the revised statute.

[30] *See*, *Byrd*, 705 A.2d at 633 (noting that the current kidnapping statute was with the intent that "a parent who kidnapped a child, however misguidedly, out of affection and disagreement over custody should not be prosecuted for that act alone").

[31] D.C. Code § 16-1022.

Fourth, the RCC kidnapping states that if the confinement or movement was incidental to the commission of any other offense, convictions for kidnapping and the other offense shall merge.[32] Under current DCCA case law a defendant may be convicted of both kidnapping and another offense that arise from the same act or course of conduct, as long as kidnapping and the other offense each include "at least one element which the other one does not."[33] By contrast, the RCC kidnapping statute reinstates the fact-based test applied by the DCCA prior to *Parker v. United States*,[34] which required courts to make a determination in each case as to whether the kidnapping was merely incidental to another offense.[35] Where, as is common,[36] the confinement or movement is incidental to another offense,[37] the authorized punishment for the other offense is sufficient. The RCC kidnapping sentencing provision improves the proportionality of the offense.

Fifth, the RCC kidnapping statute incorporates multiple penalty enhancements based on the status of the complainant, and the use of a dangerous weapon or imitation dangerous weapon, into new penalty enhancements, and caps the effect of these enhancements. The D.C. Code currently provides multiple penalty enhancements for the commission of a kidnapping offense,[38] without specifying whether or how these enhancements may be combined or "stacked" when multiple enhancements are applicable to a single charge. DCCA case law has not addressed whether most combinations of these penalty enhancements can be combined, but the combination of at least some of

[32] By barring sentences for kidnapping, the revised statute allows for the possibility that convictions for kidnapping and the other offense may be entered for purposes of appeal. If the conviction for the other offense is reversed on appeal, the appellate court may order a lower court to sentence the defendant for the surviving kidnapping conviction.

[33] *Malloy v. United States*, 797 A.2d 687, 691 (D.C. 2002)

[34] 692 A.2d 913 (D.C. 1997). In *Parker*, the DCCA applied a new test for how to determine, in the absence of legislative intent, whether charged offenses should merge. The *Parker* ruling applied the new "elements" test the DCCA first adopted in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (en banc) because there was no legislative intent discernible as to whether kidnapping should merge with murder.

[35] *E.g., West v. United States*, 599 A.2d 788, 793 (D.C. 1991); *Vines v. United States*, 540 A.2d 1107, 1109 (D.C. 1988); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978).

[36] Many offenses against persons commonly involve some type of significant, non-consensual confinement or movement. For example, victims of robberies, assaults, sexual assaults, and homicides are frequently subjected to threats or physical restraint that prevent them from fleeing. Under current District law, such offenses against persons typically would provide the basis for a kidnapping charge. In practice, however, kidnapping charges are not typically brought in cases with such offenses against persons.

[37] *E.g., Robinson*, 388 A.2d at 1212–13 (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[38] *See*, e.g., D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-4502 (enhanced penalty for committing kidnapping "while armed" or with a dangerous weapon "readily available").

these enhancements has been upheld.[39] By contrast, under the revised kidnapping statute, the penalty for first or second degree kidnapping cannot be enhanced more than once based on any of the listed enhancements.[40] While multiple penalty enhancements may be charged, proof of just one is sufficient to increase the penalty class severity, and proof of others does not change the maximum statutory penalty for the crime.[41] Capping the effect of penalty enhancements improves the proportionality of the District law by preventing aggravated forms of the offense from being penalized the same as much more serious offenses.[42]

Sixth, the RCC kidnapping statute provides new, heightened penalties based on recklessness as to the status of the complainant as a protected person, which includes on-duty law enforcement officers, on-duty public safety employee, on-duty transportation workers. The current kidnapping statute has no gradations and does not reference the status of the complainant, but multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[43] Currently, the D.C. Code does not enhance crimes based on the status of the complainant as an on-duty law enforcement officer, public safety employee, or on-duty transportation workers. By contrast, through its use of the term "protected person," the RCC kidnapping statute authorizes enhanced penalties if the accused is reckless as to the fact the complainant is an on-duty law enforcement officer, on duty public safety employee, or on-duty transportation worker. Such penalties are consistent with enhancements for assault-type,[44] robbery[45], and homicide offenses,[46] and reflect some unique vulnerabilities of such complainants.[47] Requiring a reckless culpable mental state is also consistent with many current statutes that authorize enhanced penalties based on the complainant's status.[48] Including recklessness as to the complainant being an on-duty law enforcement

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[39] Convictions have been upheld applying multiple enhancements. *C.f. Forte v. United States*, 856 A.2d 567 (D.C. 2004) (holding that "double enhancement" under senior citizen penalty enhancement statute and repeat offender statute was proper).

[40] For instance, the status of the complainant and the defendant's use of a weapon.

[41] The existence of more than one aggravating factors may be a significant factor in sentencing, however.

[42] For example, under current law the unarmed kidnapping of a 65 year old taxi cab driver is subject to two penalty enhancements under D.C. Code § 22-3601, and § 22-3751, each of which permits a sentence 1 ½ times the maximum sentence otherwise allowed. Kidnapping ordinarily carries a maximum sentence of 30 years. If these enhancements are both applied, kidnapping a 65 year old taxi driver would be subject to a maximum 60 year sentence, the same as first degree murder. D.C. Code § 22-2104.

[43] D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-3611 (minors); D.C. Code § 22-3601 (persons over 65 years of age); D.C. Code §§ 22-3751; 22-3752 (taxicab drivers); and D.C. Code §§ 22-3751.01; 22-3752 (transit operators and Metrorail station managers); and D.C. Code § 22-3602 (members of a citizen patrol).

[44] RCC § 22E-1202

[45] RCC § 22E-1201.

[46] RCC §§ 22E-1101 - 1102.

[47] For example, on-duty law enforcement and public safety officers performing investigative duties and private vehicle-for-hire services drivers may often enter situations where they are isolated with persons in enclosed places and more susceptible to unwanted interference with their personal movements; vulnerable adults may be targeted due to their limited ability to evade interference with their freedom of movement.

[48] Under current District law it is a defense to the senior citizen complainant enhancement that "the accused knew or reasonably believed the complainant was not 65 years old or older at the time of the offense, or could not have known or determined the age of the complainant because of the manner in which the offense

officer, public safety employee, a vulnerable adult, or on-duty transportation worker as a penalty enhancement to kidnapping removes a possible gap in current law, and improves the consistency and proportionality of the revised code.

Seventh, the revised kidnapping statute provides new, heightened penalties based on the offense being committed for the purpose of harming the complainant because of his or her status as a law enforcement officer, public safety employee, or District official. The current kidnapping statute has no gradations and does not reference a purpose of harming the complainant because of the status of the complainant, although multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[49] By contrast, the revised kidnapping statute includes a penalty enhancement for committing the offense with the purpose of harming another person due to that person's status as a law enforcement officer, public safety employee, or District official. In practice, this change only affects law enforcement officers and public safety employees who are not District employees, as kidnapping of any District employee is subject to more severe statutory penalties under current District law.[50] Authorizing heightened penalties for committing kidnapping with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official removes a possible gap in current law, and improves the consistency and proportionality of penalties.

Eighth, the revised kidnapping statute incorporates penalty enhancements for "displaying or using" a dangerous weapon or imitation dangerous weapon. Current D.C. Code § 22-4502 provides enhanced penalties for committing kidnapping "while armed" or "having readily available" a dangerous weapon. District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a weapon]";[51] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[52] provided that the accused also constructively possessed the weapon.[53] There is no requirement under D.C.

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was committed." D.C. Code § 22-3601(c). Similarly, under the current minor complainant enhancement, it is a defense that "the accused reasonably believed that the complainant was not a minor [person less than 18 years old] at the time of the offense." D.C. Code § 22-3611(b). The current assault of a law enforcement officer offense requires that the defendant was

[49] D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee);

[50] D.C. Code § 22-851. Subparagraph (d)(3)(C) of the RCC kidnapping statute provides liability for kidnapping committed with the purpose of harming the complainant because of the complainant's status as a District official.

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

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

[53] *Cox v. United State*s, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was

Code § 22-4502 that the accused actually used the weapon to commit kidnapping.[54] By contrast, the penalty enhancement under the revised kidnapping statute requires that the actor actually displayed or used[55] a dangerous weapon or imitation dangerous weapon. Merely possessing or having a weapon or imitation weapon readily available is insufficient to satisfy the penalty enhancement under subparagraph (d)(3)(B), although such conduct is criminalized elsewhere in current law and the RCC as a separate offense with a lower penalty.[56] Including use of a dangerous weapon or imitation dangerous weapon within the kidnapping statute as penalty enhancement improves the proportionality of punishment by matching more severe penalties to kidnappings in which the actor actually uses or displays a weapon.

Beyond these eight changes to current District law, seven other aspect of the revised kidnapping statute may constitute a substantive change of law.

First, the RCC kidnapping statute specifies that the actor must have "knowingly" confined or moved another person. The current kidnapping statute references as one means of committing the offense that the actor had "intent to hold or detain,"[57] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. In one case the DCCA stated that the current kidnapping statute requires that the actor had "specific intent to detain the complainant"[58] although it is unclear whether the DCCA in that case was referring only to the defendant's motive rather than their awareness of the objective elements of the offense. Current District practice appears to treat the kidnapping as a "general intent" offense.[59] The revised kidnapping statute specifies that a "knowingly" culpable mental state applies to the element of confining or moving the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[60] Specifying a

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required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").

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

[55] "Using" a weapon includes physically touching another person with the weapon. For example, if all other offense elements are satisfied, placing a knife or firearm to the complainant's back and telling them to walk to another location may satisfy the penalty enhancement for kidnapping under subparagraph (d)(3)(C).

[56] *See* D.C. Code § 22-4514(b); RCC § 22E-4102.

[57] *See* D.C. Code § 22-2001 ("…holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise…").

[58] *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for 'ransom or reward or otherwise' and that such detention was involuntary or by use of coercion; the detention may be for any purpose that the defendant believes might benefit him.").

[59] Redbook § 4.303 Kidnapping requires that the accused acted "voluntarily and on purpose, and not by mistake or accident," which accords with the jury instructions treatment of "general intent," not "specific intent" offenses. See Redbook § 3.100 Defendant's State of Mind.

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

culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the RCC kidnapping offense requires that the complainant did not effectively consent to the interference, other than in cases involving complainants under the age of 16, or who are incapacitated. The current kidnapping statute is silent as to whether and by what means the actor must confine or move the complainant. The current statute broadly states that a person commits kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual",[61] but none of these terms are statutorily defined. The DCCA has generally recognized that kidnapping requires an "involuntary seizure,"[62] which includes forcible seizures[63], or restraining a person by threat of force.[64] Current District practice also recognizes that a person can commit kidnapping by "seiz[ing], confin[ing], abduct[ing], or carr[ying] away [the complainant] against his/her will"[65] The revised kidnapping statute specifies that the confinement or movement must be without effective consent of the complainant, except in cases where the complainant is under the age of 16 or incapacitated. The revised language improves the clarity and proportionality of the offense.

Third, the RCC kidnapping statute requires that the actor must "substantially" confine or move the complainant. The current kidnapping statute does not explicitly include any substantiality element, and the DCCA has never discussed in a published opinion whether momentary or trivial confinement or movement suffices under the current kidnapping statute.[66] By contrast, the revised kidnapping statute requires that the actor must "substantially" confine or move the complainant. This excludes momentary or trivial confinement or movement. The precise effect on current law is somewhat unclear, as there is no case law on point. Requiring that the actor "substantially" confine

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[61] The current statute states that a person can commit kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[,]" D.C. Code § 22-2001.

[62] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (noting that "involuntary seizure is the very essence of the crime of kidnapping"); *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for "ransom or reward or otherwise" and that such detention was involuntary or by use of coercion[.]")

[63] *E.g., Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (holding that evidence showing defendant grabbed victim by the hair and pushing her into a changing room was sufficient to prove that she had been seized and detained involuntarily).

[64] *E.g., Battle v. United States*, 515 A.2d 1120 (D.C. 1986) (defendant committed kidnapping by displaying a gun, got into complainant's car, and drove the car away to a different location where the complainant would be held).

[65] D.C. Crim. Jur. Instr. § 4.303 Kidnapping.

[66] DCCA case law discussing whether kidnapping should merge with other offenses has suggested that relatively brief interference with another person's freedom of movement can constitute kidnapping. *E.g., Sinclair v. United States*, 388 A.2d 101, 1204 (D.C. 1978) (noting that "victims of [rape or robbery] are detained against their will while the criminal is accomplishing his objective"). This case law implies that even the brief detention associated with an ordinary street robbery is sufficient for kidnapping. However, the DCCA has never specifically decided whether on its own, such a brief detention would satisfy the elements of kidnapping.

or move the complainant improves the proportionality of the RCC by excluding cases that only involve trivial or momentary interference.[67]

Fourth, when the complainant is under the age of 16[68] or is incapacitated, the RCC kidnapping statute requires that the actor be reckless as to the fact that a person with legal authority over the complainant has not effectively consented to the confinement or movement. The current kidnapping statute does not specify when confining or moving a person who is under the age of 16 or is incapacitated constitutes kidnapping, and there is no relevant DCCA case law on point.[69] It is unclear under current law whether, and under what circumstances, a person would be guilty of kidnapping for confining or moving a person without effective consent of a person with legal authority over the complainant. The revised statute resolves this ambiguity by requiring that the actor at least be reckless as to whether a person with legal authority over the complainant has not effectively consented to the confinement or movement. This change improves the clarity, completeness, and perhaps the proportionality, of the revised statute.

Fifth, the RCC kidnapping statute requires that the actor confines or moves another person. The current kidnapping statute criminalizes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[.]"[70] With the exception of "enticing," discussed below, replacing these verbs with "confines" and "moves" does not appear to change current District law. The verbs "seizing," "confining," "kidnapping," "abducting," "concealing," and "carrying away" all constitute confining or moving another person. However, it is possible that "inveigling" and "decoying" a person includes conduct not covered by confining and moving another.[71] The terms "inveigling" and "decoying" are not defined in the current statute, and there is no DCCA case law defining these terms, and it is unclear how omitting these terms changes the scope of the offense. The RCC kidnapping statute resolves this ambiguity by requiring that the actor confine or move another person, without that person's effective consent.[72] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the

[67] If a defendant intended to interfere with a person's freedom of movement to a substantial degree but failed to do so and was only able to interfere in an insubstantial manner, attempt liability may still be applicable depending on the facts of the case.

[68] This form of kidnapping also requires that the actor is 18 years of age or older, and at least four years older than the complainant.

[69] *But see*, *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005) (holding that convictions for kidnapping and enticing a minor do not merge, noting that "the kidnapping statute requires . . . that the complainant was seized involuntarily through the defendant's use of mental or physical coercion; however, consent is never a valid defense to child enticement, and therefore the government is not required to show that the child was taken involuntarily."). This language suggests that kidnapping requires, even in the case of minors, that the defendant seize another person "involuntarily", and that kidnapping does not criminalize moving or confining a minor by means of enticement.

[70] D.C. Code § 22-2001.

[71] For example, the word "inveigles" may include causing a person to move by means of flattery. Under the RCC kidnapping offense, the mere use of flattery to confine or move someone would be insufficient.

[72] Or without the effective consent of a person with legal authority over the complainant if the complainant is an incapacitated individual, or under the age of 16.

offense, and only including conduct dangerous enough to warrant the penalties under the kidnapping statute.[73]

Sixth, the RCC's kidnapping statute omits the word "entices." The current kidnapping statute states that a person commits kidnapping by "enticing . . . any individual . . . with intent to hold or detain such individual for ransom, reward, or otherwise[.]"[74] Under a plain language reading, the current kidnapping statute provides liability for merely enticing a person with intent to hold or detain that person for some personal benefit, even if the person was never actually held. However, the DCCA has never discussed in a published opinion whether such conduct would actually constitute kidnapping, and such an interpretation would run counter to case law requiring the kidnapping to be "involuntary" in nature.[75] The RCC's kidnapping statute resolves this ambiguity by providing that kidnapping requires actually confining or moving a person without that person's effective consent. A person cannot commit kidnapping merely by offering some reward, without actually confining or moving another person.[76] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the kidnapping statute.[77]

Seventh, the RCC kidnapping statute does not separately criminalize a conspiracy to commit kidnapping. The District's current kidnapping statute specifically provides that any person who conspires to commit kidnapping "shall be deemed to have violated the provisions of this section."[78] The current kidnapping statute's reference to a conspiracy, however, does not specify what culpable mental states, if any, apply to the conspiracy. By contrast, under the RCC kidnapping statute, conspiracy to commit kidnapping is subject to the RCC's general conspiracy statute. The RCC's general conspiracy statute details the culpable mental state and other requirements for proof of a conspiracy in a manner broadly applicable to all offenses. To the extent that the RCC's general conspiracy provision differs from the law on conspiracy as applied to the current kidnapping statute, relying on the RCC's general conspiracy provision may constitute a

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[73] Since the RCC kidnapping statute requires intent to achieve one of the goals under paragraph (b)(3), it is unlikely, though possible, that a defendant could satisfy all the elements of kidnapping without using physical force, coercive threats, or deception. For example, it is unlikely a person would hold another person hostage or for ransom without using physical force, coercive threats, or deception.

[74] D.C. Code § 22-2001.

[75] *C.f. Walker*, 617 A.2d at 527 (noting that "involuntary seizure is the very essence of the crime of kidnapping").

[76] However, a person can commit kidnapping by initially enticing another person with offer of some benefit as a means of luring the other person to move to or remain in a particular location as long as the actor confines or moves a person without effective consent.

[77] Since the RCC kidnapping statute requires intent to achieve one of the goals under subsection (b)(3), it is unlikely, though possible, that a defendant could satisfy all the elements of kidnapping without using force, threat of force, or deception. For example, it is unlikely a person would hold another person hostage or for ransom without using force, threat of force, or deception.

[78] D.C. Code § 22-2001. "If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01."

change in current law.[79] This change improves the clarity and consistency of the revised offense.

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

The RCC kidnapping statute does not contain special provisions regarding jurisdiction. The current kidnapping statute states that "[t]his section shall be held to have been violated if the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of Columbia."[80] This language apparently is intended to ensure that District courts have jurisdiction over kidnappings that do not occur entirely within the District of Columbia. However, it is unclear whether this language changes the scope of jurisdiction that a District court would otherwise have over kidnapping cases. The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[81] Consequently, although the DCCA has not applied this rule to kidnapping cases, it seems that District courts would have jurisdiction over any case in which a person was seized or held within the District, regardless of whether the person was initially seized outside of the District, or if the person were seized within the District and transported out of the District.[82] The RCC kidnapping statute eliminates jurisdiction language specific to kidnapping. In addition to general case law providing authority for offenses if "one of several constituent elements to the complete offense" occurs within the District,"[83] RCC § 22E-303 specifically provides jurisdiction for conspiracies formed within the District when the object of the conspiracy is engage in conduct outside of the District if the conduct would constitute a crime under D.C. Code.[84] District courts would therefore have jurisdiction over conspiracies to commit kidnapping outside of the District. Omitting special jurisdiction language from the kidnapping statute improves the law's clarity by omitting unnecessary language and making the offense more consistent with other offenses.

[79] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy.
[80] D.C. Code § 22-2001.
[81] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).
[82] For example, a person who attempts to lure a person in another jurisdiction into the District for purposes of kidnapping that person may be guilty of attempted kidnapping, assuming that the defendant's conduct satisfied the dangerous proximity test.
[83] *Baish*, 460 A.2d at 40–41.
[84] RCC § 22E-303(c).

RCC § 22E-1402. Criminal Restraint.

Explanatory Note. *This section establishes the criminal restraint offense for the Revised Criminal Code. This offense criminalizes knowingly confining or moving a person without that person's effective consent. The offense is identical to the RCC's kidnapping offense, except that criminal restraint does not require intent to hold that person for ransom or another specified purpose [1] Along with the revised kidnapping[2] offense, the revised criminal restraint offense replaces the kidnapping offense in the current D.C. Code.[3] The statute also includes penalty enhancements, which require that the accused commits criminal restraint with recklessness as to the fact that the complainant is a protected person; with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official; or by recklessly displaying or using a dangerous weapon or imitation dangerous weapon.*

Subsection (a) specifies the elements of criminal restraint. Paragraph (a)(1) specifies that criminal restraint requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving a person requires causing that person to move to another location when that person would not have done so absent the actor's intervention. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor's intervention. Confining or moving a person per this subsection need not involve force, threats, or other forms of coercion.[4]

Subsection (a) also requires that the actor must *substantially* confine or move the complainant. This paragraph clarifies that momentary or trivial[5] confinement or movement is insufficient. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the confinement or movement was substantial.

Paragraph (a)(1) requires that the actor move or confine the complainant without effective consent of the complainant. The term "effective consent" is defined under RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain the he or she lacked effective consent to confine or move the complainant.

Paragraph (a)(2) specifies two additional means of committing criminal restraint when the complainant is an incapacitated individual, or under the age of 16, regardless of

[1] *See* RCC § 22E-1402.
[2] RCC § 22E-1402.
[3] D.C. Code § 22-2001.
[4] For example, a person who invites a guest to his home for dinner has "moved" and "confined" the guest, as the guest would not have gone to and remained at the person's home absent the dinner invitation. However, this would not constitute kidnapping, as the movement and confinement were consensual.
[5] Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.

whether the complainant effectively consents to the movement or confinement. Subparagraph (a)(2)(A) requires that the actor was reckless as to the complainant being an incapacitated individual, and that a person with legal authority over the complainant who is acting consistent with that authority[6] has not given effective consent to the confinement or movement, regardless of whether the complainant does so.[7] "Person with authority over the complainant" is a defined under RCC § 22E-701, which means in relevant part "[w]hen the complainant is incapacitated, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian."[8] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused disregarded a substantial risk that the complainant is incapacitated, and that a person with authority has not effectively consented to the confinement or movement.[9]

Subparagraph (a)(3)(B) requires that the actor is 18 years or older, and acts with recklessness that the complainant is under the age of 16, and at least 4 years younger than the actor, and that a person with authority over the complainant, who is acting consistent with that authority,[10] has not given effective consent to the interference, regardless of whether the complainant does so.[11] "In fact" a defined term specifies that there is no culpable mental state required as to the actor's age. "Person with authority over the complainant" is a defined under RCC § 22E-701, which means in relevant part "[w]hen the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the general care and supervision of the complainant, or someone acting with the effective consent of such a parent or person."[12] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused disregarded a substantial risk that the complainant was under the age of 16, and 4 years younger than the actor, and that a person with authority has not effectively consented to the confinement or movement.[13]

Subsection (b) specifies defenses to prosecution under this section. Paragraph (b)(1) provides two defenses when the complainant is under 18 years of age. Paragraph (b)(1) uses the term "in fact" a defined term in RCC § 22E-207, which specifies that there

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[6] If the person with legal authority over the complainant provides effective consent, but is not acting consistent with that authority, criminal restraint liability may apply.

[7] For example, a person can commit criminal restraint by leading away an incapacitated individual, without his or her guardian's consent, even if the incapacitated individual wants to be led away.

[8] RCC § 22E-701.

[9] If the actor has had no communication with a person with legal authority over the complainant that indicates effective consent to the confinement or movement, this element is satisfied.

[10] If the person with legal authority over the complainant provides effective consent, but is not acting consistent with that authority, kidnapping liability may apply. For example, if a person with legal authority over the complainant consents to the complainant being taken and held for ransom, kidnapping liability may still apply notwithstanding the effective consent.

[11] For example, a person can commit criminal restraint by leading away a child without the parent's consent, even if the child wants to be led away, provided the actor is at least 18 years of age, and at least 4 years older than the complainant.

[12] RCC § 22E-701.

[13] If the actor has had no communication with a person with legal authority over the complainant that indicates effective consent to the confinement or movement, this element is satisfied.

is no culpable mental state required as to the complainant's age. Subparagraph (b)(1)(A) provides an exclusion to liability when the complainant is under the age of 18, and the actor is a close relative or a former legal guardian with authority to control the complainant's freedom of movement who acts "with intent to"[14] assume full responsibility for the care and supervision of the complainant, and does not cause bodily injury or use a coercive threat. Subparagraph (b)(1)(B) provides an exclusion to liability if the actor reasonably believes he or she is acting at the direction of a close relative. In addition, the actor must act with intent that the close relative will assume full responsibility for the care and supervision of the complainant, and did not cause bodily injury or use an explicit or implicit coercive threat. The term "close relative" is defined in RCC § 22E-701, and means a parent, grandparent, child, sibling, aunt, or uncle. The defenses under paragraph (b)(1) do not preclude criminal liability under any other offenses.[15]

Paragraph (b)(2) provides two additional defenses to prosecution under paragraph (a)(1) of this section. Subparagraph (b)(2)(A) specifies that it is a defense that the actor is, in fact, is a transportation worker who moves the complainant while in the course of the worker's official duties.[16] Paragraph (b)(2)(B) specifies that it is a defense that the actor is, in fact, a person who moves the complainant solely by persuading the complainant to go to a location open to the general public to engage in a commercial or other legal activity.[17]

Paragraph (c) specifies two affirmative defenses. RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. Under paragraph (c)(1), it is an affirmative defense to prosecution under paragraph (a)(1) that the actor lacked effective consent to confine or move the complainant due to the use of deception, but the actor did not have intent to[18]

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[14] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain he or she would assume full responsibility for the care and supervision of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor assumed full responsibility for the care and supervision of the complainant, only that he or she believed to a practical certainty that he or she would do so.
Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase.

[15] For example, although the defense under paragraph (b)(1)(A) bars criminal restraint liability when a close relative moves a child with intent to assume full responsibility and care over the child, this does not preclude liability for parental kidnapping under RCC § 16-1022, provided the elements of that offense are satisfied.

[16] For example, if a 12 year old child gets on a public bus while unaccompanied by a parent or guardian, the bus driver would technically satisfy the elements of criminal restraint under subparagraph (a)(2)(B), by moving the complainant without consent of a person with legal authority over the complainant. This defense bars criminal liability for this conduct.

[17] For example, a store owner who convinces a 12 year old child unaccompanied by a parent or guardian to enter the store would technically satisfy the elements of criminal restraint under subparagraph (a)(2)(B), by moving the complainant without consent of a person with legal authority over the complainant. This defense bars criminal liability for this conduct.

[18] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would proceed by the infliction of bodily injury or a coercive threat if the deception should fail. Per

proceed by the infliction of bodily injury or an explicit or implicit coercive threat[19] if the deception should fail.[20] The term "coercive threat" is defined in RCC § 22E-701.

Under paragraph (c)(2), it is an affirmative defense to prosecution under paragraph (a)(2) if the actor reasonably believes that a person with legal authority over the complainant would have effectively consented to the conduct constituting the offense. This defense applies if the actor has not communicated with a person with legal authority over the complainant, but reasonably believes that such a person *would* effectively consent to the confinement or movement. The determination of whether the actor reasonably believed that a person with legal authority over the complainant would have effectively consented is a fact-specific inquiry. The complainant's age, the nature and purpose of the confinement or movement, and any other relevant circumstances may be taken into account.

Subsection (d) specifies relevant penalties for the criminal restraint. Paragraph (d)(2) specifies three penalty enhancements. If the government proves at least one of the penalty enhancements listed under paragraph (d)(2), the penalty classification for criminal restraint may be increased in severity by one penalty class. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6.

Subparagraph (d)(2)(A) requires that the actor was reckless as to the complainant being a protected person. The term "protected person" is defined under RCC § 22E-701, which includes a person who is "under 18 years of age, when, in fact the actor is 18 years of age or older and at least 4 years older than the other person," "65 years or older, when, in fact, the actor is under 65 years of age," "a vulnerable adult," "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of official duties," or "a District official." Under sub-subparagraph (a)(2)(B)(i), the actor must have been reckless as to the complainant being a protected person, a culpable mental state defined in RCC § 22E-206, meaning the accused must consciously disregard a substantial risk that the complainant is a "protected person," and that disregard of that risk is clearly blameworthy.

Subparagraph (d)(2)(B) requires that the accused commits the offense by recklessly displaying or using a dangerous weapon or imitation weapon. The phrase "by displaying or using a dangerous weapon or imitation dangerous weapon" should be broadly construed to include criminal restraints in which the accused only momentarily

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RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor proceeded with the infliction of bodily injury or a coercive threat, only that the actor believed to a practical certainty that he or she would do so if the deception failed.

[19] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, depending on the context, saying "it would be a shame if anything happened to your store," may constitute an implicit threat of property damage.

[20] Deception can fail either by the complainant realizing that he or she has been deceived, or by a third party intervening on behalf of the complainant. The defendant's motive for deceiving the other person, whether the defendant was armed, or an actual attempt to use force or threats may all be relevant to determinations of the defendant's willingness to resort to force or threats should the deception fail.

displays such a weapon, or slightly touches the complainant with such a weapon.[21] The term "use" is intended to include making physical contact with the weapon, and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[22] The terms "dangerous weapon" or "imitation weapon," are defined in RCC § 22E-701. Sub-subparagraph (a)(2)(C) specifies that a "recklessly" culpable mental state applies to this penalty enhancement, which requires that the actor consciously disregarded a substantial risk that he or she would display or use a dangerous weapon or imitation weapon. However, the sub-subparagraph also uses the term "in fact," a defined term in RCC § 22E-207, to specify that there is no culpable mental state required as to whether the implement used or displayed was a dangerous weapon or imitation dangerous weapon.

Subparagraph (d)(2)(C) requires that the actor has the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official. This requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[23] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[24] "Law enforcement officer," "public safety employee," and "public official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Subsection (e) provides that a person may not be convicted of criminal restraint and a separate offense if the confinement or movement was incidental to the commission of the other offense. Confinement or movement is incidental to another offense when the actor's primary purpose in confining or moving the other person was to commit the other offense, provided that the movement or confinement did not exceed what is normally associated with the other offense.[25] The subsection specifies that, consistent with RCC §

[21] For example, assuming the other elements of the offense are proven, rearranging one's coat to provide a momentary glimpse of part of a knife, or holding a sharp object to someone's back without actually causing injury, may be sufficient for liability under paragraph (a)(3).

[22] For further detail on what conduct constitutes "using" a dangerous weapon, see Commentary to criminal threats, RCC § 22E-1204.

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

[24] For example, confining or moving a person without consent may constitute harm, even if no bodily injury occurs, because it is an interference with the person's freedom of movement.

[25] This provision is intended to re-instate DCCA case law prior to *Parker v. United States*, 692 A.2d 913 (D.C. 1997). Prior to *Parker*, District courts employed a fact-based inquiry to determine whether convictions for kidnapping and other offenses that arise from a single act or course of conduct should merge. In *Parker*, the DCCA held that instead of a fact-based inquiry, courts should only use a *Blockburger* elements test to determine if convictions for kidnapping and separate offenses should merge.

22E-214, multiple convictions are barred only after the time for judgment for appeal has expired, or after the appeal of the judgment of conviction has been decided.

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

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

First, the RCC criminal restraint offense codifies as a separate offense for confining or moving another person when the motive of the perpetrator is not ransom, the infliction of bodily injury, or other particularly harmful or dangerous acts. The current kidnapping statute requires that the defendant hold a person "for ransom, reward, *or otherwise*[.]"[26] The D.C. Court of Appeals (DCCA) has interpreted the "or otherwise" language broadly and held that "[t]he motive behind the kidnapping is unimportant, so long as the act was done with the expectation of benefit to the transgressor."[27] By contrast, the RCC divides the current kidnapping offense into two primary offenses, with criminal constraint providing liability for confining or moving another person while the revised kidnapping requires an added wrongful intent that makes the confinement or movement especially dangerous, harmful, or terrifying. Codifying a new criminal restraint offense improves the proportionality of the RCC by separately labeling and penalizing less harmful and dangerous forms of confinement or movement.[28]

Second, the criminal restraint offense provides a defense when the complainant is under the age of 18, and the actor is either a close relative or a former legal guardian with authority to control the complainant's freedom of movement.[29] The current kidnapping statute provides an exception to liability if the victim is a minor, and the actor is the

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The restraint need not be necessarily associated with commission of the other offense. For example, a person who commits robbery by forcing a person to walk into an adjacent room to locate valuables would not be guilty of criminal restraint because the movement was incidental to the robbery. However, a person who confines another for a full day in order to facilitate commission of a robbery may still be convicted of a criminal restraint because the duration of the confinement far exceeded what would normally be associated with a robbery. *See, e.g., Sinclair v. United States*, 388 A.2d 1201 (D.C. 1978) (kidnapping was not incidental to robbery when the defendant held a person at gunpoint in a car and drove 25 blocks away); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978) (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[26] D.C. Code § 22-2001.

[27] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (quoting *United States v. Wolford,* 144 U.S.App.D.C. 1, 5-6, 444 F.2d 876, 880-81 (1971) (internal quotations omitted). For example, restraining another person in order to enact revenge, or out of a desire for companionship could sustain a kidnapping conviction under current law. *See Walker*, 617 A.2d at 527.

[28] For example, a person who in the heat of the moment blocks a door to prevent his significant other to leave in the midst of an argument may be guilty of kidnapping under current law, and subject to the same penalty as a person who, after substantial planning, forcibly seizes a person, transports them to another location, and holds them for ransom on fear of death. Under the RCC, these two types of conduct would be penalized differently, as a criminal restraint and kidnapping.

[29] When the actor is a close relative or former legal guardian, the exception also requires that the actor acts with intent to assume full responsibility for the care and supervision of the complainant, and does not cause bodily injury or use a coercive threat.

victim's parent. By contrast, in certain circumstances the RCC criminal restraint statute extends the exception to close relatives and former legal guardians. The revised criminal restraint statute recognizes that under certain circumstances, a close relative or former legal guardian confining or moving a child does not warrant criminal liability under the criminal restraint statute.[30] Extending the parental exception to include other authority figures improves the proportionality of the revised offense.

Third, the RCC criminal restraint statute bars multiple convictions for criminal restraint and any other offense if the confinement or movement was incidental to the commission of the other offense.[31] Under current DCCA case law a person may be convicted of both kidnapping and another offense that arise from the same act or course of conduct, as long as kidnapping and the other offense each include "at least one element which the other one does not."[32] By contrast, the RCC criminal restraint statute reinstates the fact-based test applied by the DCCA prior to *Parker v. United States*,[33] which required courts to make a determination in each case as to whether the confinement or movement was merely incidental to another offense.[34] Where, as is common,[35] such confinement or movement is incidental to another offense,[36] the authorized punishment for the other offense is sufficient. The RCC criminal restraint sentencing provision improves the proportionality of the offense.

Fourth, the RCC criminal restraint statute incorporates multiple penalty enhancements based on the status of the complainant, capping the effect of these enhancements. The D.C. Code currently provides multiple penalty enhancements for the commission of a kidnapping offense,[37] without specifying whether or how these

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[30] Application of this defense does not preclude liability under any other statute. A close relative may still be convicted of parental kidnapping under RCC § 16-1022, provided the elements of that offense are satisfied

[31] By barring sentences for kidnapping, the revised statute allows for the possibility that convictions for kidnapping and the other offense may be entered for purposes of appeal. If the conviction for the other offense is reversed on appeal, the appellate court may order a lower court to sentence the defendant for the surviving kidnapping conviction.

[32] *Malloy v. United States*, 797 A.2d 687, 691 (D.C. 2002)

[33] 692 A.2d 913 (D.C. 1997). In *Parker*, the DCCA applied a new test for how to determine, in the absence of legislative intent, whether charged offenses should merge. The *Parker* ruling applied the new "elements" test the DCCA first adopted in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (*en banc*) because there was no legislative intent discernible as to whether kidnapping should merge with murder.

[34] *E.g., West v. United States*, 599 A.2d 788, 793 (D.C. 1991); *Vines v. United States*, 540 A.2d 1107, 1109 (D.C. 1988); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978).

[35] Many offenses against persons commonly involve some type of significant, non-consensual interference with another person's freedom of movement. For example, victims of robberies, assaults, sexual assaults, and homicides are frequently subjected to threats or physical restraint that prevent them from fleeing. Under current District law, such offenses against persons typically would provide the basis for a kidnapping charge. In practice, however, kidnapping charges are not typically brought in cases with such offenses against persons.

[36] *E.g., Robinson*, 388 A.2d at 1212–13 (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[37] *See*, e.g., D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in

enhancements may be combined or "stacked" when multiple enhancements are applicable to a single charge. DCCA case law has not addressed whether most combinations of these penalty enhancements can be combined, but the combination of at least some of these enhancements has been upheld.[38] By contrast, under the criminal restraint statute, the penalty for criminal restraint cannot be enhanced more than once based on any of the listed penalty enhancements.[39] While multiple penalty enhancements may be charged, proof of just one is sufficient to increase the penalty class in severity and proof of others does not change the maximum statutory penalty for the crime.[40] Capping the effect of penalty enhancements improves the proportionality of the District law by preventing aggravated forms of the offense from being penalized the same as much more serious offenses.

Fifth, the RCC penalty enhancements in criminal restraint statute provides new, heightened penalties based on recklessness as to the status of the complainant as a protected person, which includes on-duty law enforcement officers, on-duty public safety employee, on-duty transportation workers. The current kidnapping statute does not reference the status of the complainant, but multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[41] Currently, the D.C. Code does not enhance crimes based on the status of the complainant as an on-duty law enforcement officer, public safety employee, or on-duty transportation workers. By contrast, through its use of the term "protected person," the RCC criminal restraint statute authorizes heightened penalties if the accused is reckless as to the fact the complainant is an on-duty law enforcement officer, on-duty public safety employee, or on-duty transportation worker. Such penalties are consistent with enhancements for assault-type,[42] robbery[43], and homicide offenses,[44] and reflect some unique vulnerabilities of such complainants.[45] Requiring a reckless culpable mental state is also consistent with many current statutes that authorize enhanced penalties based on

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the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-4502 (enhanced penalty for committing kidnapping "while armed" or with a dangerous weapon "readily available").

[38] Convictions have been upheld applying multiple enhancements. *C.f. Forte v. United States*, 856 A.2d 567 (D.C. 2004) (holding that "double enhancement" under senior citizen penalty enhancement statute and repeat offender statute was proper).

[39] For instance, the status of the complainant and the defendant's use of a weapon.

[40] The existence of more than one aggravating factors may be a significant factor in sentencing, however.

[41] D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-3611 (minors); D.C. Code § 22-3601 (persons over 65 years of age); D.C. Code §§ 22-3751; 22-3752 (taxicab drivers); and D.C. Code §§ 22-3751.01; 22-3752 (transit operators and Metrorail station managers); and D.C. Code § 22-3602 (members of a citizen patrol).

[42] RCC § 22E-1202.

[43] RCC § 22E-1201.

[44] RCC §§ 22E-1101 - 1102.

[45] For example, on-duty law enforcement and public safety officers performing investigative duties and private vehicle-for-hire services drivers may often enter situations where they are isolated with persons in enclosed places and more susceptible to unwanted interference with their personal movements; vulnerable adults may be targeted due to their limited ability to evade interference with their freedom of movement.

the complainant's status.[46] Including recklessness as to the complainant being an on-duty law enforcement officer, public safety employee, a vulnerable adult, or on-duty transportation worker as penalty enhancement removes a possible gap in current law, and improves the consistency and proportionality of the revised code.

Sixth, the revised statute includes a penalty enhancement based on the crime being committed for the purpose of harming the complainant because of his or her status as a law enforcement officer, public safety employee, or District official. The current kidnapping statute does not reference acting with the purpose of harming the complainant because of the status of the complainant, although multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[47] By contrast, the criminal restraint statute includes a penalty enhancement for committing the offense with the purpose of harming another person due to that person's status as a law enforcement officer, public safety employee, or District official. In practice, this change only affects law enforcement officers and public safety employees who are not District employees, as kidnapping of any District employee is subject to more severe statutory penalties under current District law.[48] Authorizing heightened penalties for criminal restraint with the purpose of harming the complainant because of the complainant's status as a law enforcement officer or public safety employee removes a possible gap in current law, and improves the consistency and proportionality of penalties.

Seventh, the criminal restraint statute includes a penalty enhancement for "displaying or using" a dangerous weapon or imitation dangerous weapon. Current D.C. Code § 22-4502 provides enhanced penalties for committing kidnapping "while armed" or "having readily available" a dangerous weapon. District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a weapon]";[49] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[50] provided that the

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[46] Under current District law it is a defense to the senior citizen complainant enhancement that "the accused knew or reasonably believed the complainant was not 65 years old or older at the time of the offense, or could not have known or determined the age of the complainant because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, under the current minor complainant enhancement, it is a defense that "the accused reasonably believed that the complainant was not a minor [person less than 18 years old] at the time of the offense." D.C. Code § 22-3611(b). The current assault of a law enforcement officer offense requires that the defendant was

[47] D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee);

[48] D.C. Code § 22-851. Subparagraph (d)(2)(C) of the RCC criminal restraint statute provides liability for criminal restraints with the purpose of harming the complainant because of the complainant's status as a District official.

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

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

accused also constructively possessed the weapon.[51] There is no requirement under D.C. Code § 22-4502 that the accused actually used the weapon to commit kidnapping.[52] By contrast, the penalty enhancement requires that the actor actually displayed or used[53] a dangerous weapon or imitation dangerous weapon. Merely possessing or having a weapon readily available is insufficient to satisfy the penalty enhancement subparagraph (d)(2)(B), although such conduct is criminalized elsewhere in current law and the RCC as a separate offense with a lower penalty.[54] Including use of a dangerous weapon or imitation dangerous weapon as a penalty enhancement improves the proportionality of punishment by matching more severe penalties to criminal restraints in which the defendant actually uses a weapon.

Beyond these seven changes to current District law, nine other aspects of the revised criminal restraint offense may constitute substantive changes to current District law.

First, the RCC criminal restraint statute specifies that the actor must "knowingly" confine or move another person. The current kidnapping statute references as one means of committing the offense that the actor had "intent to hold or detain,"[55] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. In one case the DCCA stated that the current kidnapping statute requires that the actor had "specific intent to detain the complainant"[56] although it is unclear whether the DCCA in that case was referring only to the defendant's motive rather than their awareness of the objective elements of the offense. Current District practice appears to treat the kidnapping as a "general intent" offense.[57] The revised criminal restraint statute specifies that a "knowingly" culpable mental state applies to the element of confining or moving the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal

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

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

[53] "Using" a weapon includes physically touching another person with the weapon. For example, if all other offense elements are satisfied, placing a knife or firearm to the complainant's back and telling them to walk to another location may satisfy the penalty enhancement under subparagraph (d)(3)(C) for kidnapping.

[54] *See* D.C. Code § 22-4514(b); RCC § 22E-4102; 22E-4104.

[55] *See* D.C. Code § 22-2001 ("…holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise…").

[56] *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for 'ransom or reward or otherwise' and that such detention was involuntary or by use of coercion; the detention may be for any purpose that the defendant believes might benefit him.").

[57] Redbook § 4.303 Kidnapping requires that the accused acted "voluntarily and on purpose, and not by mistake or accident," which accords with the jury instructions treatment of "general intent," not "specific intent" offenses. See Redbook § 3.100 Defendant's State of Mind.

behavior is a well-established practice in American jurisprudence.[58] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the RCC criminal restraint offense requires that the complainant did not effectively consent to the interference, other than in cases involving complainants under the age of 16, or who are incapacitated. The current kidnapping statute is silent as to whether and by what means the actor must confine or move the complainant. The current statute broadly states that a person commits kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual",[59] but none of these terms are statutorily defined. The DCCA has generally recognized that kidnapping requires an "involuntary seizure,"[60] which includes forcible seizures[61], or restraining a person by threat of force.[62] Current District practice also recognizes that a person can commit kidnapping by "seiz[ing], confin[ing], abduct[ing], or carr[ying] away [the complainant] against his/her will"[63] The revised criminal restraint statute specifies that the confinement or movement must be without effective consent of the complainant, except in cases where the complainant is under the age of 16 or incapacitated. The revised language improves the clarity and proportionality of the offense.

Third, the RCC criminal restraint statute provides defenses if the actor is a transportation worker who moves the complainant while in the course of the worker's official duties, or a person who moves the complainant solely by persuading the complainant to go to a location open to the general public to engage in a commercial or other legal activity. This defense recognizes that in these circumstances, moving an incapacitated individual or child under the age of 16 does not warrant criminalization even if a person with legal authority over the complainant has not effectively consented. The current kidnapping statute does not specify whether this type of movement constitutes an offense, and there is no DCCA case law on point. To resolve this ambiguity, the revised criminal restraint statute clarifies that these types of movements of

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

[59] The current statute states that a person can commit kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[,]" D.C. Code § 22-2001.

[60] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (noting that "involuntary seizure is the very essence of the crime of kidnapping"); *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for "ransom or reward or otherwise" and that such detention was involuntary or by use of coercion[.]")

[61] *E.g., Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (holding that evidence showing defendant grabbed victim by the hair and pushing her into a changing room was sufficient to prove that she had been seized and detained involuntarily).

[62] *E.g., Battle v. United States*, 515 A.2d 1120 (D.C. 1986) (defendant committed kidnapping by displaying a gun, got into complainant's car, and drove the car away to a different location where the complainant would be held).

[63] D.C. Crim. Jur. Instr. § 4.303 Kidnapping.

incapacitated individual and children under the age of 16 is not criminalized. This change improves the clarity and proportionality of the revised statute.

Fourth, the RCC criminal restraint statute requires that the actor must "substantially" confine or move the complainant. The current kidnapping statute does not explicitly include any substantiality element, and the DCCA has never discussed in a published opinion whether momentary or trivial confinement or movement suffices under the current kidnapping statute.[64] By contrast, the revised criminal restraint statute requires that the actor must "substantially" confine or move the complainant. This excludes momentary or trivial confinement or movement. The precise effect on current law is somewhat unclear, as there is no case law on point. Requiring that the actor "substantially" confine or move the complainant improves the proportionality of the RCC by excluding cases that only involve trivial or momentary interference.[65]

Fifth, when the complainant is under the age of 16 or is incapacitated, the RCC criminal restraint statute requires that the actor be reckless as to the fact that a person with legal authority over the complainant has not effectively consented to the confinement or movement. The current kidnapping statute does not specify when confining or moving a person who is under the age of 16 or is incapacitated constitutes kidnapping, and there is no relevant DCCA case law on point.[66] It is unclear under current law whether, and under what circumstances, a person would be guilty of kidnapping for confining or moving a person without effective consent of a person with legal authority over the complainant. The revised statute resolves this ambiguity by requiring that the actor at least be reckless as to whether a person with legal authority over the complainant has not effectively consented to the confinement or movement. This change improves the clarity, completeness, and perhaps the proportionality, of the revised statute.

Sixth, the RCC criminal restraint statute requires that the actor confines or moves another person. The current kidnapping statute criminalizes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[.]"[67] With the exception of "enticing," discussed

[64] DCCA case law discussing whether kidnapping should merge with other offenses has suggested that relatively brief interference with another person's freedom of movement can constitute kidnapping. *E.g.*, *Sinclair v. United States*, 388 A.2d 101, 1204 (D.C. 1978) (noting that "victims of [rape or robbery] are detained against their will while the criminal is accomplishing his objective"). This case law implies that even the brief detention associated with an ordinary street robbery is sufficient for kidnapping. However, the DCCA has never specifically decided whether on its own, such a brief detention would satisfy the elements of kidnapping.

[65] If a defendant intended to interfere with a person's freedom of movement to a substantial degree but failed to do so and was only able to interfere in an insubstantial manner, attempt liability may still be applicable depending on the facts of the case.

[66] *But see*, *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005) (holding that convictions for kidnapping and enticing a minor do not merge, noting that "the kidnapping statute requires . . . that the complainant was seized involuntarily through the defendant's use of mental or physical coercion; however, consent is never a valid defense to child enticement, and therefore the government is not required to show that the child was taken involuntarily."). This language suggests that kidnapping requires, even in the case of minors, that the defendant seize another person "involuntarily", and that kidnapping does not criminalize moving or confining a minor by means of enticement.

[67] D.C. Code § 22-2001.

below, replacing these verbs with "confines" and "moves" does not appear to change current District law. The ordinary definitions of the verbs "seizing," "confining," "kidnapping," "abducting," "concealing," and "carrying away" all constitute confining or moving another person. However, it is possible that "inveigling" and "decoying" a person includes conduct not covered by confining and moving another.[68] The terms "inveigling" and "decoying" are not defined in the current statute, and there is no DCCA case law defining these terms. The RCC criminal restraint statute resolves this ambiguity by requiring that the actor confine or move another person, without that person's effective consent.[69] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense.

Seventh, the RCC's criminal restraint statute omits the word "entices." The current kidnapping statute states that a person commits kidnapping by "enticing . . . any individual . . . with intent to hold or detain such individual for ransom, reward, or otherwise[.]"[70] Under a plain language reading, the current kidnapping statute provides liability for merely enticing a person with intent to hold or detain that person for some personal benefit, even if the person was never actually held. However, the DCCA has never discussed in a published opinion whether such conduct would actually constitute kidnapping, and such an interpretation would run counter to case law requiring the kidnapping to be "involuntary" in nature.[71] The RCC's criminal restraint statute resolves this ambiguity by providing that the offense requires actually confining or moving a person without that person's effective consent. A person cannot commit criminal restraint merely by offering some reward, without actually confining or moving another person.[72] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the criminal restraint statute.

Eighth, the RCC criminal restraint statute provides an affirmative defense when the actor obtained consent by deception and did not intend to obtain consent by inflicting bodily injury or making a coercive threat should the deception fail. The current D.C. Code kidnapping statute does not reference use of "deception," but it does include the terms "inveigle" and "decoy" which, at least considered alone, may allow for kidnapping liability for the use of deception.[73] The DCCA has never discussed in a published

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[68] For example, the word "inveigles" may include causing a person to move by means of flattery. Under the RCC criminal restraint offense, the mere use of flattery to confine or move someone would be insufficient.

[69] Or without the effective consent of a person with legal authority over the complainant if the complainant is an incapacitated individual, or under the age of 16.

[70] D.C. Code § 22-2001.

[71] *C.f. Walker*, 617 A.2d at 527 (noting that "involuntary seizure is the very essence of the crime of kidnapping").

[72] However, a person can commit kidnapping by initially enticing another person with offer of some benefit as a means of luring the other person to move to or remain in a particular location as long as the actor confines or moves a person without effective consent.

[73] D.C. Code § 22-2001. ("Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years."). One meaning of "inveigle" is "to win over by

opinion whether deception that causes a person to change how they otherwise would exercise their freedom of movement can alone constitute kidnapping, absent proof that the defendant would have resorted to force or threats should the deception fail.[74] Federal courts interpreting an analogous federal kidnapping statute[75] are split as to whether deception alone can constitute kidnapping.[76] The revised statute resolves this ambiguity, by including an affirmative defense that the actor used deception but did not intend to resort to force or coercive threats. The revised language improves the clarity and proportionality[77] of the offense.

Ninth, the revised statute does not separately criminalize a conspiracy to commit criminal restraint. The District's current kidnapping statute specifically provides that any person who conspires to commit kidnapping "shall be deemed to have violated the provisions of this section."[78] The current kidnapping statute's reference to a conspiracy, however, does not specify what culpable mental states, if any, apply to the conspiracy. By contrast, under the RCC criminal restraint statute, conspiracy to commit criminal restraint is subject to the RCC's general conspiracy statute. The RCC's general conspiracy statute details the culpable mental state and other requirements for proof of a

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wiles." Merriam Webster Dictionary Online, at https://www.merriam-webster.com/dictionary/inveigle. However, in addition to "inveigle," the plain text of the current statute also to requires "holding or detaining, or with the intent to hold or detain…" which suggests that mere substantial movement or confinement by deception may be inadequate for liability.

[74] *Miller v. United States*, 138 F.2d 258, 260 (8th Cir.1943) (defendant initially deceived complainant by lying about taking her to see her dying grandfather, then enslaved complainant and kept her in servitude by using beatings and death threats).

[75] *United States v. Wolford*, 444 F.2d 876, 879-80 (D.C. Cir. 1971) ("For all practical purposes, the conduct prohibited by section 2101 is identical to that proscribed by the Federal Kidnaping Act, as presently worded, 18 U.S.C. 1201 (1964),[6] with the exception of the requirement of the federal statute that the complainant be transported in interstate or foreign commerce. For this reason, and because both statutes were enacted by Congress, decisions construing the meaning and application of the Federal Kidnaping Act may be resorted to as an aid in determining the meaning of the similar language employed in the District statute.); D.C. Crim. Jur. Instr. § (noting that the District's kidnapping statute is "intended to cover the same acts as the federal kidnapping statute 18 U.S.C. § 1201 (a)(1)").

[76] *United States v. Corbett*, 750 F.3d 245, 246 (2d Cir. 2014) ("Other circuits differ as to whether a defendant who first "takes" control of his victim by "decoy" or trick must intend to back up his pretense with physical or psychological force in order to "hold" the unwilling victim under the statute. *Compare United States v. Boone*, 959 F.2d 1550, 1555 & n. 5 (11th Cir.1992) (requiring that the defendant "ha[ve] the willingness and intent to use physical or psychological force to complete the kidnapping in the event that his deception fail[s]"), *with United States v. Hoog*, 504 F.2d 45, 50–51 (8th Cir.1974) (finding the evidence to be sufficient where the defendant promised the victim a ride and then kept her in his car by inventing an emergency detour).").

[77] Absent the RCC specification that consent by deception must be accompanied by an intent to use bodily injury or threat of bodily injury if necessary, a broad range of otherwise accepted, legal conduct may fall within the scope of the RCC criminal restraint and current kidnapping statute. For example, if a defendant lures another person to a location, and convinces the person to remain in that location by false promise of employment, the defendant could be convicted of criminal restraint even if the defendant had no intent to use force or threats to compel the person to remain.

[78] D.C. Code § 22-2001. ("If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

conspiracy in a manner broadly applicable to all offenses. To the extent that the RCC's general conspiracy provision differs from the law on conspiracy as applied to the current kidnapping statute, relying on the RCC's general conspiracy provision may constitute a change in current law.[79] This change improves the clarity and consistency of the revised offense.

One other change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The RCC criminal restraint statute does not contain special provisions regarding jurisdiction. The current kidnapping statute states that "[t]his section shall be held to have been violated if the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of Columbia."[80] This language apparently is intended to ensure that District courts have jurisdiction over kidnappings that do not occur entirely within the District of Columbia. However, it is unclear whether this language changes the scope of jurisdiction that a District court would otherwise have over kidnapping cases. The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[81] Consequently, although the DCCA has not applied this rule to kidnapping cases, it seems that District courts would have jurisdiction over any case in which a person was seized or held within the District, regardless of whether the person was initially seized outside of the District, or if the person were seized within the District and transported out of the District.[82] The RCC criminal restraint statute eliminates jurisdiction language specific to kidnapping and criminal restraint. In addition to general case law providing authority for offenses if "one of several constituent elements to the complete offense" occurs within the District,"[83] RCC § 22E-303 specifically provides jurisdiction for conspiracies formed within the District when the object of the conspiracy is engage in conduct outside of the District if the conduct would constitute a crime under D.C. Code.[84] District courts would therefore have jurisdiction over conspiracies to commit criminal restraint outside of the District. Omitting special jurisdiction language from the criminal restraint statute improves the law's clarity by omitting unnecessary language and making the offense more consistent with other offenses.

[79] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy.
[80] D.C. Code § 22-2001.
[81] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).
[82] For example, a person who attempts to lure a person in another jurisdiction into the District for purposes of kidnapping that person may be guilty of attempted kidnapping, assuming that the defendant's conduct satisfied the dangerous proximity test.
[83] *Baish*, 460 A.2d at 40–41.
[84] RCC § 22E-303(c).

RCC § 22E-1403. Blackmail.

Explanatory Note. *This section establishes the blackmail offense for the Revised Criminal Code (RCC). The offense criminalizes compelling a person to act, or refrain from acting, by means of certain coercive threats. While some RCC crimes explicitly address commission by use of a coercive threat,*[1] *and many more RCC crimes may be committed by using a coercive threat,*[2] *the RCC blackmail statute is intended to criminalize various types of conduct that are not otherwise addressed. The revised blackmail statute does not apply to the use of coercive threats to make a complainant transfer, use, give control over, or allow the actor to damage property; to allow the actor to enter or remain on property; or to remain in or move to a particular location. and categorically excludes ordinary, legal employment actions. Due to its breadth, the social harm addressed by the blackmail statute overlaps with several other offenses that involve the use of coercive threats to compel a person to act or refrain from acting in a particular manner.*[3] *The general merger provision under RCC § 22E-214 applies to blackmail and these other offenses when they arise from the same act or course of conduct. The RCC blackmail statute also includes a defense that precludes criminal liability in certain cases where the defendant acted with a socially desirable purpose. The revised statute replaces the current blackmail statute in D.C. Code § 22-3252.*

Paragraph (a)(1) specifies that blackmail requires that the accused purposely causes a person to engage in, or refrain from any act. This requires that the other person acts, or refrains from acting, in a way that the person would not have absent the accused's intervention. The subsection specifies that a "purposely" culpable mental state applies, which requires that the actor consciously desired that he or she would cause the other person to act, or refrain from acting. A threat that does not cause another person to act or refrain from acting, or an actor who does not consciously desire that the threat causes the complainant to engage in or refrain from an action, does not commit blackmail.

Paragraph (a)(2) specifies that the actor must have caused another person to act or refrain from acting by communicating, explicitly or implicitly, that any person will commit any of the acts listed in subparagraphs (a)(2)(A)-(G). The communication does not require any precise words; it may be bluntly spoken, or done by innuendo or suggestion.[4] The verb "communicates" is intended to be broadly construed, encompassing all speech[5] and other messages,[6] which includes gestures or other

[1] These RCC offenses include: extortion RCC § 22E-2301, forced labor RCC § 22E-1601; and sexual assault RCC § 22E-1301. Unlike extortion, which requires that the actor uses coercive threats to obtain property of another, blackmail broadly criminalizes the use of coercive means to compel a person to engage in or refrain from engaging in any conduct.

[2] These RCC offenses include criminal restraint, RCC § 22E-1402, and many other offenses that require conduct occur without the complainant's effective consent. The term "effective consent" includes consent obtained by means of a coercive threat.

[3] For example, sexual assault RCC § 22E-1301; forced labor, RCC § 22E-1601; forced commercial sex, RCC § 22E-1602.

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

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

conduct,[7] that are received and understood by another person. Per the rule of interpretation under RCC § 22E-207, the "purposely" mental state also applies to this element. The actor must consciously desire that the other person would fear that if he or she does not conform his or her behavior to the actor's demands, then any person will resort to the coercive means listed in subparagraphs (a)(2)(A)-(D).

Subparagraph (a)(2)(A) specifies that blackmail includes threatening to take or withhold action as a government official, or to cause a government official to take or withhold action. This form of blackmail includes threats to cite someone for violation of a regulation, make an arrest, or deny the award of a government contract or permit.[8]

Subparagraph (a)(2)(B) specifies that blackmail incudes threatening to accuse another person of a crime. Under this form of blackmail, it is immaterial whether the accusation is accurate.[9]

Subparagraph (a)(2)(C) specifies that blackmail includes threatening to expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate hatred, contempt, ridicule, or other significant injury to personal reputation, or a significant injury to credit or business reputation. This subparagraph does not require that the asserted secret or fact be true or false. Threats to reveal minimally embarrassing information would not suffice under this form of blackmail. This form of blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.[10] This form of blackmail also includes threats to expose secrets, assert facts, etc., that would tend to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. A person who is already subject to hatred, contempt, and ridicule may still be the target of this form of threat.[11]

Subparagraph (a)(2)(D) specifies that blackmail includes threatening to significantly impair the reputation of a deceased person. This subparagraph does not include threats to impair a deceased person's reputation to a trivial degree. This form of

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

[7] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

[8] In some cases, threatening to take official action may fall under the defense under subsection (d).

[9] However, when the actor believes the accusation is accurate, the defense under subsection (d) may apply.

[10] D.C. Code § 22-3252.

[11] For example, even if it is well known that a person has engaged in numerous acts of infidelity, a threat to reveal an additional act of infidelity may still constitute blackmail under this paragraph.

blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.[12]

Subparagraph (a)(2)(E) specifies that blackmail includes threatening to notify a federal, state, or local government agency or official of, or to publicize, another person's immigration or citizenship status.

Subparagraph (a)(2)(F) specifies that blackmail includes threatening to restrict a person's access to a controlled substance that the person owns, or to prescription medication that the person owns. As this form of blackmail requires that the other person already owns the controlled substance or prescription medication, a threat to refuse to sell or provide a controlled substance or prescription medication does not constitute blackmail under this subparagraph.

Subparagraph (a)(2)(G) specifies that blackmail includes threatening that any other person will engage in conduct that constitutes a criminal offense against persons as defined in Subtitle II of Title 22E, or a property offense as defined in Subtitle III of Title 22E. This form of blackmail does not include threats to commit any other types of criminal offenses.[13] The use of "in fact" indicates that no culpable mental state is required as to whether the threatened conduct constitutes an offense against persons or a property offense. However, it must be proven that the actor threatened that a person would engage in conduct that satisfies all elements of an offense against persons or property offense, including any culpable mental states.

Subsection (b) establishes four defenses to prosecution under this section. Paragraph (b)(1) specifies that threats of ordinary and legal employment or business actions are not a basis for liability under the revised blackmail statute. This defense recognizes that ordinary and legal employment and business relationships may involve threats to reveal embarrassing information in order to coerce another party to act or refrain from acting in a particular way[14], and such conduct does not constitute a crime under this section.[15]

Paragraph (b)(2) specifies that blackmail does not include causing a person to do any of the acts listed under subparagraphs (b)(2)(A)-(C). The blackmail offense provides broad liability for use of threats to compel a person to engage in any act, but is not intended to replace or add liability to those RCC offenses that already specifically address the use of threats to compel a person to act in a particular way.[16] Consequently, this paragraph eliminates liability under the revised blackmail statute when a more narrowly-tailored RCC offense addresses the actor's conduct.[17] Subparagraph (b)(2)(A)

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[12] D.C. Code § 22-3252.

[13] For example, threatening to engage in disorderly conduct, a public order offense would not satisfy this element.

[14] For example, a manager may threaten to reveal an employee's malfeasance in the workplace to upper management unless the employee changes his behavior.

[15] Threats that go beyond ordinary and legal employment or business actions are subject to liability. For example, if a business owner threatens to reveal highly embarrassing personal information unless another business owner agrees to provide services for free, this exclusion to liability would not apply.

[16] For example, sexual assault specifically addresses the use of coercion to compel a person to engage in a sexual act or sexual contact. The revised criminal code's extortion RCC § 22E-2301 and forced labor RCC § 22E-1601 offenses also specifically address commission of those crimes by means of coercive threats.

[17] The harm in coercing a person to act is largely determined by the nature of the coerced act; coercing a person to engage in a sexual act is more wrongful than coercing a person to pay a small sum of money.

excludes causing a person to transfer, use, give control over property, or to give consent to damage property. The term "use" is intended to include use of both tangible[18] and intangible property.[19] This subparagraph prevents extortion, robbery, criminal damage to property, and other offenses that involve taking, using, controlling, or damaging property[20] being prosecuted as blackmail. Subparagraph (b)(2)(B) excludes causing a person to remain in or move to a location. This subparagraph is intended to prevent conduct that constitutes criminal restraint or kidnapping from being prosecuted as blackmail.[21] Subparagraph (b)(2)(C) excludes causing a person to consent to another person entering or remaining in a location. This subparagraph is intended to prevent trespass or burglary from being prosecuted as blackmail.[22]

Subsection (c) provides two affirmative defenses to blackmail under particular circumstances, and specifies the burden of proof. RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. Paragraph (c)(1) defines an affirmative defense that recognizes that criminal liability is not appropriate under certain circumstances when the actor causes a person to act or refrain from acting for certain benign purposes. The defense is only available to prosecutions under subparagraphs (a)(2)(A)-(F). The defense has two main components. First, under subparagraph (c)(1)(A), the actor must genuinely believe that the accusation or assertion was true[23], that the official action was justified,[24] or that the photograph, video, or audio recording was authentic.[25] Second, under subparagraph (c)(1)(B) the actor must have acted with the purpose to compel another person to desist or refrain from

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The RCC recognizes this by defining various offenses based on the type of conduct that the complainant is coerced into performing. Sexual assault is a more serious offense than 5th degree extortion. Blackmail is a residual offense, which can include compelling a person to perform an act that could be quite harmful. When the RCC has specified particular coerced acts as warranting less severe penalties, such as 5th degree extortion, it would be inappropriate to convict the person for blackmail, which is intended to cover potentially much more harmful conduct.

[18] For example, using threats to cause a person to allow the actor to operate a motor vehicle would fall under this inclusion.

[19] For example, using threats to cause a person to allow a person to make copies of audio recordings would fall within this exception.

[20] Numerous property offenses can be committed by means of a coercive threat, and are intended to be excluded from the revised blackmail statute. These offenses include: unauthorized use of property, RCC § 22E-2102; unauthorized use of a motor vehicle, RCC § 22E-2103; unlawful creation or possession of a recording, RCC § 22E-2105; unlawful operation of a recording device in a motion picture theater, RCC § 22E-2106; payment card fraud, RCC § 22E-2202; identity theft, RCC § 22E-2205; financial exploitation of a vulnerable adult, RCC § 22E-2208; and criminal graffiti, RCC § 22E-2504.

[21] Criminal restraint and kidnapping both require that the actor *substantially* confines or moves the complainant. RCC §§ 22E-1401, 1402. The exclusion under this subparagraph applies even if the confinement or movement is not substantial.

[22] For example, if a person obtains consent to enter another person's property by threatening to reveal the property owner's humiliating secret, trespass liability would apply instead of blackmail.

[23] An actor who threatened to accuse a person of a criminal offense believing that the person had not actually committed the offense would not be able to claim this defense.

[24] An actor who threatened to rescind a business license believing that rescinding the license was not actually warranted would not be able to claim this defense.

[25] An actor who threatened to publish a photograph that had been doctored to portray another person engaged in a sexually explicit act would not be able to claim this defense.

criminal[26] or tortious activity[27], or behavior harmful to any person's physical mental health[28]; to take reasonable action related to the wrong that is the subsection of the accusation[29], assertion[30], or invocation of official action[31]; or to refrain from taking any action or responsibility that the defendant believes the other unqualified.[32] Although people often act with mixed motives, the defense is only available if the actor would not have acted absent one of the benign purposes listed in this subsection. If the actor coerces another person and inadvertently brings about one of the benign ends listed in this subsection, the defense is not available.

Paragraph (c)(2) defines the elements of an effective consent affirmative defense. RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. This defense requires that the defendant reasonably believes that the complainant gives effective consent to the conduct constituting the offense. The term "effective consent" is defined in RCC § 22E-701.

Subsection (e) specifies relevant penalties for the offense.

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

Relation to Current District Law. *The RCC's revised blackmail statute replaces the blackmail statute in the current D.C. Code.*[33] *The revised blackmail statute makes five substantive changes to current District law that improve the clarity and proportionality of the code, fills gaps in the current code, and clearly describe all elements that must be proven, including culpable mental states.*

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[26] For example, a passenger riding in a car with a drunk driver threatening to report the person's drunk driving to authorities unless he pulls over.

[27] For example, threatening to expose a person's embarrassing secret in order to prevent that person from committing the tort of intentional infliction of emotional distress.

[28] For example, threatening to reveal an embarrassing secret about another person in order to coerce that person into obtaining necessary emergency medical care.

[29] Whether an action is reasonably related to the wrong depends on the totality of the circumstances, including the nature of the harm sought to be addressed, the effort and cost imposed on the coerced person, and the availability of alternative means of addressing the wrong. For example, if a prosecutor threatens to charge a defendant with an additional criminal offense unless the defendant agrees to plead guilty to a separate charge, the threat of the additional charge may be reasonably related to the wrong that is the subject of the accusation. Even when the demanded action is clearly related to the subject of the wrong, the demand must still be reasonable. For example, threatening to accuse a person of theft unless that person returns the stolen property to its rightful owner may be reasonable. However, an unreasonable demand would include threatening to accuse another of theft unless the other person pays the original property owner an amount several times the value of the stolen property.

In addition, threatening to publish nude or sexually explicit photographs, videos, or audio recordings unless the person provides additional nude or sexually explicit photographs, videos or recordings would not satisfy this element of the defense.

[30] For example, threatening to reveal that a person has been having an extra-marital affair unless that person agrees to put an end to the affair.

[31] For example, a health inspector threatening to repeal a restaurant's license unless the owners bring their restaurant into compliance with health codes.

[32] For example, threatening to reveal prior corrupt acts of prospective political candidate unless that person declines to run for office.

[33] D.C. Code § 22–3252.

First, the revised blackmail offense requires that the actor actually compels another person to engage in, or refrain from, any act. The current blackmail offense only requires threats *with intent* to cause another to do or refrain from doing any act.[34] By contrast, the revised offense requires that the accused actually succeed in compelling another person to act or refrain from acting.[35] Requiring that the defendant actually compel another person to act or refrain from acting improves the proportionality of the RCC, and is consistent with the RCC's extortion offense,[36] which requires that the defendant actually takes, obtains, transfers, or exercises control over property of another.

Second, the revised blackmail offense changes the scope of threats as compared to the current blackmail statute. The current blackmail statute includes threats to accuse any person of a crime; to expose a secret or publicize an asserted fact tending to subject any person to hatred, contempt, or ridicule; to impair the reputation of any person, including a deceased person; to distribute a photograph, video, or audio recording tending to subject another person to hatred contempt, ridicule, embarrassment, or other injury to reputation; or to notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status.[37] By contrast, the revised blackmail offense also includes four additional threats: (1) to commit an offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E; (2) to assert a fact about another person that would tend to impair that person's credit or business repute; (3) to take or withhold action as an official; or (4) to restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns. This change closes a gap in current District law, and makes the revised blackmail offense more consistent with the revised extortion offense.[38]

Third, the revised blackmail offense excludes liability when the actor's threats constituted normal and legal employment or business practices. The current D.C. Code blackmail statute does not include an exclusion for ordinary and legal employment or businesses practices, and there is no District case law on point. By contrast, the revised blackmail statute excludes threats that are part of ordinary and legal employment or business practices and involve threats to reveal embarrassing information in order to coerce another party to act or refrain from acting in a particular way.[39] Such conduct

[34] D.C. Code § 22-3252.

[35] Even if the accused fails to compel the other person to act or refrain from acting, attempt liability may apply depending on the specific facts of the case.

[36] RCC § 22E-2301.

[37] D.C. Code § 22-3252.

[38] RCC § 22E-2301. The revised extortion statute covers obtaining property of another by means of a "coercive threat," a defined term which includes several types of threats. The revised blackmail offense includes all types of threats included in the definition of "coercive threat," except for the catch-all provision, which includes any threats to "cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." RCC § 22E-701. The revised blackmail statute does not include a catch-all provision, because blackmail includes compelling a person to commit or refrain from any act. Including a catch-all provision in the revised blackmail statute would be overbroad and criminalize minor negotiations that are part of everyday life.

[39] For example, a manager may threaten to reveal an employee's malfeasance in the workplace to upper management unless the employee changes his behavior.

may have social benefits and criminalization would be inappropriate.[40] This change improves the proportionality of the revised statutes.

Fourth, the revised blackmail offense recognizes three exclusions to liability for conduct covered more specifically by other revised offenses. First, the revised offense does not include use of threats to cause a person to transfer, use, give control over, or consent to damage property. The current D.C. Code blackmail statute includes the use of various types of threats to obtain property of another, or to cause a person to do any act, and potentially overlaps with the several other D.C. Code offenses such as extortion and robbery.[41] Similarly, the revised blackmail statute also overlaps with numerous property offenses.[42] By contrast, to address this overlap, the revised blackmail statute excludes uses of threats to cause a person to transfer, use, give control over, or consent to damage property.[43] This limitation on liability prevents multiple convictions for offenses addressing the same social harm. Second, the revised offense excludes causing a person to remain in or move to a location. The current D.C. Code blackmail statute does not include this limitation, and there is no District case law on point. The current blackmail potentially overlaps with the D.C. Code kidnapping offenses.[44] By contrast, the revised statute includes this limitation to prevent the less serious offense of criminal restraint from being charged as blackmail. Third, the revised offense excludes causing another person to consent to allow a person to enter or remain in a location.[45] The current blackmail statute does not include this limitation. By contrast, the revised statute

[40] Threats that go beyond ordinary and legal employment or business actions are subject to liability. For example, if a business owner threatens to reveal highly embarrassing personal information unless another business owner agrees to provide services for free, this exclusion to liability would not apply.

[41] Numerous property offenses in the current D.C. Code criminalize taking or using property without consent. These offenses may include taking or using property when the consent was obtained by one of the threats enumerated in the current blackmail statute. For example, the current unauthorized use of a motor vehicle offense may include compelling a person to grant permission to use an automobile by threatening to reveal an embarrassing secret about that person. Other similar current offenses that may overlap with the current blackmail statute include: credit card fraud, D.C. Code § 22-3223; identity theft, unlawful operation of a recording device in a motion picture theater, D.C. Code § 22–3214.02; financial exploitation of a vulnerable adult or elderly person, D.C. Code § 22-933.01.

[42] Numerous property offenses can be committed by means of a coercive threat, and are intended to be excluded from the revised blackmail statute. These offenses include: unauthorized use of property, RCC § 22E-2102; unauthorized use of a motor vehicle, RCC § 22E-2103; unlawful creation or possession of a recording, RCC § 22E-2105; unlawful operation of a recording device in a motion picture theater, RCC § 22E-2106; payment card fraud, RCC § 22E-2202; identity theft, RCC § 22E-2205; financial exploitation of a vulnerable adult, RCC § 22E-2208; and criminal graffiti, RCC § 22E-2504.

[43] Many other property offenses may overlap with blackmail. For example, using a coercive threat to compel a person to consent to use copy a sound recording could constitute unlawful creation or possession of a recording under RCC § 22E-2105.

[44] The current blackmail statute criminalizes causing a person to engage in, or refrain from, any act, by use of certain enumerated threats. The current kidnapping statute includes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual *by any means whatsoever*[.]" It is possible that confining a person under threat of revealing a deeply embarrassing secret would constitute both kidnapping and blackmail under the current D.C. Code.

[45] The current blackmail statute criminalizes causing a person to engage in, or refrain from, any act, by use of certain enumerated threats. The current unlawful entry offense criminalizes entering property "without lawful authority[.]" Entering property with consent obtained by threat could constitute entering "without lawful authority," creating overlap between the current blackmail and unlawful entry statutes.

includes this limitation to prevent the less serious offense of trespass from being charged as blackmail. These exclusions to liability address overlap between the revised blackmail offense and other lesser offenses, and improves the clarity and proportionality of the revised criminal code.

Fifth, the revised blackmail offense includes a defense that the actor believed the accusation, assertion, or secret to be true, and acted with certain benign purposes. The current blackmail statute does not include any defenses, and there is no relevant D.C. Court of Appeals (DCCA) case law. By contrast, the revised blackmail offense includes a defense, which allows an actor to use certain threats to compel another person to act or refrain from acting in cases when criminal liability would be inappropriate. This revision improves the clarity and proportionality of the revised criminal code.

Beyond these five main changes to current District law, four other aspects of the revised blackmail statute may constitute substantive changes to current District law.

First, the revised blackmail offense requires a culpable mental state of purpose. The current blackmail statute does not specify a culpable mental state as to threatening another, but requires that the actor did so "with intent to obtain property of another or to cause another to do or refrain from doing any act."[46] The term "intent" as used in the current statute is not defined, and there is no relevant DCCA case law. To resolve this ambiguity, the revised statute applies the RCC standardized definition of "purposely." Applying at least a knowing culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[47] Using the purposeful culpable mental state is justified due to the breadth of the revised blackmail statute, which includes causing a person to do, or refrain from doing, any act. Since people routinely, and legally, engage in threatening behavior in everyday life, not desiring to cause fear but knowing the behavior will do so,[48] criminalization would be inappropriate. However, requiring only a knowing mental state would criminalize a broad array of cases in which the actor merely knew that, due to the otherwise legal threat, another person would react in some manner.[49] Requiring a purposeful mental state improves the proportionality of the revised criminal code.

Second, the revised blackmail offense includes threats that any person will engage in the conduct specified in subparagraphs (a)(2)(A)-(G). The current blackmail statute does not specify whether it includes threats that another person will carry out the threatened conduct, and there is no DCCA case law on point. Specifying that blackmail includes threats that any person will carry out the threatened conduct improves the clarity

[46] D.C. Code § 22-3252 (a).

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

[48] For example, telling someone that if they don't stop illegal conduct they will be reported the activity to the police may be perceived as a threat, but the purpose is to cause a person to cease further criminal activity.

[49] For example, it is legal to threaten to accuse a person of a crime. In most cases a person making such a threat will *know* that the other person will act in some manner that he or she would not have absent the threat. However, this knowledge alone should not create criminal liability. Only when the person makes the threat with the *purpose* of causing the other person to act is criminal liability justified.

of the revised criminal code, and make the offense consistent with the revised extortion statute.[50]

Third the revised blackmail statute, through application of the general merger provision under RCC § 22E-214, prevents multiple convictions for blackmail and other offenses that address more specific instances of coercive threats causing harms, or address the same basic social harm. The current D.C. Code does not include a general merger provision, and the DCCA has held that offenses merge if the elements of one offense are necessarily included in the elements of the other offense.[51] There is no District case law that squarely addresses whether blackmail merges with other overlapping offenses, however in dicta the DCCA has suggested that a person may be convicted of both blackmail and a separate offense that involves blackmail.[52] Resolving this ambiguity, the RCC general merger provision provides that multiple convictions for 2 or more offenses arising from the same act or course of conduct merge whenever one offense is "defined to prohibit a designated kind of conduct generally, and the other is defined to prohibit a specific instance of such conduct,"[53] or when "one offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each[.]"[54] Numerous offenses in the RCC criminalize use of coercive threats to compel another person to act in specific manner. For example, sexual assault[55] criminalizes compelling a person to engage in or submit to a sexual act or contact; forced labor[56] criminalizes compelling a person to perform labor or services, and forced commercial sex[57] criminalizes compelling a person to engage in commercial sex acts. In most cases, a person who commits these offenses will also satisfy the elements of blackmail.[58] If the other offense and blackmail arise from the same act or course of conduct, the offenses will merge as provided in RCC § 22E-214. Other offenses criminalize use of coercion to compel a person to act in a specific manner, whereas blackmail more broadly criminalizes compelling a person to engage in, or refrain from,

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[50] RCC § 22E-2301. The revised extortion statute criminalizes taking property of another by means of a "coercive threat." The term "coercive threat" is defined as a threat that "any person" will engage in one of the enumerated types of conduct. RCC § 22E-701.

[51] *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

[52] *See*, *Hall v. United States*, 343 A.2d 35, 39 (D.C. 1975) (holding that convictions for simple assault and obstructing justice do not merge, because it is possible to commit obstructing justice without necessarily committing a simple assault. The DCCA noted that "acts such as blackmail and unfulfilled threats of violence could support an obstructing justice charge.").

[53] RCC § 22E-214 (a)(2)(C).

[54] RCC § 22E-214 (a)(4).

[55] RCC § 22E-1301.

[56] RCC § 22E-1601.

[57] RCC § 22E-1602.

[58] It is possible to commit these offenses without satisfying the elements of blackmail, and therefore the offenses do not merge under a strict *Blockburger* elements test under current DCCA case law and codified in RCC § 22E213 (a)(1). Each of these offenses includes the use of a "coercive threat." The term "coercive threat" is defined in RCC § 22E-701, and includes threats to "cause harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." This catch-all provision in the "coercive threat" definition is not included in the blackmail statute. A person committing these offenses using a threat that satisfies the catch-all, but not the threats specified in the blackmail statute, would not be guilty of blackmail.

any act. The authorized penalties for these offenses reflect the relative seriousness of being coerced to engage in the specific acts required for each offense.[59] It would be disproportionately severe for an actor to be convicted of both the separate offense and blackmail based on the same act or course of conduct. This change improves the clarity and proportionality of the revised criminal code.

Fourth, the revised blackmail offense includes an affirmative effective consent defense. The current blackmail statute does not specify any defenses, and there is no relevant DCCA case law on whether a person a person may consent to be threatened in such a manner. To resolve this ambiguity, the revised blackmail offense includes an affirmative defense that the complainant effectively consented to the conduct constituting the offense. While it may be highly unusual for a person to give effective consent to another to cause them to engage in an act by the specified types of communication, should such effective consent exist it would negate the harm the blackmail offense is intended to address. This revision improves the clarity and the proportionality of the revised offense.

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

[59] For example, forced commercial sex and criminal restraint may both be committed using identical threats. However, the penalties for forced commercial sex are significantly higher than for criminal restraint, due to the particular harmfulness of coercing someone into engaging in commercial sex acts.

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

Explanatory Note. *The RCC criminal abuse of a minor offense proscribes a broad range of conduct in which there is harm to a minor's bodily integrity or mental well-being, including conduct that constitutes fourth degree assault, criminal threats, offensive physical contact, criminal restraint, stalking, or electronic stalking as those crimes are defined in the RCC.*[1] *The penalty gradations are primarily based on the degree of bodily harm or mental harm. Along with the revised criminal neglect of a minor offense,*[2] *the revised criminal abuse of a minor offense replaces the child cruelty offense*[3] *and the failure to provide for a child offense*[4] *in the current D.C. Code. Insofar as it is applicable to the current child cruelty offense, the revised child abuse statute also replaces the current enhancement for certain crimes committed against minors.*[5]

There are three degrees of the RCC criminal abuse of a minor statute. Each gradation requires that the accused is "reckless" as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant"[6] (paragraph (a)(1) and subparagraph (a)(1)(A) for first degree, paragraph (b)(1) and subparagraph (b)(1)(A) for second degree, and paragraph (c)(1) and subparagraph (c)(1)(A)) for third degree). Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant has the specified responsibility to the complainant in subparagraph (a)(1)(A) for first degree, subparagraph (b)(1)(A) for second degree, and subparagraph (c)(1)(A)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant.

Each gradation of the offense further requires that the accused is "reckless" as to the fact that the complainant is under the age of 18 years. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant is under 18 years of age in subparagraph (a)(1)(B) for first degree, subparagraph (b)(1)(B) for second degree, and subparagraph (c)(1)(B)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the complainant is under the age of 18 years.

Paragraph (a)(2) and subparagraphs (a)(2)(A) and (a)(2)(B) specify the two types of prohibited conduct in first degree criminal abuse of a minor, the highest grade of the revised offense.

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[1] RCC §§ 22E-1202 (assault), 22E-1204 (criminal threats), 22E-1205 (offensive physical contact), 22E-1404 (criminal restraint), 22E-1801 (stalking), 22E-1802 (electronic stalking).
[2] RCC § 22E-1502.
[3] D.C. Code § 22-1101.
[4] D.C. Code § 22-1102.
[5] D.C. Code § 22-3611.
[6] Such a duty of care to the complainant may arise, for example, from the actor being a parent, guardian, teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.

Subparagraph (a)(2)(A) establishes liability for causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning," to the complainant. Subparagraph (a)(2)(A) specifies that the culpable mental state for causing "serious mental injury" to the complainant is "purposely," a term defined in RCC § 22E-206 to here mean the accused must consciously desire that his or her conduct causes "serious mental injury" to the complainant. Subparagraph (a)(2)(B) establishes liability causing "serious bodily injury," a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness, to the complainant. Subparagraph (a)(2)(B) specifies that the culpable mental state for causing "serious bodily injury" to the complainant is "recklessly," a term defined in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will cause serious bodily injury to the complainant.

Paragraph (b)(2) specifies the prohibited conduct for second degree of the criminal abuse of a minor statute—causing "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (b)(1) applies to the elements in paragraph (b)(2). "Recklessly" is a defined term in RCC § 22E-206 that here means the accused is aware of a substantial risk that he or she will cause "significant bodily injury" to the complainant.

Paragraph (c)(2) and subparagraphs (c)(2)(A) and (c)(2)(B) specify the two types of prohibited conduct for third degree criminal abuse of a minor, the lowest grade of the revised offense. Paragraph (c)(2) and subparagraph (c)(2)(A) establish liability for causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning," to the complainant. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (c)(1) applies to the elements in subparagraph (c)(2)(A). "Recklessly" is a defined term in RCC § 22E-206 that here means the accused is aware of a substantial risk that he or she will cause "serious mental injury" to the complainant.

Paragraph (c)(2) and subparagraph (c)(2)(B) establish liability for the final type of liability in third degree criminal abuse of a minor—the accused must, "in fact," commit a "predicate offense against persons" against the complainant. "Predicate offense against persons" is defined in paragraph (e)(2) as the RCC offenses of fourth degree assault (RCC § 22E-1202(d)), criminal threats (RCC § 22E-1204), offensive physical contact (RCC § 22E-1205), criminal restraint (RCC § 22E-1404), stalking (RCC § 22E-1801), and electronic stalking (RCC § 22E-1802). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to given element, here whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Subsection (d) codifies an exclusion from liability for criminal abuse of a minor. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all exclusions from liability in the RCC. The actor does not commit an offense under the revised statute when, in fact, the actor's conduct is specifically permitted by a District

statute or regulation. Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[7]

Subsection (e) codifies an affirmative defense to the revised criminal abuse of a minor statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC. The affirmative defense is limited to subsection (b)—causing "significant bodily injury," as that term is defined in RCC § 22E-701—and subsection (c)—causing "serious mental injury," as that term is defined in RCC § 22E-701, or engaging in a specified "RCC predicate offense against persons," defined in paragraph (g)(2) of the revised statute, such as fourth degree assault or criminal restraint. An actor that commits a predicate offense against persons, but does not have liability for criminal abuse of a minor due to a successful affirmative defense, would still have liability for the predicate offense against persons if the requirements of that offense are met.

The defense has two requirements. First, per paragraph (e)(1), the actor must not be "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in subsection (e), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is under the age of 18 years, RCC § 22E-701 defines a "person with legal authority over the complainant" as the "parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the complainant, or someone acting with the effective consent of such a parent or such a person." "Person acting in the place of a parent per civil law" is further defined in RCC § 22E-701.

The effect of paragraph (e)(1) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense.[8] However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[9]

The second requirement for the defense is in paragraph (e)(2). The actor must reasonably believe that a "person with legal authority over the complainant," acting

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[7] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[8] The defense under paragraph (e)(1) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[9] These defenses have different requirements than the effective consent defense in subsection (e). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

consistent with that authority, would give "effective consent" to the conduct constituting the offense under subsection (b) or subsection (c). The defense applies if the actor has not communicated with a person with legal authority over the complainant, but reasonably believes that such a person, acting consistent with that authority, *would* effectively consent to the conduct. The determination of whether the actor reasonably believed that a person with legal authority over the complainant, acting consistent with that authority, would have effectively consented is a fact-specific inquiry. The complainant's age, the nature and purpose of the conduct, and any other relevant circumstances may be taken into account. The "in fact" specified in subsection (e) applies to paragraph (e)(2) and no culpable mental state, as defined in RCC § 22E-205, applies to paragraph (e)(2). It is not necessary to prove that the actor desired or was practically certain that a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense. However, the actor must subjectively believe, and that belief must be reasonable, that a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[10] There is no effective consent defense under paragraph (e)(2) when the actor makes an unreasonable mistake as to whether a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense.

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

Subsection (g) codifies a definition of "predicate offense against persons" for the offense and cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised criminal abuse of a minor statute clearly changes current District law in five main ways.*

First, the revised criminal abuse of a minor statute does not criminalize as a completed offense conduct that does not actually harm the complainant. The current second degree child cruelty statute criminalizes not only actual "maltreatment" of a complainant, but also causing a "grave risk of bodily injury," without any distinction in penalty.[11] In contrast, the revised criminal abuse of a minor statute does not criminalize as a completed offense mere risk creation. Conduct that results in a risk of serious bodily

[10] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[11] D.C. Code § 22-1101(b)(1), (c)(2) (second degree child cruelty statute prohibiting "maltreat[ing] a child" or "engag[ing] in conduct which causes a grave risk of bodily injury to a child" and, for either basis of liability, providing for a maximum term of imprisonment of 10 years).

injury, death, significant bodily injury, serious mental injury, or bodily injury from consumption of a controlled substance or alcohol is criminalized by the revised criminal neglect of a minor statute (RCC § 22E-1502). The RCC criminal neglect of a minor statute does not include any other risk of "bodily injury" because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars. However, conduct that results in a risk of physical or mental harm, including "bodily injury," may also constitute attempted criminal abuse of a minor. This change improves the organization, clarity, and proportionality of the revised statute.

Second, the revised criminal abuse of a minor statute partially grades the offense based on whether the defendant "purposely" or "recklessly" caused "serious mental injury." The current District child cruelty statute is silent as to whether the offense covers purely psychological harms.[12] However, DCCA case law is clear that the current child cruelty statute extends at least to serious psychological harm.[13] Moreover, the current child cruelty statute provides for the same penalties whether such harm was inflicted "intentionally, knowingly, or recklessly."[14] In contrast, the revised criminal abuse of a minor statute specifically prohibits "serious mental injury," as defined in RCC § 22E-701. There are two gradations for "serious mental injury" in the revised statute depending on the culpable mental state—purposely causing "serious mental injury" in first degree criminal abuse of a minor and recklessly causing "serious mental injury" in third degree criminal abuse of a minor. This change improves the clarity, consistency, and proportionality of the revised statute.

Third, the revised criminal abuse of a minor statute limits liability to a person that is reckless as to the fact that that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant." The current child cruelty statute requires that the complainant be under 18 years of age,[15] but does not state any requirements for the defendant's relationship to the complainant. As a result, the current statute significantly overlaps with the District's current assault statutes,[16] which are also subject to separate enhancements for harming a minor.[17] In contrast, the revised criminal abuse of a minor statute limits liability to a person that is reckless as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant." This change narrows the scope of liability for the offense to those persons with a duty of care to the complainant (e.g., a parent, guardian, teacher, doctor, daycare provider, or babysitter may be liable for the offense). The revised criminal abuse of a

[12] D.C. Code § 22-1101.
[13] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro v. United States*, 859 A.2d 149, 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).
[14] D.C. Code § 22-1101(a), (b), (c).
[15] D.C. Code § 22-1101.
[16] D.C. Code §§ 22-404; 22-404.01.
[17] D.C. Code § 22-3611.

minor offense thus provides a distinct charge for individuals with responsibilities under civil law for complainants under the age of 18 years and who harm those they are supposed to protect. The revised offense still overlaps in many respects with assault and other offenses that are predicates for third degree criminal abuse of a minor, but only for persons with a duty of care to the complainant they harm.[18] Individuals who do not satisfy this requirement may still have liability under other revised offenses, such as assault (RCC § 22E-1202), criminal threats (RCC § 22E-1204), criminal restraint (RCC § 22E-1404), or offensive physical contact (RCC § 22E-1205). This change reduces unnecessary overlap between the revised statute and other RCC offenses against persons, including assault.

Fourth, the revised criminal abuse of a minor statute is not subject to a separate penalty enhancement as a crime committed against a minor. Under current District law, first degree child cruelty is subject to a penalty enhancement if the defendant is 18 years of age or older and is at least two years older than a complainant under the age of 18 years.[19] There is no case law interpreting this enhancement as applied to child cruelty.[20] The current child cruelty statute and the penalty enhancement significantly overlap, effectively allowing a substantial increase in penalties for the same conduct whenever the actor is an adult. In contrast, the revised criminal abuse of a minor statute does not provide an enhancement based on the complainant's status as a minor. This change improves the proportionality of the revised criminal abuse of a minor statute, and reduces unnecessary overlap.

Fifth, the revised criminal abuse of a minor statute is not subject to a separate penalty enhancement for committing the offense "while armed" or "having readily available" a dangerous weapon, and does not grade the offense by the use or display of a weapon. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of serious crimes, including first degree child cruelty, "while armed with" or "having readily available" a dangerous weapon.[21] In contrast, the revised criminal abuse of a minor statute does not

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[18] Under the general merger provision in RCC § 22E-214, the predicate offenses for third degree criminal abuse of a minor are intended to merge into a conviction for criminal abuse of a minor when arising from the same course of conduct.

[19] D.C. Code § 22-3611. The enhancement refers to a "minor" instead of a "child," but defines a "minor" as a person under the age of 18. D.C. Code § 22-3611(c)(3). Under the enhancement, the defendant "may" receive a fine of up to 1½ times the maximum fine for first degree child cruelty, a term of imprisonment of up to 1½ times the maximum term of imprisonment for first degree child cruelty, or both. D.C. Code § 22-3611(a).

[20] However, the DCCA has declined to allow enhancement of another offense where the enhancement concerns an element in the underlying offense. The DCCA has held that the "while armed" enhancement in D.C. Code § 22-4502(a)(1) may not apply to the offense of assault with a dangerous weapon because the offense already provides for an enhancement. *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [the "while armed" enhancement in D.C. Code § 22-4502(a)(1)] may not apply to [assault with a dangerous weapon] since [the assault with a dangerous weapon offense] provides for enhancement and is a more specific and lenient provision."). Similarly, it could be argued that the enhancement for crimes against a minor enhances a crime which is already enhanced due to the complainant being under 18 years of age.

[21] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or

grade the offense based on the use or display of a dangerous weapon, and is not subject to a separate while armed weapons enhancement. The focus of the offense is on the betrayal of trust to the victim and the harm suffered by the minor. Use or display of a dangerous weapon to commit conduct that satisfies the revised criminal abuse of a minor statute may be chargeable under another RCC offense against persons, such as the RCC assault statute (RCC § 22E-1202). Or, an individual who possesses a dangerous weapon while committing criminal abuse of a minor may be subject to liability for possessing a dangerous weapon in furtherance of a crime of violence per RCC § 22E-4104. This change improves the proportionality of the revised statute.

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

First, the revised criminal abuse of a minor statute specifically bases liability on "serious mental injury," a term defined in RCC § 22E-701. The current District child cruelty statute is silent as to whether it includes psychological harm.[22] DCCA case law is clear that the current child cruelty statute extends to at least serious psychological injury,[23] but the court has not articulated a precise definition of the required harm. Resolving this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" differs from the definition of "mental injury" in the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision[24] by adding the requirement that the harm be "substantial" and "prolonged." These requirements reflect DCCA case law supporting a high standard for psychological

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firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2).

[22] D.C. Code § 22-1101.

[23] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[24] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

harm for child cruelty,[25] but given the imprecision of current case law it is unclear what change, if any, the definition will have on current District law. This change improves the clarity and completeness of the revised statute.

Second, the revised criminal abuse of a minor statute prohibits committing stalking (RCC § 22E-1801), electronic stalking (RCC § 22E-1802), criminal threats (RCC § 22E-1204), or criminal restraint (RCC § 22E-1404) against the complainant. The current District child cruelty statute is silent as to whether it includes psychological harm. DCCA case law is clear that the current child cruelty statute extends to at least serious psychological injury,[26] but the court has not articulated a precise definition of the required harm. Resolving this ambiguity, the revised statute reflects current case law by including "serious mental injury" in first degree and third degree criminal abuse of a minor, and by providing liability for separately codified criminal conduct that may cause psychological harms in third degree criminal abuse of a minor. This change improves the clarity, consistency, and completeness of the revised statute.

Third, the revised criminal abuse of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under the age of 18 years. The current child cruelty statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a "child." There is no DCCA case law discussing the culpable mental state for this element. However, under the current penalty enhancement for certain crimes against minors, including first degree child cruelty, it is an affirmative defense that "the accused reasonably believed that the victim was not a [person under 18 years old] at the time of the offense."[27] Resolving this ambiguity, the revised criminal abuse of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under the age of 18 years. The "reckless" culpable mental state in the revised criminal abuse of a minor statute preserves the substance of this defense.[28] This change improves the clarity, completeness, and proportionality of the revised criminal abuse of a minor statute.

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[25] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro v. United States*, 859 A.2d 149, 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[26] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[27] D.C. Code § 22-3611(b).

[28] "Reckless" is defined in RCC § 22E-206 and means that the accused must consciously disregard a substantial risk that the complainant was under 18. The enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial risk that the

Fourth, the revised criminal abuse of a minor statute specifies the types of physical injury that are a basis for liability. The current first degree child cruelty statute prohibits, in part, "tortures,"[29] "beats,"[30] "maltreats,"[31] and "causes bodily injury,"[32] and second degree child cruelty prohibits, in part, "maltreats."[33] The current statute does not define these terms, however. DCCA case law suggests that "bodily injury" in the child cruelty statute is a relatively low threshold,[34] but the required amount of physical harm is unclear. Similarly, the DCCA has not determined the required amount of physical harm for "tortures," "beats," or "maltreats."[35] Resolving this ambiguity, the revised criminal abuse of a minor statute specifies the minimal degree of physical harm required for each grade of the offense. For first degree, the minimal degree of physical harm required is "serious bodily injury," and for second degree, it is "significant bodily injury." For third degree, the minimal degree of physical harm required is either "bodily injury," as required by fourth degree assault, or conduct that satisfies offensive physical contact (RCC § 22E-1205) or criminal restraint (RCC § 22E-1404). The specified types of "bodily injury" in the revised statute are defined in RCC § 22E-701 and are intended to cover conduct prohibited by the words "tortures," "beats," "maltreats," and "causes bodily injury" in the current child cruelty statute. The RCC definition of "bodily injury" in RCC § 22E-701 ("physical pain, physical injury, illness, or impairment of physical condition") in particular, accords with the limited DCCA case law on "bodily injury" in the current child cruelty statute.[36] Use of the defined term "bodily injury" clarifies that not only physical contacts that result in pain are criminal under the RCC criminal abuse of a minor statute, but also potentially painless harms such as sickness[37] or impaired

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complainant was under 18 years of age. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[29] D.C. Code § 22-1101(a).

[30] D.C. Code § 22-1101(a).

[31] D.C. Code § 22-1101(a).

[32] D.C. Code § 22-1101(a).

[33] D.C. Code § 22-1101(b)(1).

[34] *See, e.g., Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[35] The DCCA has extensively discussed "maltreats" in terms of incorporating serious psychological or emotional harm, but not the required physical harm. *Alfaro v. United States*, 859 A.2d 149, 157-60 (D.C. 2004).

[36] *See, e.g., Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[37] Recklessly engaging in nonconsensual physical contact that transmits a disease to a complainant may suffice for criminal abuse of a minor. However, particular care should be given to the clear blameworthiness standard incorporated into the RCC definition of recklessness, which requires that the person's conscious disregard of a substantial risk, given the "nature and degree" of the risk, as well as the "nature and purpose of the person's conduct and the circumstances known to the person," have been "clearly blameworthy." RCC § 22E-206(d). For example, a sneezy parent who disregards a substantial risk that he will transmit a cold virus to a complainant under the age of 18 years by living in proximity to the complainant would not ordinarily satisfy the requirement of bodily injury. However, if a parent intentionally sneezes in a minor's face, there would be liability for third degree criminal abuse of a minor if pain, illness, or impairment of the minor's physical condition results, and possibly a higher gradation depending on the facts of the case.

physical conditions.[38] This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, the parental defense in RCC § 22E-408 applies to the revised criminal abuse of a minor statute, limiting liability for certain conduct undertaken with the intent of safeguarding or promoting the welfare of the complainant. The District's current child cruelty statute is silent as to whether there is a defense for parental discipline. However, while there is no case law on the applicability of a parental defense to child cruelty, the DCCA has recognized the defense for assault and has extended the parental discipline defense beyond parents to persons standing *in loco parentis* to the child.[39] The DCCA has not addressed the limits of permissible force in the parental discipline defense other than generally requiring that the force be "reasonable."[40] The parental defense in RCC § 22E-408 clarifies the scope of the parental defense as applied to RCC offenses against persons such as criminal abuse of a minor. This change improves the clarity and completeness of the law.

Sixth, the revised criminal abuse of a minor statute no longer separately criminalizes creating "a grave risk of bodily injury to a child, and thereby causes bodily injury." The current first degree child cruelty statute requires, in part, both that the defendant "engage[] in conduct which creates a graves risk of bodily injury to a child" and that the defendant "thereby cause[] bodily injury."[41] However, it is unclear whether or how this requirement differs from the alternative bases of liability in the current first degree child cruelty statute ("beats" or "maltreats" a child). No DCCA case law interprets this part of the current child cruelty statute. Resolving this ambiguity, the revised criminal abuse of a minor statute is limited to causing specific types of physical or mental harm. Conduct that results in a risk of serious bodily injury, death, significant bodily injury, serious mental injury, or bodily injury from consumption of a controlled substance or alcohol is criminalized by the revised criminal neglect of a minor statute

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[38] For example, a parent who intentionally feeds a minor food laced with drugs would face liability under third degree criminal abuse of a minor if pain, illness, or impairment of the minor's physical condition results, and possibly a higher gradation depending on the facts. If no "bodily injury" results, the parent may face liability under third degree of the revised criminal neglect of a minor statute for creating a substantial risk of "bodily injury" due to consumption of a controlled substance without a valid prescription.

[39] *Martin v. United States*, 452 A.2d 360, 362 (D.C. 1982) (finding that there was no evidence that appellant stood *in loco parentis* with his 13-year-old cousin because the record reflected "at best . . . that appellant *helped* on occasion with the basic running of the household," that disciplinary authority over the cousin had never been "specifically delegated" to appellant, and appellant had not "assumed any obligations (such as financial support) that would be 'associated with one standing as a natural parent to a child.'") (emphasis in original) (quoting *Fuller v. Fuller*, 135 U.S. App. D.C. 353 (1969). The court in *Martin* stated that "*in loco parentis* refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation. . . . It embodies the ideas of both assuming the parental status and discharging the parental duties." *Martin*, 452 A.2d at 362 (internal citations omitted). The court noted that *in loco parentis* involves "more than a duty to aid or assist . . . It arises only when one is willing to assume *all* the obligations and to receive *all* the benefits associated with one standing as a natural parent to a child." *Id*. (emphasis in original) (internal citations omitted).

[40] *See, e.g., Newby v. United States*, 797 A.2d 1233, 1241-42 (endorsing the common law "reasonable force" standard); *Florence v. United States*, 906 A.2d 889, 893 ("The [parental discipline defense] is established where the defendant uses reasonable force for the purpose of exercising parental discipline.").

[41] D.C. Code § 22-1101(a).

(RCC § 22E-1502). The RCC criminal neglect of a minor statute does not include any other risk of "bodily injury" because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars. However, conduct that results in a risk of physical or mental harm, including "bodily injury," may also constitute attempted criminal abuse of a minor. This change improves the clarity of the statute.

Seventh, the revised criminal abuse of a minor statute codifies an effective consent affirmative defense, discussed extensively in the explanatory note to the offense. District statutes do not codify general defenses to criminal conduct. The current child cruelty statute does not address whether consent of the complainant or of a parent or guardian is a defense to liability. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[42] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[43] It is unclear whether this District case law for assault would apply to child cruelty. Resolving this ambiguity, the revised criminal abuse of a minor statute codifies an effective consent affirmative defense for an actor that is not a "person with legal authority over the complainant." Due to this exclusion, the defense applies to individuals that have a duty of care to the minor, but do not rise to the level of a "person with legal authority over the complainant" as that term is defined in the RCC, such as a parent or guardian. The defense eliminates liability where the actor knows that they have no effective consent by the person with legal authority (e.g., they are absent or the contract for the childcare services didn't foresee the eventuality), and the requirements in the limited duty of care defense (RCC § 22E-408(a)(4)) are too stringent. For example, the defense would cover the babysitter who decides without prior consultation with the parent to let a minor climb the tree that results in a significant bodily injury. This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised criminal abuse of a minor statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current child cruelty statute does not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for child cruelty. The exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[44] This change improves the clarity, consistency, and proportionality of the revised statute.

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[42] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

[44] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil

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

First, the revised criminal abuse of a minor statute codifies a culpable mental state of "reckless" for causing serious bodily injury in first degree and serious mental injury or significant bodily injury in second degree. The current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly."[45] While the meaning of "recklessly" is not defined in the current child cruelty statute, case law has briefly interpreted these terms[46] in a manner consistent with the Model Penal Code definitions. The revised criminal abuse of a minor statute codifies a culpable mental state of "reckless," which is defined in RCC § 22E-206. It is unnecessary to codify the higher culpable mental states of "intentionally" and "knowingly" for these types of harm because under the general rule of construction in RCC § 22E-206, they satisfy the lower culpable mental state of "reckless." In addition, the definition of "reckless" in RCC § 22E-206 is consistent with DCCA case law.[47] This change clarifies the statute.

Second, the revised criminal abuse of a minor statute categorizes a person under the age of 18 as a "minor" and defines the revised offense in terms of the age of the complainant. The current child cruelty statute requires that the complainant be "a child under 18 years of age."[48] Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[49] These changes improve the clarity and consistency of the revised statute.

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legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[45] D.C. Code § 22-1101(a), (b).

[46] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").

[47] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002).

[48] D.C. Code § 22-1101(a).

[49] For example, the current child sexual abuse statutes consider a complainant under the age of 16 years to be a "child." D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

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

Explanatory Note. *The RCC criminal neglect of a minor offense proscribes a broad range of conduct in which there is a risk of harm to a minor's bodily integrity or mental well-being. In addition to prohibiting a risk of harm to a minor, the RCC criminal neglect of a minor offense prohibits failing to provide a minor with necessary items or care, as well as abandoning a minor. The penalty gradations are primarily based on the type of physical or mental harm that is risked. Along with the revised criminal abuse of a minor offense,[1] the revised criminal neglect of a minor offense replaces the child cruelty offense[2] and the failure to provide for a child offense[3] in the current D.C. Code.*

There are three degrees of the RCC criminal neglect of a minor statute. Each gradation requires that the accused is "reckless" as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant"[4] (paragraph (a)(1) and subparagraph (a)(1)(A) for first degree, paragraph (b)(1) and subparagraph (b)(1)(A) for second degree, and paragraph (c)(1) and subparagraph (c)(1)(A)) for third degree). Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant has the specified responsibility to the complainant in subparagraph (a)(1)(A) for first degree, subparagraph (b)(1)(A) for second degree, and subparagraph (c)(1)(A)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant.

Each gradation of the offense further requires that the accused is "reckless" as to the fact that the complainant is under the age of 18 years. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant is under 18 years of age in subparagraph (a)(1)(B) for first degree, subparagraph (b)(1)(B) for second degree, and subparagraph (c)(1)(B)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the complainant is under the age of 18 years.

Paragraph (a)(2) specifies additional requirements for first degree criminal neglect of a minor, the highest grade of the revised offense. The accused must have created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (a)(1) applies to all elements in paragraph (a)(2). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or

[1] RCC § 22E-1501.
[2] D.C. Code § 22-1101.
[3] D.C. Code § 22-1102.
[4] Such a duty of care to the complainant may arise, for example, from the actor being a parent, guardian, teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.

death. "Serious bodily injury" is a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness.

Paragraph (b)(2) and subparagraphs (b)(2)(A) and (b)(2)(B) specify the two types of prohibited conduct in second degree criminal neglect of a minor. Paragraph (b)(2) and subparagraph (b)(2)(A) establish liability for creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rule of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to all the elements in paragraph (b)(2) and subparagraph (b)(2)(A). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that the actor will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury."

Paragraph (b)(2) and subparagraph (b)(2)(B) establish liability for creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "serious mental injury." "Serious mental injury" is a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to all the elements in paragraph (b)(2) and subparagraph (b)(2)(B). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "serious mental injury."

Paragraph (c)(2) and its subparagraphs and sub-subparagraphs specify the three types of prohibited conduct in third degree criminal neglect of a minor, the lowest grade of the revised offense. Paragraph (c)(2) and subparagraph (c)(2)(A) establish liability for "knowingly" leaving the complainant in any place "with intent" to abandon the complainant. Per the rule of interpretation in RCC § 22E-207, the "knowingly" culpable mental state applies to all elements in subparagraph (c)(2)(A) until "with intent to" is specified. "Knowingly" is a defined term in RCC § 22E-206 which, applied here, means the accused is practically certain that his or her conduct will result in leaving the complainant in any place. The accused must also act "with intent to" abandon the complainant. "Intent" is a defined term in RCC § 22E-206 which, applied here, means the accused was practically certain that he or she would abandon the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such abandonment actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that abandonment would result.

Paragraph (c)(2), subparagraph (c)(2)(B), and sub-subparagraph (c)(2)(B)(i) establish liability for failing to make a reasonable effort to provide food, clothing, or other items or care for the complainant that are "essential to the physical health, mental health, or safety of the complainant." Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in subparagraph (c)(2)(B) applies to all elements in sub-subparagraph (c)(2)(B)(i). "Recklessly" is defined term in RCC § 22E-206 that here

means being aware of a substantial risk that one's conduct will fail to make a reasonable effort to provide the items or care that are "essential to the physical health, mental health, or safety of the complainant."

Paragraph (c)(2), subparagraph (c)(2)(B), and sub-subparagraph (c)(2)(B)(ii) establish liability for creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "bodily injury" from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a "controlled substance" or marijuana.[5] "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition." "Controlled substance" is also a defined term in RCC § 22E-701. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in subparagraph (c)(2)(B) applies to all elements in sub-subparagraph (c)(2)(B)(ii). "Recklessly" is defined term in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience bodily injury from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana.

Subsection (d) codifies two exclusions from liability for criminal neglect of a minor. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all exclusions from liability in the RCC. Under the first exclusion in paragraph (d)(1), the actor does not commit an offense under the revised statute for conduct that, in fact, constitutes surrendering a newborn child in accordance with D.C. Code § 4-1451.01 *et. seq.* Paragraph (d)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor's conduct constitutes surrendering a newborn child in accordance with D.C. Code § 4-1451.01 *et seq.* Under the second exclusion in paragraph (d)(2), the actor does not commit an offense under the revised statute when, in fact, the actor's conduct is specifically permitted by a District statute or regulation. Paragraph (d)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[6]

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[5] Specific reference is made to marijuana to ensure that marijuana is categorically included, regardless of amount. Title 48 of the D.C. Code generally defines a controlled substance to include marijuana as a controlled substance (see D.C. Code § 48–901.02(4)), but also separately modifies that general definition (see D.C. Code § 48–904.01(a)(1A)(A)) to eliminate marijuana under 2 ounces possessed by a person 21 or over. Because marijuana is categorically included, a parent who legally possesses marijuana may, for example, still be liable for blowing smoke from the marijuana upon a small child if it is proven that such conduct creates a substantial risk that the complainant would experience a bodily injury from the smoke.

[6] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

Subsection (e) codifies an affirmative defense to the revised criminal neglect of a minor statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC. The affirmative defense is limited to subsection (b)—creating or failing to mitigate remedy a risk of "significant bodily injury" or "serious mental injury" as those terms are defined in RCC § 22E-701—and subparagraph (c)(2)(B)—failing to make a reasonable effort to provide essential items or care or creating, or failing to remedy a risk of bodily injury from drug or alcohol consumption.

The defense has two requirements. First, per paragraph (e)(1), the actor must not be "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is under the age of 18 years, RCC § 22E-701 defines a "person with legal authority over the complainant" as the "parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the complainant, or someone acting with the effective consent of such a parent or such a person." "Person acting in the place of a parent per civil law" is further defined in RCC § 22E-701.

The effect of paragraph (e)(1) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense.[7] However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[8]

The second requirement for the defense is in paragraph (e)(2). The actor must reasonably believe that a "person with legal authority over the complainant," acting consistent with that authority, would give "effective consent" to the conduct constituting the offense under subsection (b) or subparagraph (c)(2)(B).[9] The defense applies if the actor has not communicated with a person with legal authority over the complainant, but reasonably believes that such a person, acting consistent with that authority, *would* effectively consent to the conduct. The determination of whether the actor reasonably believed that a person with legal authority over the complainant, acting consistent with that authority, would have effectively consented is a fact-specific inquiry. The complainant's age, the nature and purpose of the conduct, and any other relevant circumstances may be taken into account. The "in fact" specified in subsection (e) applies to paragraph (e)(2) and no culpable mental state, as defined in RCC § 22E-205, applies to paragraph (e)(2). It is not necessary to prove that the actor desired or was practically certain that a person with legal authority over the complainant, acting

[7] The defense under paragraph (e)(1) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[8] These defenses have different requirements than the effective consent defense in subsection (e). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

[9] The "conduct that constitutes the offense" in paragraph (e)(2) includes an omission. The paragraph does not use the term "omission," but the offense includes a failure to mitigate or remedy a risk and encompasses omissions.

consistent with that authority, would give effective consent to the conduct constituting the offense. However, the actor must subjectively believe, and that belief must be reasonable, that a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[10] There is no effective consent defense under paragraph (e)(2) when the actor makes an unreasonable mistake as to whether a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense.

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

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

Relation to Current District Law. *The revised criminal neglect of a minor statute clearly changes current District law in six main ways.*

First, the revised criminal neglect of a minor statute prohibits leaving a complainant with intent to abandon him or her as an offense distinct from the revised criminal abuse of a minor statute. The current second degree child cruelty statute prohibits, in relevant part, "expos[ing] a child, or aid[ing] and abet[ting] in exposing a child in any highway, street, field house, outhouse or other place, with intent to abandon the child,"[11] as well as "maltreat[ing]" a child.[12] Both these means of committing second degree child cruelty have the same maximum ten year penalty.[13] There is no case law defining the meaning of "exposing." In contrast, in the RCC, abandoning a complainant under the age of 18 years is criminalized by the criminal neglect of a minor statute instead of the revised criminal abuse of a minor statute (RCC § 22E-1501). Abandonment alone, absent any actual harm, is comparatively less serious than the physical or mental injury required in the revised criminal abuse of a minor statute. However, higher gradations of the revised criminal neglect of a minor statute or other RCC offenses may apply to abandonment that involves a risk of serious injury or any

[10] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[11] D.C. Code § 22-1101(b)(2).

[12] D.C. Code § 22-1101(b)(1).

[13] D.C. Code § 22-111(c)(2). In addition to abandoning a child, the current second degree cruelty statute prohibits "engag[ing] in conduct which causes a grave risk of bodily injury to a child." D.C. Code § 22-1101(b)(2). It also has a maximum term of imprisonment of ten years. D.C. Code § 22-111(c)(2).

actual harm.[14] This change reduces unnecessary overlap between offenses and improves the organization and proportionality of the revised offense.

Second, the revised criminal neglect of a minor statute incorporates liability for a failure to provide certain items and care for a complainant under 18 years of age. Current D.C. Code § 22-1102 prohibits a parent or guardian of "sufficient financial ability" from refusing or neglecting to provide the "food, clothing, and shelter as will prevent the suffering and secure the safety" of a child under 14 years of age.[15] The offense has a maximum term of imprisonment of three months.[16] In contrast, in the RCC, failing to support a minor is criminalized as part of the revised criminal neglect of a minor statute[17] and is no longer a separate offense. Also, unlike the current failure to support offense, which is limited to children under 14 years of age,[18] the failure to support gradation in the revised criminal neglect of a minor statute applies to any complainant under 18 years of age so that it matches the current child cruelty statute[19] and revised criminal abuse of a minor[20] statute. This change reduces unnecessary overlap between offenses and improves the consistency and proportionality of the revised statute.

Third, the revised criminal neglect of a minor statute is limited to conduct that does not actually harm the complainant. The current second degree child cruelty statute criminalizes actual "maltreatment," causing a "grave risk of bodily injury," and "exposing a child . . . with intent to abandon it," without any distinction in penalty.[21] In contrast, the revised criminal neglect of a minor statute is limited to conduct that does not actually harm the complainant. First degree and second degree of the revised criminal neglect of a minor statute prohibit endangering the complainant and third degree prohibits failing to provide for the complainant, abandoning the complainant or creating a risk of bodily injury due to consumption of alcohol or a controlled substance. However, if the complainant sustains physical or mental injury as a result of the neglect, there may be liability under the revised criminal abuse of a minor statute (RCC § 22E-1501) or other

[14] If leaving the complainant with intent to abandon him or her results in a *risk* of significant bodily injury, serious mental injury, serious bodily injury, or death, then the defendant's conduct may be subject to first degree or second degree criminal neglect of a minor. Moreover, if the complainant sustains physical or mental injury, or death, as a result of the abandonment, there may be liability under the revised criminal abuse of a minor statute, RCC § 22E-1501, the revised assault statute, RCC § 22E-1202, or the revised homicide statutes, RCC §§ 22E-1101 – 22E-1103.

[15] D.C. Code § 22-1102.

[16] D.C. Code § 22-1102.

[17] The specification of failing to support the complainant as third degree criminal neglect of a minor does not preclude the possibility that such failure to support may, depending on the facts of the case, be charged as a more serious gradation or offense. If failing to provide the necessary items or care results in a risk of significant bodily injury, serious mental injury, serious bodily injury, or death, then the defendant's conduct may be subject to first degree or second degree criminal neglect of a minor. Moreover, if the complainant sustains physical or mental injury, or death, as a result of the failure to provide, there may be liability under the revised criminal abuse of a minor statute, RCC § 22E-1501, the revised assault statute, RCC § 22E-1202, or the revised homicide statutes, RCC §§ 22E-1101 – 22E-1103.

[18] D.C. Code § 22-1102

[19] D.C. Code § 22-1101.

[20] RCC § 22E-1501.

[21] D.C. Code § 22-1101(b)(1), (c)(2) (second degree child cruelty statute prohibiting "maltreat[ing] a child" or "engag[ing] in conduct which causes a grave risk of bodily injury to a child" and providing for either basis of liability a maximum term of imprisonment of 10 years).

RCC offenses against persons. This change improves the consistency and proportionality of the revised offense.

Fourth, the revised criminal neglect of a minor statute partially grades the offense based on creating a risk of "serious bodily injury or death," "significant bodily injury," or "serious mental injury." The current second degree child cruelty offense prohibits, in part, creating "a grave risk of bodily injury."[22] However, the statute does not define "bodily injury." DCCA case law on the current child cruelty statute suggests "bodily injury" may have a relatively low threshold for physical harm,[23] but does not provide a general definition. With regard to mental injury, the DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children."[24] However, the DCCA has not discussed whether a risk of extreme emotional pain or suffering is sufficient for the "grave risk of bodily injury" prong of the current second degree child cruelty offense. In contrast, the revised criminal neglect of a minor statute partially grades the offense based on whether there is a risk of "serious bodily injury or death," "significant bodily injury," or "serious mental injury" and defines those terms in RCC § 22E-701. These types of "bodily injury" are consistent with the RCC assault statute (RCC § 22E-1202). The RCC criminal neglect of a minor statute does not criminalize a risk of "bodily injury" other than bodily injury due to the complainant's drug or alcohol consumption because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars. This change improves the clarity and proportionality of the revised child neglect statute.

Fifth, the revised criminal neglect of a minor statute limits liability for a risk of bodily injury to a risk of bodily injury due to drug or alcohol consumption. The current second degree child cruelty offense prohibits, in part, creating "a grave risk of bodily injury."[25] The statute does not define "bodily injury." DCCA case law on the current child cruelty statute suggests "bodily injury" may have a relatively low threshold for physical harm,[26] but does not provide a general definition. In contrast, the revised criminal neglect of a minor statute limits liability for creating a risk of bodily injury to a risk of "bodily injury" due to the complainant consuming alcohol or consuming or inhaling, without a valid prescription, a controlled substance or marijuana. If the actor recklessly creates such a risk of a higher level of "bodily injury," such as "significant bodily injury," there is liability under first degree or second degree of the RCC criminal neglect of a minor statute. The RCC criminal neglect of a minor statute does not criminalize a risk of "bodily injury" other than bodily injury due to the complainant's

[22] D.C. Code § 22-111(b)(1).
[23] *See, e.g., Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").
[24] *Alfaro*, 859 A.2d at 153-54; *see also Speaks*, 959 A.2d at 717 (stating that the evidence permitted a reasonable juror to conclude beyond a reasonable doubt that two minor children "sustained emotional pain and suffering and a battery (*i.e.* they were 'terrified' and 'screaming')" and permitting separate convictions for second degree child cruelty under the "grave risk of bodily injury" prong).
[25] D.C. Code § 22-111(b)(1).
[26] *See, e.g., Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

drug or alcohol consumption because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars. Conduct that results in a risk of "bodily injury" in contexts other than the complainant's drug or alcohol consumption may constitute attempted criminal abuse of a minor.[27] This change improves the clarity, consistency, and proportionality of the revised statutes, and may remove a possible gap in liability.

Sixth, the revised criminal neglect of a minor statute limits liability to individuals that are "reckless" as to the fact that they have "a responsibility under civil law for the health, welfare, or supervision of the complainant." The current child cruelty statute does not state any requirements for the defendant's relationship to the child, and the DCCA has sustained second degree child cruelty convictions for creation of a "grave risk of bodily injury" when an individual has no relationship to the child.[28] There is no DCCA case law interpreting the scope of the abandonment prong of second degree child cruelty. The failure to support a child offense in D.C. Code § 22-1102, however, is limited to a "parent or guardian."[29] In contrast, all gradations of the revised criminal neglect of a minor statute require that the defendant is "reckless" as to the fact that "he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant." This change narrows the scope of liability for the offense to those persons with a duty of care to the minor (e.g., a parent, guardian, teacher, doctor, daycare provider, or babysitter may be liable for the offense). The revised criminal neglect of a minor offense thus provides a distinct charge for individuals with responsibilities under civil law for complainants under the age of 18 years who subject to a risk of harm those they are supposed to protect. The revised statute applies a culpable mental state of "reckless" as to the fact that the defendant has a responsibility under civil law for the health, welfare, or supervision of the complainant." This change improves the proportionality and consistency of revised offenses.

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

First, the revised criminal neglect of a minor statute requires a culpable mental state of "knowingly" for "leav[ing]" the complainant. The abandonment prong in the current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly," but also requires the conduct occur "with intent to abandon the child."[30]

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[27] In addition, if an actor recklessly creates, or fails to mitigate or remedy, a risk that a complainant would experience bodily injury from consumption of drugs or alcohol, and "bodily injury" results, there would be liability under the RCC criminal abuse of a minor statute (RCC § 22E-1501).

[28] *See, e.g., Coffin v. United States*, 917 A.2d 1089, 1090, 1093 (affirming appellant's convictions for attempted second degree child cruelty when appellant drove a car dangerously while intoxicated with two children in the back seat that were not in seatbelts because he created a grave risk of bodily injury to the child passengers); *Speaks v. United States*, 959 A.2d 712, 713, 714, 716-17 (D.C. 2008) (affirming three counts of second degree cruelty to children while armed (which was subsequently amended to remove the "armed" element) when the appellant carjacked a vehicle containing three small children and crashed the vehicle into a parked car).

[29] D.C. Code § 22-1102.

[30] D.C. Code § 22-1101(b)(2).

While the meaning of these culpable mental states is not defined in the current child cruelty statute, case law has briefly interpreted these terms[31] in a manner consistent with the Model Penal Code definitions. Instead of this ambiguity, the revised criminal neglect of a minor statute codifies a culpable mental state of "knowingly" for the element "leaves the complainant in any place" and provides that leaving the complainant must be done "with the intent of" abandoning the complainant. This change resolves the inconsistent culpable mental states in the current statute[32] and clarifies the law.

Second, the failure to support gradation in the revised criminal neglect of a minor statute broadly includes failures to provide "supervision, medical services, medicine, or other items or care essential for the health or safety of the child." The current failure to support a child offense in D.C. Code § 22-1102 refers only to "food, clothing, and shelter."[33] However, the DCCA has stated that "the broad sweep" of the current statute includes a duty of providing medical care.[34] Current District statutes defining a "neglected child" for civil purposes also specifically refer to a lack of parental "care or control necessary for [the child's] physical, mental, or emotional health."[35] The list of items and care in the revised third degree criminal neglect of a minor statute reflects the DCCA's expansive interpretation of current D.C. Code § 22-1102 and the broad sweep of relevant civil laws in the District. This change reduces possible gaps in the law and improves consistency with the civil statutes.

Third, the failure to support gradation of the revised criminal neglect of a minor statute requires that the defendant "fails to make a reasonable effort" to provide the specified support. The current statute in D.C. Code § 22-1102 refers only to a person "of sufficient financial ability, who shall refuse or neglect to provide…" the specified support.[36] The DCCA has not interpreted the limits of this language. In the revised statute, however, a person must only fail to make a "reasonable effort" to provide the specified support. The revised language would preclude liability where a person does not provide necessary support due, not only to insufficient financial ability, but also due to factors such as a hospitalization or other incapacity.[37] This change improves the clarity and proportionality of the revised statute.

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[31] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").

[32] It is unclear in the current child cruelty statute how a person could "recklessly" abandon a child "with intent to abandon" the child. However, a knowledge requirement as to leaving the child and an intent requirement as to abandonment, as these terms are defined in the RCC, are compatible. See, generally, Commentary to RCC § 22E-206.

[33] D.C. Code § 22-1102.

[34] *Faunteroy v. United States*, 413 A.2d 1294, 1300 (D.C. 1980).

[35] D.C. Code § 16-2301(9A).

[36] D.C. Code § 22-1102.

[37] The District's current civil statutes define "neglected child," in part as "a child:…(ii) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or custodian; (iii) whose parent, guardian, or custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity." D.C. Code § 16-2301(9)(A).

Fourth, the revised criminal neglect of a minor statute specifies that "fail[ing] to mitigate" or "fail[ing] to remedy" a substantial risk is sufficient for liability. It is unclear whether the current child cruelty statute includes failing to mitigate or remedy a risk of harm to the complainant. Current first degree child cruelty criminalizes, in part, conduct that "maltreats" the complainant or "creates a grave risk of bodily injury to a child and thereby causes bodily injury."[38] Current second degree child cruelty criminalizes, in part, conduct that "maltreats" a child,[39] as well as conduct that "causes a grave risk of bodily injury" to a child.[40] "Maltreats" is not statutorily defined and there is no DCCA case law regarding whether the current child cruelty offense extends to failing to mitigate or remedy a risk of harm. The current failure to support statute in D.C. Code § 22-1102 criminalizes the refusal or neglect to provide "food, clothing, and shelter as will prevent the suffering and secure the safety of such child,"[41] but is silent as to failing to mitigate or remedy a risk and there is no case law on point. However, in the context of parental duties, the DCCA also has recognized the "unique obligation of parents to take affirmative actions for their children's benefit."[42] Resolving this ambiguity, the revised criminal neglect of a minor statute clarifies that not only creating risks to a child, but also failing to mitigate or remedy a substantial risk, is sufficient for liability. Under the general provision in RCC § 22E-202, omissions are equivalent to affirmative conduct and sufficient for liability for any offense in the RCC where the defendant had a duty of care to the complainant.[43] However, although technically superfluous, given that neglect offenses usually will involve an omission, the revised statute explicitly codifies "fail[ing] to remedy" or "fail[ing] to remedy" as a basis for liability. This change clarifies the revised statute.

Fifth, the revised criminal neglect of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under 18 years of age. The current child cruelty statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a "child." There is no DCCA case law discussing if there is a culpable mental state for this element. However, under the current enhancement for certain crimes against minors it is an affirmative defense that "the accused reasonably believed that the victim was not a minor [person less than 18 years

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[38] D.C. Code §22-1101(a). First degree child cruelty also prohibits "tortures" and "beats" a child. *Id.*
[39] D.C. Code § 22-1101(b)(1).
[40] D.C. Code § 22-1101(b)(1).
[41] D.C. Code § 22-1102.
[42] *Young v. United States*, 745 A.2d 943, 948 (D.C. 2000). Similarly, the DCCA has used the common law to find that there is a common law duty of parents to provide medical care for their dependent children. *Faunteroy v. United States*, 413 A.2d at 1299-300 (D.C. 1980) ("The cases of several state courts hold there is a 'common law natural duty of parents to provide medical care for their minor dependent children. . . . Since no statute for the District operates to specifically abolish it, this duty remains the common law of this jurisdiction."). To the extent that the common law imposes a duty to aid a child, the DCCA may find a common law duty in the District. *See generally* § 6.2.Omission to act, 1 Subst. Crim. L. § 6.2 (3d ed.)
[43] This principle is reflected in the current version of the draft general provision on omission liability. See RCC § 202(c), (d) ("(c) 'Omission' means a failure to act when (1) a person is under a legal duty to act and (2) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. (d) For purposes of this Title, a legal duty to act exists when: (1) The failure to act is expressly made sufficient by the law defining the offense; or (2) A duty to perform the omitted act is otherwise imposed by law.").

old] at the time of the offense."[44] The "reckless" culpable mental state in the revised criminal neglect of a minor statute preserves the substance of this defense.[45] This change improves the clarity, completeness, and proportionality of the revised statute.

Sixth, for liability, the revised criminal neglect of a minor statute requires a "substantial risk" of the specified physical or mental harm. The current second degree child cruelty offense prohibits "engag[ing] in conduct which causes a grave risk of bodily injury."[46] There is no DCCA case law discussing the meaning of "grave risk." However, in an attempted second degree cruelty to children case, the DCCA affirmed a conviction based upon the defendant creating a "grave or substantial risk of bodily injury,"[47] suggesting that "grave" and "substantial" are interchangeable, equivalent terms. The revised criminal neglect of a minor statute clarifies that the required risk must be "substantial." The "substantial" language is technically superfluous where recklessness is alleged because the "reckless" culpable mental state, as defined in RCC § 22E-206, also requires that a risk be "substantial" and the accused's conscious disregard of the risk be "clearly blameworthy." However, given that neglect offenses will often depend on the nature of the risk to the complainant, the revised statute specifies the "substantial" requirement to clarify the statute, particularly where the defendant is alleged to act knowingly, intentionally, or purposely.[48] This change improves the clarity and consistency of the revised statute.

Seventh, the revised criminal neglect of a minor statute specifically bases liability on "serious mental injury" in RCC § 22E-701. The current District child cruelty statute is silent as to whether it includes psychological harm. DCCA case law is clear that the current child cruelty statute extends at least to serious psychological injury,[49] but the

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[44] D.C. Code § 22-3611(b).

[45] "Reckless" is defined in RCC § 22E-206 and, as applied here, means that the accused must consciously disregard a substantial risk that the complainant was under the age of 18 years. The enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness or knowledge as to the age of the complaining witness because the accused would not consciously disregard a substantial risk (recklessness) or be practically certain (knowledge) that the complainant was under 18 years of age. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[46] D.C. Code § 22-111(b)(1).

[47] *Dorsey v. United States*, 902 A.2d 107, 112-13 (D.C. 2006) (discussing the Model Penal Code definition of "recklessly" and affirming the appellant's conviction for attempted second degree cruelty to children because the appellant "created a grave or substantial risk of bodily injury when he struck [the child] in the face and disregarded 'the risk of fractures of the orbital eye socket.'").

[48] For example, where a parent gives her sick child with cancer an experimental and dangerous drug prescribed by the child's oncologist, the fact that the parent *knows* (i.e. is practically certain) that doing so will create a risk of serious bodily injury or death to the child does not, by itself, establish first degree child neglect. Rather, it would also have to be proven by the government, as an affirmative element of the offense, that this risk was *substantial* under the circumstances.

[49] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be

court has not articulated a precise definition of the requisite psychological harm. Instead of this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" modifies the definition of "mental injury" in the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision[50] by adding the requirement that the harm be "substantial" and "prolonged." by adding the requirement that the harm be "substantial" and "prolonged." The requirements of "substantial" and "prolonged" reflect DCCA case law supporting a high standard for psychological harm for child abuse,[51] but given the imprecision of current case law it is unclear what change, if any, the definition will have on current District law. This change clarifies the law.

Eighth, the revised criminal neglect of a minor statute codifies an effective consent affirmative defense, discussed extensively in the explanatory note to the offense. District statutes do not codify general defenses to criminal conduct. The current child cruelty statute does not address whether consent of the complainant or of a parent or guardian is a defense to liability. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[52] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[53] It is unclear whether this District case law for assault would apply to child cruelty. Resolving this ambiguity, the revised criminal neglect of a minor statute codifies an effective consent affirmative defense for an actor that is not a "person with legal authority over the complainant." Due to this exclusion, the defense applies to individuals that have a duty of care to the minor, but do not rise to the level of a "person with legal authority over the complainant" as that term is defined in the RCC, such as a parent or guardian. The defense eliminates liability where the actor knows that they have

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serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[50] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[51] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[52] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

no effective consent by the person with legal authority (e.g., they are absent or the contract for the childcare services didn't foresee the eventuality), and the requirements in the limited duty of care defense (RCC § 22E-408(a)(4)) are too stringent. For example, the defense would cover the babysitter who decides to let a minor briefly play outside in the snow without gloves if the babysitter can't find them or there aren't any available. This change improves the clarity, consistency, and proportionality of the revised statutes.

Ninth, the revised criminal neglect of a minor statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current child cruelty statute does not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for child cruelty. The exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[54] This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, the revised criminal neglect of a minor statute codifies a culpable mental state of "recklessly" for the element "created, or failed to mitigate or remedy, a substantial risk." The current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly."[55] While the meaning of "recklessly" is not defined in the current child cruelty statute, case law has briefly interpreted these terms,[56] in a manner consistent with the Model Penal Code definitions. The revised criminal neglect of a minor statute codifies a culpable mental state of "recklessly," which is defined in RCC § 22E-206. It is unnecessary to codify the higher culpable mental states of "intentionally" and "knowingly" because under the general rule of construction in RCC § 22E-206, they satisfy the lower culpable mental state of "recklessly." In addition, the definition of "recklessly" in RCC § 22E-206 is consistent with DCCA case law.[57] This change clarifies the revised statute.

Second, subsection (f) of the revised criminal neglect of a minor statute codifies an exclusion from liability for surrendering a newborn child in accordance with D.C. Code § 4-1451.01 *et. seq*. It is inconsistent for an individual who surrenders a newborn child in accordance with D.C. Code § 4-145.01 *et. seq.* to face criminal liability. Current

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[54] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[55] D.C. Code § 22-1101(a), (b).

[56] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").

[57] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002).

D.C. Code § 4-1451.02 states such a person "shall not . . . be prosecuted for the surrender of the newborn."[58] This change clarifies the revised statute.

Third, the revised criminal neglect of a minor statute categorizes a person under the age of 18 as a "minor" and defines the revised offense in terms of the age of the complainant. The current child cruelty statute requires that the complainant be "a child under 18 years of age."[59] Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[60] These changes improve the clarity and consistency of the revised statute.

[58] D.C. Code § 4-1451.02(a) ("Except when there is actual or suspected child abuse or neglect, a custodial parent who is a resident of the District of Columbia may surrenders a newborn in accordance with this chapter and shall have the right to remain anonymous and to leave the place of surrender at any time and shall not be pursued by any person at the time of surrender or prosecuted for the surrender of the newborn.").

[59] D.C. Code § 22-1101(a).

[60] For example, the current child sexual abuse statutes consider a complainant under the age of 16 years to be a "child." D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

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

Explanatory Note. *The RCC criminal abuse of a vulnerable adult or elderly person offense proscribes a broad range of conduct in which there is harm to a vulnerable adult or elderly person's bodily integrity or mental well-being, including conduct that constitutes fourth degree assault, criminal threats, offensive physical contact, criminal restraint, stalking, or electronic stalking as those crimes are defined in the RCC.*[1] *The penalty gradations for the revised offense are primarily based on the degree of bodily harm or mental harm. Along with the revised criminal neglect of a vulnerable adult or elderly person offense,*[2] *the revised criminal abuse of a vulnerable adult or elderly person offense replaces several offenses and provisions in the current D.C. Code: abuse of a vulnerable adult or elderly person offense and penalties;*[3] *neglect of a vulnerable adult or elderly person offense and penalties;*[4] *and the spiritual healing defense for abuse or neglect of a vulnerable adult or elderly person.*[5]

There are three degrees of the RCC criminal abuse of a vulnerable adult or elderly person statute. Each gradation requires that the accused is "reckless" as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant"[6] (paragraph (a)(1) and subparagraph (a)(1)(A) for first degree, paragraph (b)(1) and subparagraph (b)(1)(A) for second degree, and paragraph (c)(1) and subparagraph (c)(1)(A)) for third degree). Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant has the specified responsibility to the complainant in subparagraph (a)(1)(A) for first degree, subparagraph (b)(1)(A) for second degree, and subparagraph (c)(1)(A)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant.

Each gradation of the offense further requires that the accused is "reckless" as to the fact that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant is a "vulnerable adult" or "elderly person" in subparagraph (a)(1)(B) for first degree, subparagraph (b)(1)(B) for second degree, and subparagraph (c)(1)(B)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22E-701.

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[1] RCC §§ 22E-1202(d) (fourth degree assault), 22E-1204 (criminal threats), 22E-1205 (offensive physical contact), 22E-1404 (criminal restraint), 22E-1801 (stalking), 22E-1802 (electronic stalking).
[2] RCC § 22E-1504.
[3] D.C. Code §§ 22-933, 22-936.
[4] D.C. Code §§ 22-934, 22-936.
[5] D.C. Code § 22-935.
[6] Such a duty of care to the complainant may arise, for example, from the actor being a parent, guardian, teacher, doctor, or caregiver, depending on the facts of a case.

Paragraph (a)(2) and subparagraphs (a)(2)(A) and (a)(2)(B) specify the three types of prohibited conduct in first degree criminal abuse of a vulnerable adult or elderly person, the highest grade of the revised offense.

Subparagraph (a)(2)(A) specifies liability for one type of prohibited conduct in first degree criminal abuse of a vulnerable adult or elderly person—causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning," to the complainant. Subparagraph (a)(2)(A) specifies that the culpable mental state for causing "serious mental injury" is "purposely," a term defined in RCC § 22E-206 that, applied here, means the accused must consciously desire that the accused causes "serious mental injury" to the complainant. Subparagraph (a)(2)(B) specifies the second type of prohibited conduct for first degree criminal abuse of a vulnerable adult or elderly person—causing "serious bodily injury," a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness, to the complainant. Subparagraph (a)(2)(B) specifies that the culpable mental state for causing "serious bodily injury" is "recklessly," a term defined in RCC § 22E-206 that, applied here, means being aware of a substantial risk that the accused will cause serious bodily injury to the complainant.

Paragraph (b)(2) specifies the prohibited conduct in second degree criminal abuse of a vulnerable adult or elderly person—causing "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (b)(1) applies to the elements in paragraph (b)(2). "Recklessly" is a defined term in RCC § 22E-206 that here means the accused is aware of a substantial risk that he or she will cause "significant bodily injury" to the complainant.

Paragraph (c)(2) and subparagraphs (c)(2)(A) and (c)(2)(B) specify the two types of prohibited conduct for third degree criminal abuse of a vulnerable adult or elderly person, the lowest grade of the revised offense. Paragraph (c)(2) and subparagraph (c)(2)(A) establish liability for causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning," to the complainant. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (c)(1) applies to the elements in subparagraph (c)(2)(A). "Recklessly" is a defined term in RCC § 22E-206 that here means the accused is aware of a substantial risk that he or she will cause "serious mental injury" to the complainant.

Paragraph (c)(2) and subparagraph (c)(2)(B) establish liability for the final type of liability in third degree criminal abuse of a vulnerable adult or elderly person —the accused must, "in fact," commit a "predicate offense against persons" against the complainant. "Predicate offense against persons" is defined in paragraph (g)(2) as the RCC offenses of fourth degree assault (RCC § 22E-1202(d)), criminal threats (RCC § 22E-1204), offensive physical contact (RCC § 22E-1205), criminal restraint (RCC § 22E-1404), stalking (RCC § 22E-1801), and electronic stalking (RCC § 22E-1802). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental

state requirement as to given element, here whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Subsection (d) codifies an exclusion from liability for the offense. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all defenses in the RCC. An actor does not commit an offense under the revised criminal abuse of a vulnerable adult or elderly person statute when, in fact, the actor's conduct is specifically permitted by a District statute or regulation. Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[7]

Subsection (e) codifies two defenses for the revised criminal abuse of a vulnerable adult or elderly person statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all defenses in the RCC.

Paragraph (e)(1) codifies a defense for subparagraph (a)(2)(B) of first degree of the revised criminal abuse of a vulnerable adult or elderly person statute—causing "serious bodily injury," as that term is defined in RCC § 22E-701.

Paragraph (e)(1) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (e)(1) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements for the defense. First, per subparagraph (e)(1)(A) and sub-subparagraph (e)(1)(A)(i), the injury must be caused by a "lawful cosmetic or medical procedure." The "lawful" requirement applies both to a cosmetic procedure and a medical procedure. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the injury is caused by a lawful cosmetic or medical procedure. A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they are otherwise legal under District or federal law. Cosmetic procedures that are legal[8] also are within the scope of the defense.

In the alternative, subparagraph (e)(1)(A) and sub-subparagraph (e)(1)(A)(ii) apply if the injury is caused by an omission. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the injury is caused by an "omission," a defined term in RCC § 22E-701. An omission

[7] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[8] *See*, e.g., D.C. Code § 47–2853.81. Scope of practice for cosmetologists.

includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall.

Subparagraph (e)(1)(B) requires that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is an "incapacitated individual," RCC § 22E-701 defines a "person with legal authority over the complainant" as "the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian." RCC § 22E-701 further defines "incapacitated individual."

The effect of subparagraph (e)(1)(B) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense[9] to first degree criminal abuse of a vulnerable adult or elderly person. However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[10]

Subparagraph (e)(1)(C) specifies the final requirement for the defense under paragraph (e)(1)—the actor must "reasonably believe" that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The provision in subparagraph (e)(1)(C) for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of vulnerable adults and elderly persons giving effective consent to the actor. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires some indication (by word or action) of agreement given by a person generally competent to do so. In addition, the RCC definition of "consent" excludes consent from a person that "[b]ecause of youth, mental illness or disorder, or intoxication, is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." Thus, although subparagraph (e)(1)(C) permits complainants that are vulnerable adults or elderly persons to give effective consent in certain situations, the RCC definition of "consent" may preclude these individuals from giving consent and, in such a case, if the actor believes it, the defense does not apply.

The "in fact" specified in paragraph (e)(1) applies to the requirements in subparagraph (e)(1)(C). No culpable mental state, as defined in RCC § 22E-205, applies

[9] The defense under paragraph (e)(1) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[10] These defenses have different requirements than the effective consent defense in paragraph (e)(1). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

to subparagraph (e)(1)(C). It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[11] There is no effective consent defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Finally, subparagraph (e)(1)(C) requires that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to cause the injury of engage in the omission. As is discussed above, due to the "in fact" specified in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(1)(C). However, the actor must subjectively believe, and that belief must be reasonable,[12] that there is effective consent to consent to cause the injury of engage in the omission. There is no effective consent defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the type of injury or omission to which effective consent is given.[13]

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[11] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[12] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[13] For example, if, as part of a lawful medical procedure, the complainant gives effective consent to the actor to cause "bodily injury," and the actor unreasonably believes that the complainant gives effective consent to cause "serious bodily injury," the effective consent defense does not apply, and the actor may be guilty of fourth degree assault as a predicate offense against persons in third degree of the revised statute. However, the inverse is also true. If, as part of a lawful medical procedure, the complainant gives effective consent to the actor to cause "bodily injury," and the actor *reasonably* believes that the complainant gives effective consent to "serious bodily injury," the effective consent defense does apply, and the actor is not guilty of first degree of the revised statute.

Paragraph (e)(2) codifies a defense for second degree (subsection (b)) of the revised statute—causing "significant bodily injury," as that term is defined in RCC § 22E-701—and third degree (subsection (c)) of the revised statute—causing "serious mental injury," as that term is defined in RCC § 22E-701, or engaging in a specified "RCC predicate offense against persons," defined in paragraph (g)(2) of the revised statute, such as fourth degree assault or criminal restraint. An actor that commits a predicate offense against persons, but does not have liability for criminal abuse of a vulnerable adult or elderly person due to a successful affirmative defense, would still have liability for the predicate offense against persons if the requirements of that offense are met.

Paragraph (e)(2) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (e)(2) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements to the defense. The requirement in subparagraph (e)(2)(A) that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, is identical to the requirement in subparagraph (e)(1)(B), discussed above.

Subparagraph (e)(2)(B) requires that the actor "reasonably believes" that the either the complainant or a "person with legal authority over the complainant" acting consistent with that authority gives "effective consent" to the actor to engage in the conduct specified in sub-subparagraphs (e)(2)(B)(i) and (e)(2)(B)(ii). The provision in subparagraph (e)(2)(B for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of vulnerable adults or elderly persons giving effective consent to the actor. "Effective consent" is a defined term in RCC § 22E-701 and is defined to incorporate the RCC definition of "consent." These terms, and their applicability to the defense in paragraph (e)(1) for first degree criminal abuse of a vulnerable adult or elderly person, are discussed above. This discussion also applies to the defense to second degree and third degree in subparagraph (e)(2)(B).

The "in fact" specified in paragraph (e)(2) applies to subparagraph (e)(2)(B) and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(2)(B). It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the effective consent of one of the specified persons. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[14]

[14] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in

There is no effective consent defense under subparagraph (e)(2)(B) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (e)(2)(B) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Sub-subparagraphs (e)(2)(B)(i), (e)(2)(B)(ii), and (e)(2)(B)(iii) specify alternate bases for the defense under paragraph (e)(2). First, subparagraph (e)(2)(B) and sub-subparagraph (e)(2)(B)(i) require that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to cause the injury. As is discussed above, due to the "in fact" specified in paragraph (e)(2), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(2)(B) or the following sub-subparagraphs. However the actor must subjectively believe, and that belief must be reasonable[15] that there is effective consent to cause the injury. There is no effective consent defense under subparagraph (e)(2)(B) when the actor makes an unreasonable mistake as to the injury to which effective consent is given.

In the alternative, subparagraph (e)(2)(B) and sub-subparagraph (e)(2)(B)(ii) apply if the injury is caused by an omission and the complainant or a "person with legal authority over the complainant" acting consistent with that authority, gave effective consent to the actor to engage in the omission. As specified by use of "in fact" in paragraph (e)(2), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the injury is caused by an "omission," a defined term in RCC § 22E-701. An omission includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall.

Finally, and in the alternative, subparagraph (e)(2)(B) and sub-subparagraph (e)(2)(B)(iii) require that the actor reasonably believes that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority, gives "effective consent" to the actor to engage in a lawful sport, occupation, or other concerted

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judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[15] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

activity.[16] As noted above, there is no effective consent defense when the actor makes an unreasonable mistake as to the conduct to which effective consent is given. Sub-subparagraph (e)(2)(B)(iii) further requires that the actor's infliction of the injury is a reasonably foreseeable hazard of that activity. As specified by the "in fact" in paragraph (e)(2), no culpable mental state, as defined in RCC § 22E-205, applies to the requirement that the actor's infliction of the injury is a reasonably foreseeable hazard of a permissible activity. This is an objective determination and the defense does not apply if the infliction of the injury is not a reasonably foreseeable hazard.

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

Subsection (g) codifies a definition of "predicate offense against persons" for the offense and cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised criminal abuse of a vulnerable adult or elderly person statute clearly changes current District law in six main ways.*

First, the revised abuse of a vulnerable adult or elderly person statute includes a gradation for causing "significant bodily injury," which is defined in RCC § 22E-701. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "physical pain or injury,"[17] "serious bodily injury,"[18] or "permanent bodily harm"[19] resulted. The statute does not define any of these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[20] but there is no DCCA case law interpreting "serious bodily injury" or "permanent bodily harm." It is unclear how "serious bodily injury" and "permanent bodily harm" differ, if at all, particularly given that DCCA case law for the current aggravated assault statute includes permanent bodily injury in the definition of "serious bodily injury."[21] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute includes an additional gradation for causing "significant bodily

[16] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

[17] D.C. Code § 22-933(1); D.C. Code § 22-936(a).

[18] D.C. Code § 22-936(b).

[19] D.C. Code § 22-936(c).

[20] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[21] The District's current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

injury," using the revised definition for that term in RCC § 22E-701. Both the current[22] and revised[23] assault statutes use "significant bodily injury" to partially grade the offenses, and the revised definition is modified from the definition in the current assault with significant bodily injury statute.[24] This change improves the clarity, consistency, and proportionality of the revised offense.

Second, the revised criminal abuse of a vulnerable adult or elderly person statute does not recognize as a distinct basis of liability causing the death of a vulnerable adult or elderly person. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on the death of the vulnerable adult or elderly person.[25] The current statute provides a maximum term of imprisonment of 20 years for such conduct, which is inconsistent with applicable homicide penalties currently in the D.C. Code.[26] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute does not grade based on the death of the vulnerable adult or elderly person. The RCC homicide offenses, through penalty enhancements for killing a "protected person,"[27] provide enhanced liability for the death of a vulnerable adult or elderly person. This change reduces unnecessary overlap between the revised statute and RCC homicide offenses, and improves the proportionality and consistency of the revised statute.

Third, the revised criminal abuse of a vulnerable adult or elderly person statute has two grades that provide liability for causing "serious mental injury," depending on whether the conduct is done purposely or recklessly. The current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "severe mental distress" resulted.[28] Such injury requires a culpable mental state of either "intentionally" or "knowingly," without distinction in penalty,[29] and neither the current statute nor case law defines these culpable mental state terms. In contrast, the revised statute prohibits "purposely" causing "serious mental injury" in first degree criminal abuse of a vulnerable adult or elderly person and "recklessly" causing "serious mental injury" in third degree criminal abuse of a vulnerable adult or elderly person. Including a "recklessly" culpable mental state makes the revised criminal abuse of a vulnerable adult or elderly person statute consistent with the current[30] and revised[31] assault offenses and the current[32] and

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[22] D.C. Code § 22-404(a)(2).

[23] RCC § 22E-1202.

[24] D.C. Code § 22-404(a)(2) (assault with significant bodily injury statute defining "significant bodily injury" as an "injury that requires hospitalization or immediate medical attention.").

[25] D.C. Code § 22-936(c).

[26] Currently, the maximum penalty for first degree murder, absent aggravating circumstances, is 60 years. The maximum penalty for second degree murder, absent aggravating circumstances, is 40 years. If an aggravating circumstance is present, the maximum penalty for first and second degree murder is incarceration for life. Notably, one aggravating factor for both first and second degree murder is that the victim was "more than 60 years old." The maximum penalty for voluntary and involuntary manslaughter is 30 years.

[27] RCC §§ 22E-1101; 22E-1102.

[28] D.C. Code §§ 22-933, 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).

[29] D.C. Code §§ 22-933 (abuse of a vulnerable adult or elderly person statute requiring a culpable mental state of "intentionally" or "knowingly."); 22-936 (penalty statute for abuse of a vulnerable adult or elderly person statute).

[30] *See, e.g.*, D.C. Code § 22-404(a)(2) (offense of assault with significant bodily injury requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the

revised[33] criminal abuse of a minor statutes, which either require or have gradations for a "recklessly" culpable mental state. This change improves the consistency and proportionality of the revised statute.

Fourth, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state of "recklessly" for physical harm. The current abuse of a vulnerable adult or elderly person statute requires a culpable mental state of either "intentionally" or "knowingly."[34] Neither the current statute nor case law defines these culpable mental state terms. In contrast, the revised first degree criminal abuse of a vulnerable adult or elderly person statute requires a "recklessly" culpable mental state for causing serious bodily injury, significant bodily injury, or bodily injury. The "recklessly" culpable mental state is consistent with gradations in the current[35] and revised[36] assault offenses and the current[37] and revised[38] criminal abuse of a minor statutes. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised criminal abuse of a vulnerable adult or elderly person statute is no longer limited to "corporal means." The current abuse of a vulnerable adult or elderly person statute requires, in part, "inflict[ing] or threat[ening] to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means."[39] There is no case law regarding the phrase "corporal means." In contrast, the revised statute requires that the defendant "cause[]" the specified type of physical or mental injury by any means.[40] This change broadens the statute to potentially include drugging a complainant or using mechanical devices to inflict bodily injury. The requirement of causing injury by any means matches the current[41] and revised[42] assault

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culpable mental state). The District's current simple assault statute, D.C. Code § 22-404(a)(1) does not specify a culpable mental state. Current District case law suggests that recklessness may suffice, however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. The culpable mental state for simple assault is discussed in First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses.

[31] RCC § 22E-1202 (requiring a culpable mental state of "recklessly" in several gradations).

[32] D.C. Code § 22-1101(a), (b) (requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state).

[33] RCC § 22E-1501 (requiring a culpable mental state of "recklessly" in several gradations).

[34] D.C. Code § 22-933.

[35] *See, e.g.*, D.C. Code § 22-404(a)(2) (offense of assault with significant bodily injury requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state). The District's current simple assault statute, D.C. Code § 22-404(a)(1) does not specify a culpable mental state. Current District case law suggests that recklessness may suffice, however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. The culpable mental state for simple assault is discussed in the commentary to the RCC assault and offensive physical contact offenses (RCC §§ 22E-1202 and 22E-1205).

[36] RCC § 22E-1202 (requiring a culpable mental state of "recklessly" in several gradations).

[37] D.C. Code § 22-1101(a), (b) (requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state).

[38] RCC § 22E-1501 (requiring a culpable mental state of "recklessly" in several gradations).

[39] D.C. Code § 22-933(1).

[40] For example, throwing a caustic substance on someone, causing burns, or mixing a toxic ingredient in someone's food.

[41] *See, e.g.*, D.C. Code §§ 22-404(a)(2) ("causes significant bodily injury to another."); 22-404.01(a)(1), (2) ("causes serious bodily injury.").

[42] RCC § 22E-1202.

statutes and the current[43] child cruelty and revised[44] criminal abuse of a minor statutes. This change reduces an unnecessary gap in the offense's coverage and improves the consistency of the statute with similar statutes.

Sixth, the revised criminal abuse of a vulnerable adult or elderly person statute limits liability to a person that reckless as to the fact that "he or she has a responsibility under civil law for the health, welfare, or supervision" of the complainant. The current abuse of a vulnerable adult or elderly person statute does not state any requirements for the defendant's relationship to the complainant.[45] As a result, the current statute significantly overlaps with the District's current assault statutes,[46] which are also subject to separate enhancements for harming an elderly person.[47] However, the current neglect of a vulnerable adult or elderly person statute requires "a duty to provide [necessary] care and services" to the vulnerable adult or elderly person statute.[48] Regarding mental states, the current abuse of a vulnerable adult or elderly person statute requires an "intentionally" culpable mental state, and the current neglect statute requires "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty."[49] There is no DCCA case law interpreting "intentionally" in the abuse statute, but the DCCA has generally found that "wanton, reckless, or willful indifference" in the neglect statute requires something similar to recklessness.[50] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute limits liability to a person that is "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant." This change narrows the scope of liability for the offense to those persons with a duty of care to the complainant (e.g., a teacher, doctor, or caretaker). The revised criminal abuse of a vulnerable adult or elderly person offense thus provides a distinct charge for individuals with responsibilities under civil law who harm those they are supposed to protect. The revised offense still overlaps in many respects with assault and other offenses that are predicates for third degree criminal abuse of a vulnerable adult or elderly person statute, but only for persons with a duty of care to the complainant they harm.[51] Individuals who do not satisfy this requirement may still have liability under other revised offenses, such as assault (RCC § 22E-1202), criminal threats (RCC § 22E-1204), criminal restraint (RCC § 22E-1404), or offensive physical contact (RCC § 22E-1205). This change reduces unnecessary overlap between the revised statute and other RCC offenses against persons, including assault.

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[43] D.C. Code § 22-1101(a) ("causes bodily injury.").
[44] RCC § 22E-1501.
[45] D.C. Code § 22-933.
[46] D.C. Code §§ 22-404; 22-404.01.
[47] D.C. Code § 22-3601.
[48] D.C. Code § 22-934.
[49] D.C. Code § 22-934.
[50] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).
[51] Under the general merger provision in RCC § 22E-214, the predicate offenses for third degree criminal abuse of a vulnerable adult or elderly person are intended to merge into a conviction for criminal abuse of a vulnerable adult or elderly person when arising from the same course of conduct.

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

First, the revised criminal abuse of a vulnerable adult or elderly person statute prohibits behavior that would constitute stalking, electronic stalking, criminal threats, or criminal restraint, as defined by the RCC. The current abuse of a vulnerable adult or elderly person statute prohibits, in part, conduct that "threatens to inflict physical pain or injury,"[52] uses "repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening,"[53] or involves "unreasonable confinement or involuntary seclusion, including but not limited to, the forced separation from other persons against his or her will or the directions of any legal representative."[54] There is no DCCA case law interpreting the meaning of these provisions in the current statute, or how such conduct may differ from conduct covered in other current statutes that prohibit threats,[55] stalking,[56] or involuntary confinement.[57] Resolving this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute clearly states that third degree includes the RCC offenses of stalking, criminal threats, or criminal restraint. The revised stalking (RCC § 22E-1801), electronic stalking (RCC § 22E-1802), and criminal threats (RCC § 22E-1204) statutes cover threats of "physical pain or injury" and "repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening" in the current statute, and the revised criminal restraint statute (RCC § 22E-1404) covers conduct involving unreasonable confinement or involuntary seclusion in the current statute. This change improves the clarity of the revised offense and creates consistency between the revised offense and other closely related offenses pertaining to such as criminal threats and restraint.

Second, the revised criminal abuse of a vulnerable adult or elderly person statute prohibits behavior that satisfies fourth degree assault as defined in RCC § 22E-1202(d) and offensive physical contact as defined in RCC § 22E-1205. The current abuse of a vulnerable adult or elderly person statute requires, in part, "inflict[ing] or threat[ening] to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means."[58] The DCCA has interpreted "physical pain or injury…or other corporal means" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[59] but did not provide a definition of the terms. The revised abuse of a vulnerable adult or elderly person statute establishes that, whether or not it would constitute a physical injury by corporal means, causing "bodily injury," as required by fourth degree

[52] D.C. Code § 22-933(1).
[53] D.C. Code § 22-933(2).
[54] D.C. Code § 22-933(3).
[55] D.C. Code §§ 22-404(a)(1); 22-1810.
[56] D.C. Code § 22-3133.
[57] D.C. Code § 22-2001.
[58] D.C. Code § 22-933(1).
[59] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

assault, or offensive physical contact is within the scope of the offense. This change clarifies and potentially fills a gap in the current statute.

Third, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state of recklessness as to the fact that the complainant is a vulnerable adult or elderly person. The current abuse of a vulnerable adult or elderly person statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a vulnerable adult or elderly person.[60] There is no DCCA case law discussing if there is a culpable mental state for this element. However, the current enhancement for certain crimes committed against senior citizens provides a defense that the accused did not know or reasonably believed that the victim was not 65 years or older.[61] To resolve these ambiguities, the revised criminal abuse of a vulnerable adult or elderly person statute consistently requires a "recklessly" culpable mental state as to the fact that the complainant is a vulnerable adult or elderly person. The "recklessly" culpable mental state matches the culpable mental state for the fact that the complainant is under the age of 18 years in the revised criminal abuse of a minor and criminal neglect of a minor statutes (RCC §§ 22E-1501 and 22E-1502), and the "protected person" gradations in the revised assault statute (RCC § 22E-1202). A "recklessly" culpable mental state is also consistent with the culpable mental state requirements in the current enhancement for certain crimes committed against senior citizens.[62] This change improves the consistency and proportionality of the revised offense.

Fourth, the revised criminal abuse of a vulnerable adult or elderly person statute incorporates the standard definitions for the terms "serious bodily injury" and "bodily injury" in RCC § 22E-701. The District's current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "physical pain or injury" or "serious bodily injury" results.[63] The current statute, however, does not define these terms. The

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[60] The current neglect of a vulnerable adult or elderly person statute requires a culpable mental state of "intentionally or knowingly." D.C. Code § 22-933. Surprisingly, "vulnerable adult" or "elderly person" are not codified elements of the current criminal abuse of a vulnerable adult or elderly person offense in D.C. Code § 22-933, nor is proof that the complainant is a "vulnerable adult" or "elderly person" codified as an element in the offense's penalty provisions. D.C. Code §§ 22-933, 22-936.

[61] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Abuse of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[62] "Reckless" is defined in RCC § 22E-206 and means that the accused must consciously disregard a substantial risk that the complainant was 65 years of age or older. In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant, per the current enhancement for crimes against senior citizens, would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial risk that the complainant was 65 years of age or older. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[63] If "serious bodily injury or severe mental distress" results, the current abuse of a vulnerable adult offense has a maximum term of imprisonment of 10 years. D.C. Code § 22-936(b). If "permanent bodily harm or death" results, the current offense has a maximum term of imprisonment of 20 years. D.C. Code § 22-936(c). If the offense results in a lesser harm than "serious bodily injury," "severe mental distress,"

DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[64] but did not provide a definition of either term. There is no DCCA case law interpreting "serious bodily injury" in the current abuse of a vulnerable adult or elderly person statute.[65] Resolving this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute codifies and uses standard definitions of "serious bodily injury" and "bodily injury" per RCC § 22E-701. The revised definition of "serious bodily injury" is modified from the definition that the DCCA applies to the current aggravated assault statute[66] and would appear to encompass "permanent bodily harm" in the current abuse of a vulnerable adult or elderly person statute. It is unclear whether the revised definition otherwise changes "serious bodily injury" in the current statute. The revised definition of "bodily injury" in RCC § 22E-701 encompasses the limited DCCA case law interpreting "bodily injury" for the current abuse of a vulnerable adult or elderly person statute, as well as the alternative basis for liability in the current statute, that the conduct cause "physical pain."[67] This change improves the clarity, consistency, and proportionality of the revised abuse of a vulnerable adult or elderly person statute.

Fifth, the revised criminal abuse of a vulnerable adult or elderly person statute incorporates the standardized definition of "serious mental injury" in RCC § 22E-701. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on

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"permanent bodily harm," or death the current offense is a misdemeanor with a maximum term of imprisonment of 180 days. D.C. Code § 22-936(a).

[64] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[65] However, there is DCCA case law interpreting "serious bodily injury" in the current aggravated assault statute. "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[66] "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[67] D.C. Code § 22-933(1) ("[i]nflicts or threatens to inflict physical pain or injury . . . by corporal means.").

whether "severe mental distress" resulted,[68] but the statute does not define the term and there is no DCCA case law. Resolving this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The revised criminal abuse of a minor and criminal neglect of a minor statutes also use the term "serious mental injury," which is modified from the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision.[69] This change improves the clarity and consistency of the revised offense.

Sixth, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state as to the resulting physical or mental injury. The current abuse of a vulnerable adult or elderly person statute requires culpable mental states of "intentionally or knowingly" as to the prohibited conduct.[70] However, the current offense's penalty gradations do not specify culpable mental states for whether the prohibited conduct "causes" "serious bodily injury or severe mental distress"[71] or "permanent bodily harm or death."[72] The DCCA has not determined whether there is a culpable mental state for the resulting physical or mental harm in the abuse of a vulnerable adult or elderly person statute. Unlike the current statute, the revised statute clarifies that a culpable mental state applies to the resulting physical or mental harm—either "recklessly" or "purposely." This change improves the clarity, completeness, and proportionality of the revised statute.

Seventh, the revised criminal abuse of a vulnerable adult or elderly person statute does not recognize as a distinct basis of liability causing "permanent bodily harm." The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "permanent bodily harm" resulted,[73] providing a maximum term of imprisonment of 20 years for such conduct. The current statute does not define "permanent bodily harm" and there is no comparable grade in the District's current assault statutes. However, the current aggravated assault statute does prohibit "serious bodily injury"[74] and DCCA case law includes permanent bodily injury in the definition of "serious bodily injury."[75] To resolve this ambiguity, the revised criminal abuse of a

[68] D.C. Code § 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).

[69] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[70] D.C. Code § 22-933.

[71] D.C. Code § 22-936(b).

[72] D.C. Code § 22-936(c).

[73] D.C. Code § 22-936(c).

[74] D.C. Code § 22-404.01.

[75] The District's current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of

vulnerable adult or elderly person statute grades, in part, on whether "serious bodily injury" occurred, as that term is defined in RCC § 22E-701. This change improves the clarity and consistency of the revised statute.

Eighth, the revised criminal abuse of a vulnerable adult or elderly person statute codifies an effective consent defense, discussed extensively in the explanatory note to the offense. District statutes do not codify general defenses to criminal conduct. The current abuse of a vulnerable adult or elderly person statute does not address whether consent of the complainant is a defense to liability, although current D.C. Code § 22-935 exempts from liability anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[76] Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[77] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[78] It is unclear whether this District case law for assault would apply to abuse of a vulnerable adult or elderly person. Resolving this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute effective consent defense clarifies when the actor's reasonable belief that the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701, has given "effective consent" is a defense. In particular, the new effective consent defenses in subsection (e) specifically address where the injury is caused by an "omission" if the complainant, or a "or person with legal authority over the complainant" acting consistent with that authority gives effective consent to the omission. This replaces in relevant part the exception in the current D.C. Code abuse or neglect of a vulnerable adult or elderly person statutes.[79] An omission includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall. This change improves the clarity, consistency, and proportionality of the revised statutes.

Ninth, the revised criminal abuse of a vulnerable adult or elderly person statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current abuse of a vulnerable adult or elderly person

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jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[76] D.C. Code § 22-935.

[77] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

[79] D.C. Code § 22-935.

statutes do not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for those offenses. The exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[80] This change improves the clarity, consistency, and proportionality of the revised statute.

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

[80] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

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

Explanatory Note. *The RCC criminal neglect of a vulnerable adult or elderly person offense proscribes a broad range of conduct in which there is a risk of harm to a vulnerable adult or elderly person's bodily integrity or mental well-being. In addition to prohibiting a risk of harm to a vulnerable adult or elderly person, the RCC neglect of a vulnerable adult or elderly person offense prohibits failing to provide a vulnerable adult or elderly person with necessary items or care. The penalty gradations are primarily based on the type of physical or mental harm that is risked. Along with the revised criminal abuse of a vulnerable adult or elderly person offense, the revised criminal neglect of a vulnerable adult or elderly person offense replaces several offenses and provisions in the current D.C. Code: abuse of a vulnerable adult or elderly person;*[1] *neglect of a vulnerable adult or elderly person;*[2] *and the spiritual healing defense for abuse or neglect of a vulnerable adult or elderly person.*[3]

There are three degrees of the RCC criminal neglect of a vulnerable adult or elderly person statute. Each gradation requires that the accused is "reckless" as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant"[4] (paragraph (a)(1) and subparagraph (a)(1)(A) for first degree, paragraph (b)(1) and subparagraph (b)(1)(A) for second degree, and paragraph (c)(1) and subparagraph (c)(1)(A)) for third degree). Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant has the specified responsibility to the complainant in subparagraph (a)(1)(A) for first degree, subparagraph (b)(1)(A) for second degree, and subparagraph (c)(1)(A)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant.

Each gradation of the offense further requires that the accused is "reckless" as to the fact that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant is a "vulnerable adult" or "elderly person" in subparagraph (a)(1)(B) for first degree, subparagraph (b)(1)(B) for second degree, and subparagraph (c)(1)(B)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22E-701.

Paragraph (a)(2) specifies the prohibited conduct for first degree criminal neglect of a vulnerable adult or elderly person, the highest grade of the revised criminal neglect

[1] D.C. Code §§ 22-933, 22-936.
[2] D.C. Code §§ 22-934, 22-936.
[3] D.C. Code § 22-935.
[4] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, or caregiver, depending on the facts of a case.

of a vulnerable adult or elderly person offense—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "serious bodily injury" or death. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (a)(1) applies to this requirement. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she created, or failed to mitigate or remedy, a substantial risk that the complainant would experience "serious bodily injury" or death. "Serious bodily injury" is a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness.

Subsection (b) specifies the prohibited conduct for second degree criminal neglect of a vulnerable adult or elderly person. Paragraph (b)(2) and subparagraph (b)(2)(A) specify one type of prohibited conduct—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to the elements in paragraph (b)(2) and subparagraph (b)(2)(A). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury."

Paragraph (b)(2) and subparagraph (b)(2)(B) specify the second type of prohibited conduct for second degree criminal neglect of a vulnerable adult or elderly person—creating, or failing to mitigate or remedy, a substantial risk that a child would experience "serious mental injury." "Serious mental injury" is a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to the elements in paragraph (b)(2) and subparagraph (b)(2)(B). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "serious mental injury."

Subsection (c) specifies the prohibited conduct for third degree criminal neglect of a vulnerable adult or elderly person. Subparagraph (c)(2)(A) specifies one type of prohibited conduct—failing to make a reasonable effort to provide food, clothing, or other items or care for the complainant that are "essential to the physical health, mental health, or safety of the complainant." Per the rules of interpretation in RCC § 22E-207, the culpable mental state of "reckless" in paragraph (c)(1) applies to all the elements in subparagraph (c)(2)(A). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will fail to make a reasonable effort to provide the items or care and that the items or care are "essential to the physical health, mental health, or safety of the complainant."

Subparagraph (c)(2)(B) establishes liability for creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "bodily injury" from

consumption of alcohol, or consumption or inhalation, without a valid prescription, of a "controlled substance" or marijuana.[5] "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition." "Controlled substance" is also a defined term in RCC § 22E-701. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (c)(1) applies to all elements in subparagraph (c)(2)(B). "Recklessly" is defined term in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience bodily injury from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana.

Subsection (d) codifies an exclusion from liability for the offense. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all exclusions from liability in the RCC. An actor does not commit an offense under the revised criminal neglect of a vulnerable adult or elderly person statute when, in fact, the actor's conduct is specifically permitted by a District statute or regulation. Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[6]

Subsection (e) codifies two defenses for the revised criminal neglect of a vulnerable adult or elderly person statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all defenses in the RCC.

Paragraph (e)(1) codifies a defense for first degree (subsection (a)) of the revised criminal neglect of a vulnerable adult or elderly person statute—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "serious bodily injury," as that term is defined in RCC § 22E-701, or death.

Paragraph (e)(1) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of

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[5] Specific reference is made to marijuana to ensure that marijuana is categorically included, regardless of amount. Title 48 of the D.C. Code generally defines a controlled substance to include marijuana as a controlled substance (see D.C. Code § 48–901.02(4)), but also separately modifies that general definition (see D.C. Code § 48–904.01(a)(1A)(A)) to eliminate marijuana under 2 ounces possessed by a person 21 or over. Because marijuana is categorically included, a caregiver who legally possesses marijuana may, for example, still be liable for blowing smoke from the marijuana upon a vulnerable adult or elderly person if it is proven that such conduct creates a substantial risk that the complainant would experience bodily injury from the smoke.

[6] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

the defense in paragraph (e)(1) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements for the defense. First, per subparagraph (e)(1)(A) and sub-subparagraph (e)(1)(A)(i), the risk must be caused by a "lawful cosmetic or medical procedure." The "lawful" requirement applies both to a cosmetic procedure and a medical procedure. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the risk is caused by a lawful cosmetic or medical procedure. A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they are otherwise legal under District or federal law. Cosmetic procedures that are legal[7] also are within the scope of the defense.

In the alternative, subparagraph (e)(1)(A) and sub-subparagraph (e)(1)(A)(ii) apply if the risk is caused by an omission. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the risk is caused by an "omission," a defined term in RCC § 22E-701. An omission includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall.

Subparagraph (e)(1)(B) requires that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is an "incapacitated individual," RCC § 22E-701 defines a "person with legal authority over the complainant" as "the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian." RCC § 22E-701 further defines "incapacitated individual."

The effect of subparagraph (e)(1)(B) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense[8] to first degree criminal neglect of a vulnerable adult or elderly person. However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[9]

Subparagraph (e)(1)(C) specifies the final requirement for the defense under paragraph (e)(1)—the actor must "reasonably believe" that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The

[7] *See*, e.g., D.C. Code § 47–2853.81. Scope of practice for cosmetologists.

[8] The defense under paragraph (e)(1) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[9] These defenses have different requirements than the effective consent defense in paragraph (e)(1). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

provision in subparagraph (e)(1)(C) for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of vulnerable adults and elderly persons giving effective consent to the actor. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires some indication (by word or action) of agreement given by a person generally competent to do so. In addition, the RCC definition of "consent" excludes consent from a person that "[b]ecause of youth, mental illness or disorder, or intoxication, is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." Thus, although subparagraph (e)(1)(C) permits complainants that are vulnerable adults or elderly persons to give effective consent in certain situations, the RCC definition of "consent" may preclude these individuals from giving consent and, in such a case, if the actor believes it, the defense does not apply.

The "in fact" specified in paragraph (e)(1) applies to the requirements in subparagraph (e)(1)(C). No culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(1)(C). It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[10] There is no effective consent defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Finally, subparagraph (e)(1)(C) requires that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to engage in the conduct that constitutes the offense. As is discussed above, due to the "in fact" specified in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(1)(C). However, the actor must subjectively believe, and that belief must be reasonable,[11] that

[10] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[11] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of

there is effective consent to consent to engage in the conduct that constitutes the offense. There is no effective consent defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the conduct to which effective consent is given.

Paragraph (e)(2) codifies a defense for second degree (subsection (b)) of the revised statute—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury" or "serious mental injury" as those terms are defined in RCC § 22E-701—and third degree (subsection (c)) of the revised statute—failing to make a reasonable effort to provide essential items or care or creating, or failing to remedy a risk of bodily injury from drug or alcohol consumption.

Paragraph (e)(2) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (e)(2) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements to the defense. The requirement in subparagraph (e)(2)(A) that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, is identical to the requirement in subparagraph (e)(1)(B), discussed above.

Subparagraph (e)(2)(B) requires that the actor "reasonably believes" that the either the complainant or a "person with legal authority over the complainant" acting consistent with that authority gives "effective consent" to the actor to engage in the conduct specified in sub-subparagraphs (e)(2)(B)(i) and (e)(2)(B)(ii). The provision in subparagraph (e)(2)(B for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of vulnerable adults or elderly persons giving effective consent to the actor. "Effective consent" is a defined term in RCC § 22E-701 and is defined to incorporate the RCC definition of "consent." These terms, and their applicability to the defense in paragraph (e)(1) for first degree criminal neglect of a vulnerable adult or elderly person, are discussed above. This discussion also applies to the defense to second degree and third degree in subparagraph (e)(2)(B).

The "in fact" specified in paragraph (e)(2) applies to subparagraph (e)(2)(B) and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(2)(B). It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[12] There is no effective consent

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the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[12] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care

defense under subparagraph (e)(2)(B) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (f)(2)(B) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Sub-subparagraphs (e)(2)(B)(i) and (e)(2)(B)(ii) specify alternate bases for the defense under paragraph (e)(2). First, subparagraph (e)(2)(B) and sub-subparagraph (e)(2)(B)(i) require that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to engage in the conduct to constitute the offense.[13] As is discussed above, due to the "in fact" specified in paragraph (e)(2), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(2)(B) or the following sub-subparagraphs. However the actor must subjectively believe, and that belief must be reasonable[14] that there is effective consent to engage in the conduct that constitutes the offense. There is no effective consent defense under subparagraph (e)(2)(B) when the actor makes an unreasonable mistake as to the conduct to which effective consent is given.

In the alternative, subparagraph (e)(2)(B) and sub-subparagraph (e)(2)(B)(ii) require that the actor reasonably believes that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority, gives "effective consent" to the actor to engage in a lawful sport, occupation, or other concerted activity.[15] As noted above, there is no effective consent defense when the actor makes an unreasonable mistake as to the conduct to which effective consent is given. Sub-subparagraph (e)(2)(B)(ii) further requires that the actor's creation of the risk, or failure

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that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[13] The "conduct that constitutes the offense" in sub-subparagraph (e)(2)(B)(i) includes an omission. The sub-subparagraph does not use the term "omission," but the offense includes a failure to mitigate or remedy a risk and encompasses omissions.

[14] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[15] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

to mitigate or remedy the risk,[16] is a reasonably foreseeable hazard of that activity. As specified by the "in fact" in paragraph (e)(2), no culpable mental state, as defined in RCC § 22E-205, applies to the requirement that the actor's creation of, or failure to mitigate or remedy, the risk is a reasonably foreseeable hazard of a permissible activity. This is an objective determination and the defense does not apply if the infliction of the injury is not a reasonably foreseeable hazard.

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

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

Relation to Current District Law. *The revised criminal neglect of a vulnerable adult or elderly person statute changes current District law in three main ways.*

First, the revised criminal neglect of a vulnerable adult or elderly person statute is limited to conduct that does not actually harm a person. The current neglect of a vulnerable adult or elderly person statute requires a failure to discharge a duty to provide necessary care and services to a vulnerable adult or elderly person.[17] The penalties for the offense, however, partially grade the offense on actual harm to the vulnerable adult or elderly person,[18] and partially on a failure to discharge the required duty.[19] In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute no longer grades the offense based on whether actual harm to the vulnerable adult or elderly person resulted. The revised statute is instead limited to creating, or failing to mitigate or remedy, a risk of harm to an elderly person or vulnerable adult, or a failure to provide necessary items or care. However, if physical or mental injury or death results, there still may be liability under the revised criminal abuse of a vulnerable adult or elderly person statute (RCC § 22E-1503), the revised assault statute (RCC § 22E-1202), or the revised homicide offenses[20] (RCC §§ 22E-1101, 22E-1102, 22E-1103). This change reduces

[16] "Failure to mitigate or remedy" a risk in sub-subparagraph (e)(2)(B)(ii) encompass an omission even though the sub-subparagraph does not use the term "omission."

[17] D.C. Code § 22-934.

[18] The higher gradations of the current statute require either "serious bodily injury or severe mental distress," with a maximum term of imprisonment of ten years, D.C. Code §§ 22-934, 22-936(b), or "permanent bodily harm or death," with a maximum term of imprisonment of 20 years, D.C. Code §§ 22-934, 22-936(c).

[19] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days.").

[20] The current abuse of a vulnerable adult or elderly person statute prohibits, in part, "intentionally or knowingly impos[ing] unreasonable confinement or involuntary seclusion." D.C. Code § 22-933(3). In one gradation of the current offense, if the defendant "causes permanent bodily harm or death," there is a maximum term of imprisonment of 20 years. D.C. Code § 22-934(c). The current statute does not specify any culpable mental state as to causing death and there is no DCCA case law, meaning that current District law may apply strict liability. For example if, after a defendant cuts off an elderly person's phone lines, the elderly person falls and dies because he or she cannot call for help, a court could find that the defendant "caused" the elderly person's death, even if the defendant was unaware that there was a risk of death. It is unclear whether current District homicide laws would cover imposing "unreasonable confinement or involuntary seclusion" that leads to death, as in this scenario.

unnecessary overlap between offenses and improves the consistency and proportionality of the revised offense.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute applies a recklessness requirement rather than a reasonable person standard to whether items or care are essential for the well-being of the vulnerable adult or elderly person. The current neglect of a vulnerable adult or elderly person statute requires "that a reasonable person would deem the items or care essential for the well-being of the vulnerable adult or elderly person."[21] It is unclear under the current statute what culpable mental state, if any, applies to the fact that the items or care are essential, although the statute's "reasonable person" standard may suggest a culpable mental state of negligence for this element. DCCA case law has not specifically addressed this culpable mental state, but has generally found that "wanton, reckless or willful indifference," two other culpable mental states specified in the current criminal neglect of a vulnerable adult or elderly person statute, requires something similar to recklessness.[22] In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute eliminates the current statute's reasonable person requirement and applies a "recklessly" culpable mental state as defined in RCC § 22E-206. As applied in the revised statute, "recklessly" requires that a person is aware of a substantial risk that the items or care are "essential for the health or safety of a vulnerable adult or elderly person." This change improves the clarity and proportionality of the revised offense.[23]

Third, the revised criminal neglect of a vulnerable adult or elderly person statute no longer requires as a distinct element that the defendant fail to discharge a duty to provide necessary care and services. The current D.C. Code neglect of a vulnerable adult or elderly person statute requires that the defendant "fail[] to discharge a duty to provide care and services necessary to maintain the physical and mental health" of a vulnerable adult or elderly person.[24] There is no case law regarding this phrase. Moreover, the D.C. Code does not specify any general defense for assault-type conduct committed with intent to fulfill a person's duty of care to another person, and there is no case law concerning such a general defense.[25] In contrast, the revised criminal neglect of a vulnerable adult or

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The revised criminal abuse of a vulnerable adult or elderly person statute no longer specifically prohibits "unreasonable confinement or involuntary seclusion," although this conduct appears to be covered under the revised criminal restraint offense (RCC § 22E-1404). However, the RCC has a revised negligent homicide offense (RCC § 22E-1103) that may cover this conduct, and, depending on the facts of the case, the revised manslaughter offense (RCC § 22E-1102) may cover it.

[21] D.C. Code § 22-934.

[22] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

[23] Although "essential for the health or safety of a vulnerable adult or elderly person" is an element of third degree of the revised criminal neglect of a vulnerable adult or elderly person statute, the issue also may arise in the other degrees of the offense that prohibit "a substantial risk" of specified physical and mental harms. In these degrees, the "recklessly" culpable mental state would encompass recklessness as to whether items or care were essential for the health or safety of the vulnerable adult or elderly person.

[24] D.C. Code § 22-934.

[25] The DCCA has recognized a "lesser-evils" or "necessity" type of justification defense, however, that may apply in situations where an actor commits an assault-type act on a complainant as part of his or her duty of care to the complainant (e.g., a caretaker who restrains his ward to keep the ward from running into

elderly person statute requires as an element of the offense only that the defendant have a responsibility under civil law for the health, welfare, or supervision of the complainant, is reckless as to having this responsibility, and commit otherwise specified conduct. The RCC general justification defense for parents, guardians, and others per RCC § 22E-408 limits liability when an otherwise criminal act is justifiably committed because of the actor's duty of care to the complainant. Under this defense, once an actor's burden of production is satisfied, the government must prove that the actor's conduct was a violation of his or her duty of care. Specifically, in a charge of third degree of the RCC criminal neglect of a vulnerable adult or elderly person statute, where an actor claims his or her conduct is in accord with his duty of care under RCC § 22E-408, the government then would need to prove that his or her failure to provide essential items or care was a violation of the actor's duty of care. Consequently, the effect of removing as a distinct element of the revised statute that the defendant fail to discharge a duty to provide necessary care and services is simply that the burden of alleging that such a failure was not a violation of the actor's duty of care falls upon the actor. This change improves the clarity and consistency of the revised statute.

Beyond these three substantive changes to current District law, seven other aspects of the statute may be viewed as a substantive change of law.

First, the revised criminal neglect of a vulnerable adult or elderly person statute requires a culpable mental state of recklessness as to the fact that the complainant is a vulnerable adult or elderly person. The current neglect of a vulnerable adult or elderly person statute is silent as to what culpable mental state, if any, applies to the fact that the complainant is a vulnerable adult or elderly person. There is no DCCA case law discussing the matter. However, the current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to a vulnerable adult or elderly person, which may imply awareness of the complainant's status which is the basis of the "duty." In a related statutory provision, the current enhancement for certain crimes committed against senior citizens provides a defense that the accused did not know or reasonably believed that the victim was not 65 years or older.[26] To resolve these ambiguities, the revised criminal neglect of a vulnerable adult or elderly person statute consistently requires a "reckless" culpable mental state as to the fact that the complainant is an elderly person or a vulnerable adult. The reckless culpable mental state requirement matches the culpable mental state required as to the fact that the complainant is under the age 18 years in the revised criminal abuse and criminal neglect of a minor statutes (RCC § 22E-1501 and § 22E-1502) and the "protected person" gradations in the revised assault statute

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traffic). *See Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) ("In essence, the necessity defense exonerates persons who commit a crime under the "pressure of circumstances," if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law.").

[26] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 223601(c). Abuse of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

(RCC § 22E-1202). A "reckless" culpable mental state is also consistent with the culpable mental state requirements in the current enhancement for certain crimes committed against senior citizens.[27] This change improves the consistency and proportionality of the revised offense.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute requires a "substantial risk" of the specified physical or mental harm for liability. The current neglect of a vulnerable adult or elderly person statute requires a failure to discharge a duty to provide necessary care and services to a vulnerable adult or elderly person.[28] The penalties for the offense partially grade on a failure to discharge the required duty.[29] In such a situation, it appears that an actual risk of harm may not be necessary,[30] although failure to mitigate a risk has been the basis of liability in at least one case.[31] The revised criminal neglect of a vulnerable adult or elderly person statute clarifies that the required risk must be "substantial." The "substantial" language is technically superfluous where recklessness is alleged because the "reckless" culpable mental state, as defined in RCC § 22E-206, also requires that a risk be "substantial" and the accused's conscious disregard of the risk be "clearly blameworthy." However, given that neglect offenses will often depend on the nature of the risk to the vulnerable adult or elderly person, the revised statute specifies the "substantial" requirement to clarify the

[27] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 223601(c). "Reckless" is defined in RCC § 22E-206 and means that the accused must consciously disregard a substantial risk that the complainant was 65 years of age or older. In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant would not satisfy the culpable mental states of recklessness or knowledge as to the age of the complaining witness. The accused would not consciously disregard a substantial risk (recklessness) or be practically certain (knowledge) that the complainant was 65 years of age or older. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element. Criminal neglect of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[28] D.C. Code § 22-934.

[29] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days."). The higher gradations of the current statute require either "serious bodily injury or severe mental distress," with a maximum term of imprisonment of ten years, D.C. Code §§ 22-934, 22-936(b), or "permanent bodily harm or death," with a maximum term of imprisonment of 20 years, D.C. Code §§ 22-934, 22-936(c).

[30] For example, a caretaker who knowingly fails to discharge their duty to provide necessary medicine to a vulnerable person may be liable under the current statute even though the vulnerable person was not actually at risk of an adverse consequence due to the intervention of a third party.

[31] *Jackson v. United States*, 996 A.2d 796, 797, 798 (D.C. 2010) (finding the evidence sufficient for criminal neglect of a vulnerable adult because "a reasonable factfinder could conclude that, under the statute, appellant failed to take steps that a 'reasonable person would deem essential for the well-being of the complainant' when appellant was involved in an altercation with the vulnerable adult, which left visible and significant injuries, and appellant did not inform his supervisor or file an incident report as required by his job duties).

statute, particularly where the defendant is alleged to act knowingly, intentionally, or purposely.[32] This change improves the clarity and consistency of the revised statute.

Third, the revised criminal neglect of a vulnerable adult or elderly person statute incorporates the standard definitions for the terms "serious bodily injury" and "significant bodily injury" in RCC § 22E-701. The District's current neglect of a vulnerable adult or elderly person statute is graded, in part, on whether "serious bodily injury," "permanent bodily harm," or a lesser, unspecified, physical harm results.[33] The current statute, however, does not define these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[34] but did not provide a general definition. There is no DCCA case law interpreting these terms for the current neglect of a vulnerable adult or elderly person statute. To resolve these ambiguities, the revised criminal neglect of a vulnerable adult or elderly person statute codifies and uses standard definitions of "serious bodily injury" and "significant bodily injury" per RCC § 22E-701. The revised definition of "serious bodily injury" is modified from the definition that the DCCA applies to the current aggravated assault statute.[35] The revised definition of "serious bodily injury" would appear to encompass "permanent bodily harm" in the current neglect of a vulnerable adult or elderly person statute, but it is unclear whether the revised definition otherwise changes "serious bodily injury" in the current statute. This change improves the clarity, consistency, and proportionality of the revised statute.

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[32] For example, where a caregiver gives an elderly person with cancer an experimental and dangerous drug prescribed by the elderly person's oncologist, the fact that the caregiver *knows* (i.e. is practically certain) that doing so will create a risk of serious bodily injury or death to the elderly person does not, by itself, establish first degree neglect of a vulnerable adult or elderly person. Rather, it would also have to be proven by the government, as an affirmative element of the offense, that this risk was *substantial* under the circumstances.

[33] If "serious bodily injury or severe mental distress" results, the current abuse of a vulnerable adult offense has a maximum term of imprisonment of 10 years. D.C. Code § 22-936(b). If "permanent bodily harm or death" results, the current offense has a maximum term of imprisonment of 20 years. D.C. Code § 22-936(c). If the offense results in a lesser harm than "serious bodily injury," "severe mental distress," "permanent bodily harm," or death, the current offense is a misdemeanor with a maximum term of imprisonment of 180 days. D.C. Code § 22-936(a) ("A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person shall be subject to a fine not more than the amount set forth in § 22-3571.01, imprisoned for not more than 180 days, or both.

[34] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[35] "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

Fourth, the revised criminal neglect of a vulnerable adult or elderly person statute incorporates the standardized definition of "serious mental injury" in RCC § 22E-701. The current neglect of a vulnerable adult or elderly person statute grades, in part, based on whether "severe mental distress" resulted,[36] but the statute does not define the term. There is no DCCA case law interpreting "serious mental distress." RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The revised criminal abuse of a minor and criminal neglect of a minor statutes also use the term "serious mental injury," which is modified from the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision.[37] This change improves the clarity and consistency of the revised offenses.

Fifth, the revised criminal neglect of a vulnerable adult or elderly person statute limits liability for creating a risk of bodily injury to a risk of bodily injury due to drug or alcohol consumption. The current neglect of a vulnerable adult or elderly person statute prohibits failing to discharge a duty to "provide care and services necessary to maintain the physical and mental health of a vulnerable adult or elderly person."[38] The offense is partially graded on a failure to discharge the required duty.[39] The statute appears to provide liability for a failure to discharge the required duty even if the resulting risk to the physical or mental health of the complainant is comparatively trivial. There is no DCCA case law on this issue. Resolving this ambiguity, the revised criminal neglect of a vulnerable adult or elderly person statute limits liability for creating a risk of comparatively low-level physical harm to a risk of "bodily injury" due to the complainant consuming alcohol or consuming or inhaling, without a valid prescription, a controlled substance or marijuana. "Bodily injury" is the lowest level of physical harm in the RCC and is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition." Prohibiting reckless creation of a risk of any "bodily injury" in the revised statute may criminalize the risk of comparatively trivial harms that are part of everyday life. If the actor recklessly creates such a risk with a higher level of "bodily injury," such as "significant bodily injury," there remains liability under first degree or second degree of the RCC criminal neglect of a vulnerable adult or elderly person statute. Conduct that results in a risk of "bodily injury" in contexts other than drug or alcohol consumption may constitute attempted criminal neglect of a vulnerable

[36] D.C. Code § 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results). In the revised criminal neglect of a vulnerable adult or elderly person statute, risk of mental harm that does not satisfy the definition of "serious mental injury" may be covered by attempted criminal neglect of a vulnerable adult or elderly person, or as third degree criminal abuse of a vulnerable adult or elderly person in RCC § 22E-1503.

[37] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[38] D.C. Code § 22-934.

[39] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days.").

adult or elderly person.[40] This change improves the clarity, consistency, and proportionality of the revised statutes.

Sixth, the revised criminal neglect of a vulnerable adult or elderly person statute codifies an effective consent defense, discussed extensively in the explanatory note to the offense. District statutes do not codify general defenses to criminal conduct. The current neglect of a vulnerable adult or elderly person statute does not address whether consent of the complainant is a defense to liability, although current D.C. Code § 22-935 exempts from liability anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[41] Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[42] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[43] It is unclear whether this District case law for assault would apply to neglect of a vulnerable adult or elderly person. Resolving this ambiguity, the revised criminal neglect of a vulnerable adult or elderly person statute effective consent defense clarifies when the actor's reasonable belief that the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701, has given "effective consent" is a defense. In particular, the new effective consent defenses in subsection (e) specifically address where the risk, or failure to mitigate remedy the risk, is caused by an omission if the complainant, or a "or person with legal authority over the complainant" gives effective consent to the omission. This replaces in relevant part the exception in the current D.C. Code abuse or neglect of a vulnerable adult or elderly person statutes.[44] An omission includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall. This change improves the clarity, consistency, and proportionality of the revised statutes.

Seventh, the revised criminal neglect of a vulnerable adult or elderly person statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current neglect of a vulnerable adult or elderly person statutes do not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for those offenses. The exclusion resolves any apparent conflict within District laws. For example, Title 22,

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[40] In addition, if an actor recklessly creates, or fails to mitigate or remedy, a risk that a complainant would experience bodily injury from consumption of drugs or alcohol, and "bodily injury" results, there would be liability under the RCC criminal abuse of a vulnerable adult or elderly person statute (RCC § 22E-1503).
[41] D.C. Code § 22-935.
[42] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").
[43] *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).
[44] D.C. Code § 22-935.

Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[45] This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, the revised criminal neglect of a vulnerable adult or elderly person statute specifies that "fail[ing] to mitigate" or "fail[ing] to remedy" a substantial risk is sufficient for liability. The current neglect of a vulnerable adult or elderly person statute criminalizes conduct that "fails to discharge a duty" to provide necessary care and services.[46] The revised statute clarifies that not only creating risks to a vulnerable adult or elderly person, but also failing to mitigate or remedy a substantial risk, is sufficient for liability. Under the general provision in RCC § 22E-202, omissions are equivalent to affirmative conduct and sufficient for liability for any offense in the RCC where the defendant had a duty of care to the complainant.[47] However, although technically superfluous, given that neglect of a vulnerable adult or elderly person offenses usually will involve an omission, the revised statute explicitly codifies "fail[ing] to remedy" or "fail[ing] to remedy" as a basis for liability. The change clarifies the revised statute.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute requires that the defendant have a "responsibility under civil law for the health, welfare, or supervision" of the vulnerable adult or elderly person and applies a recklessly culpable mental state to this element. The current neglect of a vulnerable adult or elderly person statute requires that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person. The extent of such care and services, however, is unclear under the statute, and "duty to provide care and services" is not statutorily defined. In addition, it is unclear as to whether any of these culpable mental states apply to the fact that the defendant has a duty to provide such care and services. There is no DCCA case law on point, but the DCCA has generally found that "wanton, reckless, or willful indifference" requires a mental state similar to recklessness.[48] To resolve these

[45] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[46] D.C. Code § 22-934.

[47] This principle is reflected in the current version of the draft general provision on omission liability. See RCC § 202(c), (d) ("(c) 'Omission' means a failure to act when (1) a person is under a legal duty to act and (2) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. (d) For purposes of this Title, a legal duty to act exists when: (1) The failure to act is expressly made sufficient by the law defining the offense; or (2) A duty to perform the omitted act is otherwise imposed by law.").

[48] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of

ambiguities, the revised statute requires that the defendant is reckless as to the fact he or she has a "responsibility under civil law for the health, welfare, or supervision" of the vulnerable adult or elderly person. While generally corresponding to the language of the current statute, including duties pertaining to "supervision" may slightly expand liability for failure to provide services or care. The RCC also applies a culpable mental state of recklessness to the fact that the complainant has a responsibility under civil law for the health, welfare, or supervision of the complainant because this matches the culpable mental state as to the fact that the complainant is a vulnerable adult or elderly person. Logically, the mental state as to the duty of care should match the mental state as to the attribute that gives rise to the duty. This change improves the clarity and completeness of the revised statute.

Third, the revised criminal neglect of a vulnerable adult or elderly person statute codifies a "reckless" culpable mental state, defined in RCC § 22E-206, with respect to creating or failing to mitigate or remedy a risk, or to provide essential care or items. The current neglect of a vulnerable adult or elderly person statute prohibits failing to discharge a duty to provide necessary care and services "willfully or through wanton, reckless or willful indifference,"[49] but does not define any of these terms. The DCCA in *Tarpeh v. United States* discussed the meaning of "reckless" under the statute and said that it is a "state of mind that falls somewhere between simple negligence . . . and an intentional or willful decision to cause harm to a person."[50] The court stated that to prove "reckless indifference" in the neglect of a vulnerable adult or elderly person statute, "the evidence, as found by the trier of fact, must show not only that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of risks involved in light of known alternative courses of action."[51] In *Tarpeh,* the DCCA explicitly referred to the Model Penal Code definition of "reckless," which requires the defendant to "consciously disregard[] a substantial and *unjustified* risk that the material element exists or will result from his conduct."[52] The revised criminal neglect of a vulnerable adult or elderly person applies a "reckless" culpable mental state as defined in RCC § 22E-206, which is similar to the Model Penal Code.[53] This change improves the clarity of the revised statute.

Fourth, the revised criminal neglect of a vulnerable adult or elderly person statute requires a "recklessly" culpable mental state as to the risk of physical or mental injury. The current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person. However, the statute is unclear as to whether any of these culpable mental states applies to the fact that, per the penalty gradations, the neglect causes "serious bodily injury or severe mental distress"[54] or "permanent bodily harm or death."[55] DCCA case

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the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

[49] D.C. Code § 22-934.

[50] *Tarpeh*, 62 A.2d at 1270.

[51] *Tarpeh*, 62 A.2d at 1270.

[52] *Tarpeh*, 62 A.2d at 1270 (emphasis in original).

[53] See Commentary to RCC § 22E-206.

[54] D.C. Code § 22-936(b).

law has not specifically addressed whether a culpable mental state applies to the penalty gradations, but has found that "reckless indifference" with respect to the failure to provide care and services in the current offense requires something similar to recklessness.[56] The revised statute provides that the standard culpable mental state of "recklessly" applies to the resulting risk of physical or mental harm. This change improves the clarity and proportionality of the revised statute.

[55] D.C. Code § 22-936(c).

[56] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

RCC § 22E-1601. Forced Labor.

Explanatory Note. *This section establishes the forced labor offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing another person to provide services either by means debt bondage or an explicit or implicit coercive threat. This offense replaces the forced labor offense in the current D.C. Code,[1] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[2]*

Paragraph (a)(1) specifies that forced labor requires that an actor knowingly causes a person to provide services. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[3] which requires that the accused was practically certain that he or she would cause a person to engage in labor or services. The term "services" is defined under RCC § 22E-701.[4]

Paragraph (a)(2) specifies that forced labor requires that the actor cause another person to engage in labor or services either by means of debt bondage or an explicit or implicit coercive threat.[5] "Debt bondage" is also defined under RCC § 22E-701, and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.[6] "Coercive threat" is defined under RCC § 22E-701, and is comprised of seven different forms of threats. Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The accused must be practically certain both that he or she is using debt bondage or coercive threats, and that the debt bondage or coercive threat *causes* the other person to provide services.

Subsection (b) specifies that communicating that any person will engage in legal employment actions is not a basis for liability under the forced labor statute. Such communications, which otherwise might satisfy the requirement of a coercive threat, may be a sufficient basis for other human trafficking offenses.[7]

Subsection (c) specifies relevant penalties and enhancements for the offense. Paragraph (c)(1) specifies the penalty for forced labor.

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[1] D.C. Code § 22-1832.
[2] D.C. Code § 22-1837.
[3] RCC § 22E-206(b).
[4] For further discussion on these terms, see Commentary to RCC § 22E-701.
[5] A coercive threat may come in the form of a verbal or written communication. However, gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.
[6] Debt bondage requires that complainant provides labor, services, or commercial sex acts to satisfy a debt and one of the following conditions apply: 1) the value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; 2) the length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or 3) the amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.
[7] Threats that go beyond ordinary and legal employment actions are subject to liability. For example, the exception under this provision would not apply to a store manager who threatens to fire an employee unless that employee agrees to work for 24 hours without respite.

Paragraph (c)(2) provides penalty enhancements applicable to this offense. Subparagraph (c)(2)(A) specifies that if a person commits forced labor and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[8] here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age and such conduct was sufficiently blameworthy. Subparagraph (c)(2)(B) specifies that if the actor held the complainant or caused the complainant to provide labor or services for a total of more than 180 days, the offense classification may be increased in severity by one class.[9] Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in subparagraph (c)(2)(A) applies to the conduct in subparagraph (c)(2)(B). Even if both penalty enhancements are proven, the most the penalty can be increased is one class. The penalty enhancement under paragraph (c)(2) shall be applied in addition to any general penalty enhancements under this title.

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

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

First, by reference to the RCC's "coercive threats" definition, the forced labor statute does not provide liability for causing another to provide labor by fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[10] and by extension the current forced labor statute includes using fraud or deception to cause a person to provide services. By contrast, the RCC's "coercive threats" definition does not include fraud or deception,[11] and such conduct is not a sufficient basis for forced labor liability. A person who uses deception or fraud to cause another person to provide services has not committed forced labor unless that person also uses one of the other coercive means listed in the RCC's definition or holds another person in debt bondage.[12] While using deception to cause another to provide services is wrongful, it does not warrant equal punishment to using coercive threats or debt bondage and could provide major felony liability for common employment disputes.[13] Rather, a person who causes another to provide services through fraud or deception may still be liable under the

[8] RCC § 22E-206 (d).

[9] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.

[10] D.C. Code § 22-1831 (3)(D).

[11] RCC § 22E-701.

[12] Forced labor may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who initially lures a laborer with the false promise of high wages, and then coerces the laborer to provide labor or services under threat of bodily injury could be convicted under the RCC's forced labor statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

[13] For instance, under the current statutory definition of "coercion," a person may be liable for forced labor or services, subject to a 20 year maximum imprisonment, for falsely stating the terms of an employee's advancement eligibility or scope of work duties at the time of hiring.

RCC's revised fraud[14] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised offense.

Second, by reference to the RCC's "coercive threats" definition, the revised forced labor offense criminalizes restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any controlled substance or addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised forced labor offense only provides liability for threatening to restrict a person's access to controlled substances that the person owns or prescription medication that the person owns.[15] Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[16] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[17] and precludes arguments that an employer's attempts to limit an employee's access to legal and readily available addictive substances like tobacco or alcohol constitute forced labor.[18] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[19] Eliminating the facilitation of access to any addictive substance as a form of coercive threat prevents the possibility of criminalizing relatively less coercive conduct.[20] This change improves the clarity and proportionality of the revised statute.

Third, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim

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[14] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

[15] A person can satisfy this subsection by providing a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.

[16] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

[17] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

[18] For example, an employer who predicates a person's employment on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance.

[19] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

[20] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

is held or provides services for more than 180 days[.]"[21] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days that exceeds 180. This change clarifies and may improve the proportionality of the revised statute.

Fourth, the revised forced labor offense authorizes enhanced penalties if the actor is reckless as to whether the complainant is under 18 years of age. The current forced labor offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but forced labor is not currently listed in the definition of a "crime of violence."[22] By contrast, the revised forced labor offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

Beyond these three changes, five other aspects of the revised statute may constitute a substantive change to current District law.

First, by reference to the RCC's definition of "coercive threats," forced labor includes causing a person to provide services by threatening that any person will commit an offense against persons or a property offense.[23] The current "coercion" definition does not explicitly include threats to "commit any criminal offense against persons" but does include threats of "force" and "threats of physical restraint," conduct that appears to constitute the criminal offenses of assault, kidnapping, or criminal restraint. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[24] The revised definition of "coercive threats" and the RCC crime of forced labor together specify that a threat to commit any criminal offense against persons is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised statute specifies that threats of ordinary and legal employment actions are not a basis for liability under the forced labor statute. The current D.C. Code "coercion" definition includes "serious harm," which is defined as "any harm . . . that is sufficiently serious under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue

[21] D.C. Code § 22-1837.
[22] D.C. Code § 22-1331 (4).
[23] RCC § 22E-701.
[24] D.C. Code § 22-1831 (7).

to perform labor, services, or commercial sex acts to avoid incurring that harm."[25] There is no relevant DCCA case law as to whether legal employment actions could be sufficient to compel a reasonable person to perform labor or services. The revised statute prevents liability for forced labor where the coercion consists only of ordinary and legal employer demands. Such conduct does not warrant criminalization as a serious felony. This change improves the clarity and proportionality of the revised statute.

Third, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[26] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days that exceeds 180. This change clarifies and may improve the proportionality of the revised statute.

Fourth, the revised offense allows for offense-specific penalty enhancements and general penalty enhancements. The current D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[27] However, neither this penalty enhancement nor other general penalty enhancements defined in the D.C. Code applicable to human trafficking specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the penalty enhancements applicable to human trafficking statutes specifically, and the D.C. Code provisions concerning repeat offender enhancements,[28] hate crime enhancements,[29] and pretrial release penalty enhancements.[30] To resolve this ambiguity, the revised statute specifies that the revised statute's penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Charging and Proof of Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Pretrial Release Penalty Enhancement, or § 22E-608 Hate Crime Penalty Enhancement. This change improves the clarity and may improve the proportionality of the revised statute.

One other change to the forced labor statute is clarificatory, and is not intended to change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[31] "Actor" is a defined term[32], which

[25] *Id.*
[26] D.C. Code § 22-1837.
[27] *Id.*
[28] D.C. Code §§ 22-1804; 22-1804a.
[29] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[30] D.C. Code § 23-1328.
[31] D.C. Code § 22-1832.

means "a person accused of any offense." The term "person" is also a defined term[33], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[32] RCC § 22E-701.
[33] RCC § 22E-701.

RCC § 22E-1602. Forced Commercial Sex.

Explanatory Note. *This section establishes the forced commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing a person to engage in a commercial sex act by means of physical force, a coercive threat, debt bondage, or by administering a drug or other intoxicant. There is no analogous offense under the current human trafficking chapter, although conduct constituting forced commercial sex may violate the current forced labor statute. This offense also replaces aspects of several offenses in chapter 27 of the current D.C. Code, including: conduct to "compel" or attempt to compel a person into prostitution under the pandering statute;*[1] *compelling an individual to live life or prostitution against his or her will;*[2] *and causing a spouse or domestic partner "by force, fraud, coercion, or threats…to lead a life of prostitution."*[3] *To the extent that certain statutory provisions authorizing extended periods of supervised release*[4] *apply to the current forced labor statute, these provisions are replaced in relevant part by the revised offensive forced commercial sex offense.*

Paragraph (a)(1) specifies that forced commercial sex requires that an actor knowingly causes the complainant to engage in or submit to a commercial sex act with or for[5] another person.[6] The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would cause

[1] D.C. Code §22-2705. The pandering statute makes it a crime to "cause, compel . . . or attempt to cause or compel . . . any individual . . . to engage in prostitution[.]" The precise effect on D.C. law is unclear, as the D.C. Court of Appeals has not clearly defined what constitutes "compelling" a person to engage in prostitution. It is possible that some coercive means that would constitute "compelling" under the pandering statute do not fall within the revised "coercive threat" definition. In addition, the pandering statute provides for enhanced penalties when the person caused or compelled to engage in prostitution is under the age of 18. D.C. Code §22-2705 (2). The penalty provision under the RCC's forced commercial sex statute replaces this provision in the current pandering statute.

[2] D.C. Code § 22-2706. This statute makes it a crime to "by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact." This conduct may also be criminalized under the RCC's kidnapping statute, RCC § 22E-1401 or criminal restraint statute, RCC § 22E-1402.

[3] D.C. Code § 22-2708. This statute makes it a crime to "by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]" This conduct will be criminalized under the RCC's forced commercial sex statute. However, the RCC's forced commercial sex statute is narrower than § 22-2708. The forced commercial sex statute does not criminalize causing another person to provide commercial sex acts by means of deception or fraud.

[4] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current forced labor or services offense covers sexual acts or contacts without consent, D.C. Code § 22-403.01 may authorize an extended period of supervised release.

[5] The words "or for" clarify that the offense includes a person engaging masturbatory conduct for another person to observe.

[6] An actor who compels a person to engage in a commercial sex act with *the actor* himself or herself may be subject to liability under sex assault offenses defined under Chapter 13.

another person to engage in or submit to a commercial sex act. The term "commercial sex act" is defined under RCC § 22E-701.[7] Paragraph (a)(1) also specifies that the actor must cause the complainant to engage in or submit to commercial sex act with or for another person, which means that the act must be with or for someone other than the actor. This element may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct for a third party.[8]

Paragraph (a)(2) specifies the prohibited means by which the actor must cause a person to engage in or submit to a commercial sex act. Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this paragraph, which requires that the actor is practically certain that the means listed in subparagraphs (a)(2)(A)-(D) *cause* the complainant to engage in or submit to a commercial sex act.

Under subparagraph (a)(2)(A) the actor must use physical force that causes "bodily injury" to, overcomes, or retrains any person. "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition." Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this subparagraph, which here requires that the actor was practically certain that the actor used force that caused bodily injury to overcome or restrain any person.

Under subparagraph (a)(2)(B), the actor must use an explicit or implicit coercive threat to cause a person to engage in or submit to a commercial sex act. "Coercive threat" is defined under RCC § 22E-701 and includes multiple per se types of threats, as well as a flexible standard referring to a threat of any harm sufficiently serious to cause a reasonable person in the complainant's situation to comply.[9] Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this subparagraph, which here requires that the actor was practically certain he was making a coercive threat, explicit or implicit.

Under subparagraph (a)(2)(C), the actor must use debt bondage to cause a person to engage in or submit to a commercial sex act. "Debt bondage" is defined under RCC § 22E-701 and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.[10] Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The actor must be practically certain both that he or she is using coercive threats or debt bondage, and that the coercive threat or debt bondage *causes* the other person to engage in a commercial sex act.

Under subparagraph (a)(2)(D), the actor must administer, or cause to be administered, to the complainant an intoxicant or other substance without the

[7] For further discussion of these terms, see Commentary to RCC § 22E-701.

[8] Masturbation is not explicitly included in the definition of "commercial sex act." However, the term "commercial sex act" is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a "commercial sex act."

[9] For further discussion of this term, see Commentary to RCC § 22E-701.

[10] For further discussion of this term, see Commentary to RCC § 22E-701.

complainant's "effective consent." "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." In addition, the actor must administer the intoxicant or other substance "with intent" to impair the complainant's ability to express unwillingness to engage in the commercial sex act (sub-subparagraph (a)(2)(D)(i)). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that administering the intoxicant or other substance would impair the complainant's unwillingness to engage in the commercial sex act. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the drug or intoxicant impaired the complainant's ability to express unwillingness to engage in the commercial sex act, only that the actor believed to a practical certainty that it would. However, sub-subparagraph (a)(2)(D)(ii) does require that the intoxicant or other substance have a specified effect on the complainant. The intoxicant or other substance must, "in fact," render the complainant asleep, unconscious, substantially paralyzed, or passing in and out of consciousness (sub-subparagraph (a)(2)(D)(ii)(I)), "substantially incapable of appraising the nature of the commercial sex act" (sub-subparagraph (a)(2)(D)(ii)(II)), or "substantially incapable of communicating unwillingness to engage in the commercial sex act" (sub-subparagraph (a)(2)(D)(ii)(III)). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to a given element, here the required effect of the intoxicant or other substance on the complainant.

Subsection (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(2)(A) specifies that if a person commits forced commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[11] here requiring that the actor was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, subparagraph (b)(2)(A) also specifies that if a person commits forced commercial sex, and in fact, the complainant is under the age of 12, an enhancement of one penalty class applies. The term "in fact" specifies that no culpable mental state is required as to the complainant being under the age of 12. Subparagraph (b)(2)(B) specifies that if the actor held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.[12] Subparagraph (b)(2)(B) specifies that a "recklessly" culpable mental state applies to this enhancement. Even if more than one penalty enhancement is proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (b) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

[11] RCC § 22E-206.

[12] This enhancement may apply if the combined time in which a person was held and engaged in commercial sex acts is greater than 180 days, even if the person did not engage in commercial sex acts for the entire time. If a person was held for 100 days, and engaged in commercial sex acts for 81 days, this penalty enhancement would apply.

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

Relation to Current District Law. *The RCC's forced commercial sex offense changes current District law in three main ways.*

First, RCC forced commercial sex act creates a standardized penalty and enhancements for coercing or using debt bondage to cause a person to engage in a commercial sexual act. Although the current human trafficking chapter does not have a separate forced commercial sex offense, conduct constituting forced commercial sex could be charged under several current Chapter 27 offenses, with maximum sentences ranging from five years[13] to twenty years.[14] In contrast, the revised forced commercial sex act provides a single penalty, with applicable enhancements. This change improves the consistency and proportionality of the revised statutes.

Second, by reference to the RCC's "coercive threats" definition, the forced commercial sex statute criminalizes restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any controlled substance or addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the forced commercial sex offense only provides liability for threatening to restrict a person's access to controlled substances that the person owns or prescription medication that the person owns.[15] Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[16] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[17] and precludes arguments that an actor's attempts to limit an another person's access to legal and readily available addictive substances like tobacco or alcohol constitute forced commercial sex.[18] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[19] Eliminating the facilitation of

[13] D.C. Code § 22-2705.
[14] D.C. Code § 22-2706.
[15] A person can satisfy this subsection by providing a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.
[16] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.
[17] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."
[18] For example, an actor who limits a person's access to tobacco or alcohol may be liable for "controlling" the person's access to the substance.
[19] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

access to any addictive substance as a form of coercive threats prevents the possibility of criminalizing relatively less coercive conduct.[20] This change improves the clarity and proportionality of the revised statute.

Third, the revised forced commercial sex offense authorizes enhanced penalties if the actor was reckless as to whether the complainant was under 18 years of age, or if the complainant was, in fact, under 12 years of age. It is unclear if the current forced labor and services statute criminalizes forced commercial sex acts, but even if it does, the current forced labor and services statute offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but forced labor is not currently a "crime of violence."[21] By contrast, the revised trafficking in forced commercial sex offense provides a penalty enhancement based on recklessness as to whether the complainant was under the age of 18, or based on strict liability if the complainant was under the age of 12. This change improves the consistency and proportionality of the revised statutes.

Eight other changes to the forced commercial sex statute may constitute a substantive change to current District law that improve the clarity, consistency, and proportionality of the revised offense, and eliminate overlap with other offenses.

First, by reference to the RCC's definition of "coercive threats," the forced commercial sex statute does not provide liability for causing another to engage in commercial sex by fraud or deception. The current forced labor offense criminalizes using "coercion to cause person to provide labor or services"[22] and "coercion" is defined to include "fraud or deception."[23] If commercial sex acts fall within the definition of "labor or services," then under current law using fraud or deception to cause a person to engage in commercial sex acts constitutes forced labor. However, the current code does not specify whether "labor or services" includes commercial sex acts, and there is no relevant DCCA case law. The RCC's "coercive threats" definition does not include fraud or deception,[24] and such conduct is not a sufficient basis for forced commercial sex liability. A person who uses deception or fraud to cause another person to engage in commercial sex has not committed forced commercial sex unless that person also uses one of the other coercive means listed in the RCC's definition or holds another person in debt bondage.[25] While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt

[20] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.
[21] D.C. Code § 22-1331 (4).
[22] D.C. Code § 22-1832.
[23] D.C. Code § 22-1831.
[24] RCC § 22E-701.
[25] Forced commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, if a person initially lures a sex worker with the false promise of high wages, and then coerces the person to provide labor under threat of bodily injury could be convicted under the RCC's forced commercial sex statute. *E.g., United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

bondage and could provide major felony liability for what amount to disputes over payments for consensual commercial sex.[26] Rather, a person who causes another to engage in commercial sex through fraud or deception may still be liable under the RCC's revised fraud[27] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statutes.

Second, by reference to the RCC's definition of "coercive threats" the forced commercial sex offense includes causing a person to engage in a commercial sex act by threatening that any person will commit an offense against persons, or property offense.[28] The current "coercion" definition does not explicitly include threats to commit any "an offense against persons" but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[29] By contrast, the revised definition of "coercive threats" and the RCC crime of forced commercial sex together specify that a threat to commit any offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the current coercion definition. This change improves the clarity and consistency of the revised statutes.

Third, the RCC forced commercial sex act offense specifies what types of conduct constitute a crime when used to compel a person to engage in prostitution. Various offenses under Chapter 27 of the current D.C. Code make it a crime to "compel" a person to "engage in prostitution"[30]; "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"[31]; to "compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact"[32]; or to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]"[33] The current D.C. Code does not define the terms "threats," "duress," "detain," "force," "fraud," or "intimidation" for the as used in Chapter 27, and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the revised statute refers to the defined terms "coercive threat" and "debt bondage," and specifies that physical force that causes bodily injury, and administering a drug, intoxicant, or other substance are barred means of

[26] For instance, under the current statutory definition of "coercion," a person would coerce another if he or she causes that person to engage in a commercial sex act by a lie about how much would be paid.
[27] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.
[28] RCC § 22E-701.
[29] D.C. Code § 22-1831 (7).
[30] D.C. Code § 22-2705.
[31] D.C. Code § 22-2706.
[32] *Id*.
[33] D.C. Code § 22-2708.

compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of the revised statutes.

Fourth, the RCC forced commercial sex offense requires a person to act with a "knowing" culpable mental state. Statutes under Chapter 27[34] that are replaced in whole or in part by the RCC's forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC forced commercial sex act offense specifies one consistent, defined culpable mental state. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[35] This change improves the clarity, consistency, and proportionality of the revised statutes.

Fifth, the RCC forced commercial sex offense requires only a single commercial sexual act for liability. Offenses under Chapter 27 criminalize detaining a person "for the purpose of prostitution,"[36] or compelling a person to "lead a life or prostitution,"[37] and make no reference to the number of occasions in which a person is compelled to engage in prostitution. There is no relevant DCCA case law on the unit of prosecution for these offenses, and it appears that compelling a person to engage in prostitution numerous times may constitute only a single violation of these statutes. In addition, it is possible that coercing a person to engage in a commercial sex act may constitute forced labor under the current statute.[38] However, the current forced labor statute does not specify whether commercial sex acts constitute labor or services, and if they do, whether multiple commercial sex acts may be prosecuted as more than one instance of forced labor. In contrast, the RCC forced commercial sex act offense provides liability for each separate commercial sexual act. This change improves the clarity and proportionality of the revised statutes.[39]

Sixth, the RCC forced commercial sex statute requires that the actor caused the complainant to engage in a commercial sex act with or for a person other than the actor. It is unclear if the current forced labor statute criminalizes coerced commercial sex, and if it does, whether the actor must have caused the complainant engage in a commercial sex act with someone other than the actor. There is no relevant DCCA case law. To resolve this ambiguity, the revised statute specifies that the offense requires that the actor caused the person to engage in a commercial sex act with another person. This change improves the clarity of the revised statute, and reduces unnecessary overlap.

Seventh, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a

[34] D.C. Code § 22-2705; D.C. Code § 22-2706; D.C. Code 22-2708.
[35] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[36] D.C. Code § 22-2706.
[37] *Id*.
[38] D.C. Code § 22-1832.
[39] Under the revised offense, a person who uses a coercive threat or debt bondage to compel another person to engage in more than one commercial sex act may be convicted for multiple counts of forced commercial sex. However, whether multiple convictions are permitted in a given case is governed by the merger analysis set for under RCC § 22E-214.

total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[40] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

Eighth, the revised offense allows for offense-specific penalty enhancements and general penalty enhancements. The current D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[41] However, neither this penalty enhancement nor other general penalty enhancements defined in the D.C. Code applicable to human trafficking specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the penalty enhancements applicable to human trafficking statutes specifically, and the D.C. Code provisions concerning repeat offender enhancements,[42] hate crime enhancements,[43] and pretrial release penalty enhancements.[44] To resolve this ambiguity, the revised statute specifies that the revised statute's penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Charging and Proof of Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Pretrial Release Penalty Enhancement, or § 22E-608 Hate Crime Penalty Enhancement. This change improves the clarity and may improve the proportionality of the revised statute.

Three changes to the forced commercial sex offense statute are clarificatory in nature and not intended to substantively change current District law.

First, the forced commercial sex offense explicitly criminalizes as a human trafficking offense causing a person to engage in commercial sex acts by means of coercive threat or debt bondage. It is unclear whether the current forced labor statute criminalizes the use of coercion or debt bondage to cause a person to engage in commercial sex acts. The current forced labor offense requires that the actor "use coercion to cause a person to provide labor or services" or to "keep any person in debt bondage."[45] However, the current D.C. Code does not specify whether "labor or "services" include commercial sex acts. "Labor" is currently defined as "work that has economic or financial value," and "services" is currently defined as "legal or illegal duties or work done for another, whether or not compensated." [46] There is no relevant

[40] D.C. Code § 22-1837.
[41] D.C. Code § 22-1837.
[42] D.C. Code §§ 22-1804; 22-1804a.
[43] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[44] D.C. Code § 23-1328.
[45] D.C. Code § 22-1832.
[46] D.C. Code § 22-1831.

D.C. DCCA case law. The current D.C. Code, however, contains several prostitution-related offenses that do appear to criminalize coercing a person to engage in commercial sex acts.[47] The revised statute, however, specifies that the use of coercive threats to cause a person to engage in commercial sex is not only criminal, but a human trafficking offense. There is no clear justification for distinguishing the harm of using coercive threats to cause a person perform commercial sex when the complainant is a person who other times chooses to engage in commercial sex work from someone who has not engaged in such work. This change improves the clarity, organization, and proportionality of the revised statutes.

Second, the RCC defines a "commercial sex act" as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person."[48] Chapter 27 defines "prostitution" as "a sexual act or contact with another person in return for giving or receiving anything of value."[49] The RCC's definition of "commercial sexual act" definition is essentially equivalent to the current Chapter 27 definition of prostitution. The RCC's definition of "commercial sex act" is not intended to differ in any substantive way from the current code's definition of "prostitution."

Third, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[50] "Actor" is a defined term[51], which means "a person accused of any offense." The term "person" is also a defined term[52], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[47] D.C. Code §§ 22-2705; 22-2706; 22-2708.
[48] RCC § 22E-701.
[49] D.C. Code § 22-2701.01(3).
[50] D.C. Code § 22-1832.
[51] RCC § 22E-701.
[52] RCC § 22E-701.

RCC § 22E-1603. Trafficking in Labor.

Explanatory Note. *This section establishes the trafficking in labor offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, anyone will cause that person to provide labor or services by means of coercive threat or debt bondage. Trafficking persons for commercial sex acts is criminalized under the separate trafficking in commercial sex offense. The RCC's trafficking in labor offense, along with the RCC's trafficking in forced commercial sex offense[1], replaces the trafficking in labor or commercial sex acts statute,[2] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[3]*

Paragraph (a)(1) specifies that trafficking in labor requires that an actor knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, a person. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word "houses" is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would entice, house, transport, provide, obtain, and maintain a person.

Paragraph (a)(2) specifies that the person must have acted "with intent that" the trafficked person will be caused, as a result, to provide labor or services by means of an explicit or implicit coercive threat[4] or debt bondage. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the trafficked person will be caused, as a result, to provide labor or services by means of a coercive threat or debt bondage. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually performs labor or services, only that the actor believed to a practical certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the labor or services that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was

[1] RCC § 22E-1604.
[2] D.C. Code § 22-1833.
[3] D.C. Code § 22-1837.
[4] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

practically certain that the person would be caused to provide labor or services by means of coercive threat or debt bondage.[5]

Paragraph (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(1)(A) specifies that if a person commits trafficking in labor and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[6] here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age. Subparagraph (b)(2)(B) specifies that if the complainant was held or provides services for more a total of more than 180 days, the offense classification may be increased in severity by one class.[7] Subparagraph (b)(2)(B) specifies that a "recklessly" culpable mental state applies to this enhancement, which requires that the actor was aware of a substantial risk that the complainant was held or provided services for more than 180 days. Even if both penalty enhancements are proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (b) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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

Relation to Current District Law. *The trafficking in labor offense changes current District law in six main ways.*

First, by reference to the RCC's definitions of "labor" and "services", the revised offense excludes liability for trafficking persons who will engage in commercial sex acts. The current trafficking in labor or commercial sex acts offense criminalizes trafficking persons who will engage in labor, services, *or* commercial sex acts.[8] In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses. This change improves the organization of the revised offense.

Second, by reference to the RCC's "coercive threat" definition, the trafficking in labor statute does not provide liability for trafficking a person who will be caused to provide labor or services by fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[9] and by extension the current trafficking in labor or commercial sex acts statute references using fraud or deception to cause a person to provide labor or service. By contrast, the RCC's "coercive threat" definition does not include fraud or deception,[10] and trafficking a person who will be tricked into performing labor or services is not a sufficient basis for liability under the revised trafficking in labor

[5] For example, if a taxi driver gives a ride to a person running an errand, practically certain that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor.
[6] RCC § 22E-206 (d).
[7] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.
[8] D.C. Code § 22-1833.
[9] D.C. Code § 22-1831 (3)(D).
[10] RCC § 22E-701.

offense. The revised offense only provides liability for trafficking a person who will be caused to provide labor or services under threat of one of the means listed in the RCC's definition of "coercive threats," or by subjecting the person to debt bondage.[11] While using deception to cause another to engage in labor or services is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for common employment disputes and those engaged in such schemes.[12] Rather, a person who encourages or assists a person who causes another to provide labor or services through fraud or deception may still be liable as an accomplice[13] under the RCC's revised fraud[14] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statute.

Third, by reference to the RCC's "coercive threat" definition, the revised trafficking in labor offense criminalizes trafficking when the coercion at issue is restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised trafficking in labor offense only provides liability for trafficking a person who will caused to provide labor or services under threat of restricting access to controlled substances that the person owns or prescription medication that the person owns. Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[15] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[16] and precludes arguments that trafficking an employee knowing that an employer seeks to limit the employee's access to legal and readily available addictive

[11] Trafficking in labor may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a laborer knowing that he or she was initially lured with the false promise of high wages, and will be coerced into providing labor under threat of bodily injury could be convicted under the RCC's trafficking in labor statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

[12] For instance, under the current statutory definition of "coercion," a person may be liable for trafficking in labor or commercial sex acts, subject to a [] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.

[13] RCC § 22E-210.

[14] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

[15] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

[16] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

substances like tobacco or alcohol constitutes trafficking in labor.[17] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[18] Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.[19] This change improves the clarity and proportionality of the revised statute.

Fourth, the revised trafficking in labor offense requires that the actor acted *with intent* that the trafficked person will be caused to provide labor or services by means of coercive threat or debt bondage. The current statute includes acting "with reckless disregard of the fact that" coercion will be used to cause the person to provide labor or services. By contrast, the revised statute requires that the actor was practically certain that the complainant will be caused to perform labor or services by means of a coercive threat or debt bondage.[20] Requiring that the actor was at least practically certain that the person will be caused to provide labor or services by means of coercive threat or debt bondage may avoid disproportionate penalties for persons who were unaware that the person would be coerced into providing labor or services.[21] This change improves the proportionality of the revised statute.

Fifth, the revised trafficking in labor offense requires that an actor's trafficking activity occur with intent that the complainant *as a result will* provide labor or services. The current D.C. Code trafficking in labor or commercial sex acts statute does not specify any relationship between the transporting, housing, etc., and the performance of labor or services. Consequently, it appears that there is criminal liability when a person transports, houses, etc. a person in a manner that is entirely unrelated to the coerced labor or services.[22] The current D.C. Code statute also states that it applies when "coercion

[17] For example, an employer who predicates a person's employment on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance, and a person knowingly recruiting an employee into such circumstances may be liable for trafficking.

[18] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

[19] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

[20] For example, if a taxi driver overhears his passenger make comments which suggest that upon arrival at her destination, she may be coerced into performing labor or services, the driver is not guilty of trafficking in labor if the driver is only aware of a substantial risk, but not practically certain, that the passenger will be coerced into engaging labor or services.

[21] Under the rule of imputation of knowledge for deliberate ignorance set forth in RCC § 22E-208, an actor who traffics a person with recklessness that the person will be caused to provide labor or services by means of coercive threat or debt bondage may be held liable, if the actor avoided confirming or failed to investigate whether the trafficked person will be coerced into providing labor or services, with the purpose of avoiding criminal liability.

[22] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor.

will be used or is being used."[23] By contrast, the revised statute requires a causal relationship between the trafficking activity, and the person performing labor or services. The actor's trafficking conduct need not be the sole or primary cause of the complainant being coerced by a threat or debt bondage, but there must be a causal link to a future result.[24] This revision excludes persons who may provide assistance to a complainant (e.g., housing, meals) that are unrelated to the coerced acts.[25] This change improves the proportionality of the revised criminal code.

Sixth, the revised trafficking in labor offense authorizes enhanced penalties if the actor was reckless as to whether the complainant was under 18 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but trafficking in labor is currently not a "crime of violence."[26] By contrast, the revised trafficking in labor offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

In addition, the revised trafficking in labor offense makes three other changes that may constitute a substantive change to current District law.

First, by reference to the RCC's definition of "coercive threat," trafficking in labor includes causing a person to engage in labor or services by threatening that any person will "commit any criminal offense against persons" or any "property offense."[27] The current "coercion" definition does not explicitly include threats to "commit any criminal offense against persons" but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[28] The revised definition of "coercive threat" and the RCC crime of trafficking in labor together specify that trafficking a person with intent that any person will use threats to commit any criminal offense against persons or property offense to compel labor or services is categorically a basis for liability, even if it

[23] D.C. Code § 22-1833.
[24] The result may be imminent or in the distant future, so long as the actor's conduct is causally linked and other elements of the offense are met. For example, an actor who drives people in a van to a District work site and believes to a practical certainty that as a result they will perform commercial labor or services by coercive threats, either immediately or weeks later, may be guilty of trafficking in labor.
[25] For example, there is not the required causal link where a waiter in a public restaurant serves a meal to a person, believing (due to an overheard conversation) to a practical certainty that the person will perform labor or services under coercive threat later that week. Also, there would not be a causal link to a future act of labor or services, or liability for trafficking in labor for a shelter driver who transports persons known to have performed labor or services by coercive threats to a shelter.
[26] D.C. Code § 22-1331 (4).
[27] RCC § 22E-701.
[28] D.C. Code § 22-1831 (7).

would otherwise be unclear whether the threat would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised trafficking in labor statute replaces the word "harbor" with "houses." The current D.C. Code trafficking statute refers to "harboring" as one of many types of predicate conduct, including "recruit, entice, harbor, transport, provide, obtain, or maintain." "Harboring" is not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, in the revised statute the word "houses" replaces the word "harbor." The RCC reference to "houses" may be narrower than "harbor,"[29] although the term "houses" is intended to broadly refer to the provision of physical shelter, including temporary shelter. This change clarifies and may improve the proportionality of the revised statute.

Third, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code trafficking in labor or services statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[30] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

One other change to the trafficking in labor statute is clarificatory, and is not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[31] "Actor" is a defined term[32], which means "a person accused of any offense." The term "person" is also a defined term[33], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[29] The verb form of the word "harbor" is defined by Meriam-Webster's Dictionary as, "to give shelter or refuge to[.]" https://www.merriam-webster.com/dictionary/harbor
[30] D.C. Code §22-1837 (a)(2).
[31] D.C. Code § 22-1832.
[32] RCC § 22E-701.
[33] RCC § 22E-701.

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

Explanatory Note. *This section establishes the trafficking in forced commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, the person will be caused to engage in a commercial sex act by means of physical force that causes bodily injury, a coercive threat, debt bondage, or a drug, intoxicant, or other substance. The RCC's trafficking in forced commercial sex offense, along with the RCC's trafficking in labor offense[1], replaces the trafficking in labor or commercial sex acts statute[2] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[3] The revised offense also replaces portions of the pandering statute[4] the compelling an individual to live life or prostitution against his or her will statute,[5] the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute[6] in Chapter 27 of the current D.C. Code.. To the extent that certain statutory provisions authorizing extended periods of supervised release[7] apply to the current trafficking in labor or commercial sex acts statute, these provisions are replaced in relevant part by the revised trafficking in forced commercial sex acts statute.*

Paragraph (a)(1) specifies that trafficking in forced commercial sex requires that an actor knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, the complainant. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word "houses" is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would entice, house, transport, provide, obtain, or maintain the complainant.

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[1] RCC § 22E-1603.

[2] D.C. Code § 22-1833.

[3] D.C. Code § 22-1837.

[4] D.C. Code § 22-2705. The pandering statute makes it a crime for "any parent, guardian, or other person having legal custody of the person of an individual, to consent to the individual's being taken, detained, or used by any person, for the purpose of prostitution or a sexual act or sexual contact." This conduct will be criminalized under the RCC's trafficking in commercial sex statute.

[5] D.C. Code § 22-2706. This statute makes it a crime to "by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact." This conduct may also be criminalized under the RCC's kidnapping statute, RCC § 22E-1401 or criminal restraint statute, RCC § 22E-1402.

[6] D.C. Code § 22-2704.

[7] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current trafficking in labor or commercial sex acts offense involves sexual acts or contacts without consent, D.C. Code § 22-403.01 may authorize an extended period of supervised release.

Paragraph (a)(2) specifies that the actor must have acted with intent that the complainant will be caused, as a result, to engage in or submit to a "commercial sex act" by one of the means listed in subparagraphs (a)(2)(A)-(D). The term "commercial sex act" is a defined term.[8] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant will be caused to engage in or submit to a commercial sex act by means specified in subparagraphs (a)(2)(A)-(D). Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually engages in or submits to a commercial sex act, only that the actor believed to a practical certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the commercial sex act that the trafficked person will engage in or submit to. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to engage in or submit to a commercial sex act by one of the means listed in subparagraphs (a)(2)(A)-(D).[9]

Paragraph (a)(2) also specifies that the actor must cause the complainant to engage in or submit to a commercial sex act with or for another person, which means that the act must be with or for someone other than the actor.[10] This element may be satisfied if the actor intends that the complainant will engage in or submit to a commercial sex act with a third party, or that the complainant will engage in masturbatory conduct for a third party.[11]

Under subparagraph (a)(2)(A) the actor must intend that the trafficked person will be caused to engage in or submit to a commercial sex act by means of physical force that causes "bodily injury" to, overcomes, or retrains any person. "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition."

Under subparagraph (a)(2)(B), the actor must intend that a coercive threat, explicit or implicit, will be used to cause the complainant to engage in or submit to a commercial sex act. "Coercive threat" is defined under RCC § 22E-701 and includes multiple per se types of threats, as well as a flexible standard referring to a threat of any harm sufficiently serious to cause a reasonable person in the complainant's situation to comply.[12]

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[8] RCC § 22E-701.

[9] For example, if a taxi driver gives a ride to a person running an errand, practically certain that the next day that person will be coerced into performing a commercial sex act, if there is no relationship between that errand and the commercial sex act the person will perform, the taxi driver cannot be held liable for trafficking in forced commercial sex.

[10] An actor who traffics a person with intent that the person engage in a commercial sex act *with the actor* by means of a coercive threat or debt bondage may be subject to liability under sex assault offenses defined under Chapter 13.

[11] Masturbation is not explicitly included in the definition of "commercial sex act." However, the term "commercial sex act" is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a "commercial sex act."

[12] For further discussion of this term, see Commentary to RCC § 22E-701.

Under subparagraph (a)(2)(C), the actor must intend that debt bondage will be used to cause a person to engage in or submit to a commercial sex act. "Debt bondage" is defined under RCC § 22E-701 and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.[13]

Under subparagraph (a)(2)(D), the actor must intend that the administration of an intoxicant or other substance without the complainant's "effective consent" will be used to cause the complainant to engage in or submit to a commercial sex act. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant would be caused to engage in or submit to a commercial sex act by administration of a drug, intoxicant or other substance. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that anyone administered a drug, intoxicant, or other substance.

Subsection (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(2)(A) specifies that if a person commits trafficking in forced commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[14] here requiring that the actor was aware of a substantial risk that the complainant was under 18 years of age and such conduct was clearly blameworthy. Alternatively, subparagraph (b)(2)(A) also specifies that if a person commits trafficking in forced commercial sex, the complainant was, in fact, under the age of 12, an enhancement of one penalty class applies. The term "in fact" specifies that no culpable mental state is required if the complainant was under the age of 12. Paragraph (b)(2)(B) specifies that if the actor held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.[15] Subparagraph (b)(2)(B) specifies that a "recklessly" culpable mental state applies to this enhancement. Even if more than one penalty enhancement is proven, the most the penalty can be increased is one class. The penalty enhancement under paragraph (b)(2) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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

Relation to Current District Law. *The trafficking in forced commercial sex statute changes current District law in nine main ways.*

[13] For further discussion of this term, see Commentary to RCC § 22E-701.
[14] RCC § 22E-206.
[15] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.

First, the RCC trafficking in forced commercial sex offense is codified in a separate and distinct manner from the offense of trafficking in labor. The D.C. Code currently criminalizes in one statute trafficking persons who will engage in labor, services, *or* commercial sex acts.[16] In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses and clarifies that commercial sex acts are not part of the revised definitions of "labor" and "services." This change improves the organization of the revised offenses.

Second, by reference to the RCC's "coercive threats" definition, the trafficking in forced commercial sex statute does not provide liability for trafficking a person who will be caused to engage in or submit to a commercial sex act by means of fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[17] and by extension the current trafficking in in labor or commercial sex acts statute references using fraud or deception to cause a person to engage in a commercial sex act. By contrast, the RCC's "coercive threat" definition does not include fraud or deception,[18] and trafficking a person will be tricked into performing commercial sex is not a sufficient basis for liability under the revised trafficking in forced commercial sex offense. The revised offense only provides liability for trafficking a person who will be caused to engage in a commercial sex act under threat of one of the means listed in the RCC's definition of "coercive threat," or by subjecting the person to debt bondage.[19] While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage.[20] Rather, a person who encourages or assists a person who causes another to provide commercial sex through fraud or deception may still be liable as an accessory[21] under the RCC's revised fraud[22] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statute.

Third, by reference to the RCC's "coercive threat" definition, the revised trafficking in forced commercial sex offense criminalizes trafficking when the coercion at issue is restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any addictive substance, and by extension the current trafficking in labor or commercial sex acts statute references

[16] D.C. Code § 22-1833.
[17] D.C. Code § 22-1831 (3)(D).
[18] RCC § 22E-701.
[19] Trafficking in forced commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a worker knowing that he or she was initially lured with the false promise of high wages, and will also be coerced into engaging in commercial sex acts under threat of bodily injury may be convicted under the RCC's trafficking in forced commercial sex statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).
[20] For instance, under the current statutory definition of "coercion," a person may be liable for trafficking in labor or commercial sex acts, subject to a [] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.
[21] RCC § 22E-210.
[22] RCC § 22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

facilitating or controlling access to addictive substances to cause a person to engage in a commercial sex act. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised trafficking in forced commercial sex offense only provides liability for trafficking a person who will caused to provide a commercial sex act under threat of restricting access to controlled substances that the person owns or prescription medication that the person owns. Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of coercive threat.[23] Restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of coercive threat. This change eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[24] and precludes arguments that trafficking a person knowing that someone will seek to limit that person's access to legal and readily available addictive substances like tobacco or alcohol constitutes trafficking in forced commercial sex acts.[25] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[26] Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.[27] These changes improve the clarity and proportionality of the revised statute.

Fourth, the revised trafficking in forced commercial sex offense requires that the actor acted *with intent* that the complainant will be caused to engage a commercial sex act by means of coercive threat or debt bondage. The current statute includes acting "with reckless disregard of the fact that" coercion or debt bondage will be used to cause the person to engage in a commercial sex act. By contrast, the revised statute requires that the actor was practically certain that the complainant will be caused to engage in a commercial sex act by means of a coercive threat or debt bondage.[28] Requiring that the actor was at least practically certain that the person will be caused to engage in a

[23] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

[24] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

[25] For example, a person who recruits someone to perform commercial sex acts, knowing that another will predicate performance of the commercial sex work on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance, and may be liable for trafficking.

[26] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

[27] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to [] years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

[28] For example, if a taxi driver overhears his passenger make comments which suggest that upon arrival at her destination, she may be coerced into performing a commercial sex act, the driver is not guilty of trafficking in forced commercial sex if the driver is only aware of a substantial risk, but not practically certain, that the passenger will be coerced into engaging in a commercial sex act.

commercial sex act by means of coercive threat or debt bondage avoids disproportionate penalties for persons who were unaware that the person would be coerced into providing labor or services.[29] This change improves the proportionality of the revised statute.

Fifth, the revised trafficking in forced commercial sex offense requires that an actor's trafficking activity occur with intent that the complainant *as a result will* provide a commercial sex act. The current D.C. Code trafficking in labor or commercial sex acts statute does not specify any relationship between the transporting, housing, etc., and the performance of labor or services. Consequently, it appears that there is criminal liability when a person transports, houses, etc. a person in a manner that is entirely unrelated to the coerced labor or services.[30] The current D.C. Code statute also states that it applies when "coercion will be used or is being used."[31] By contrast, the revised statute requires a causal relationship between the trafficking activity, and the person performing a commercial sex act. The actor's trafficking conduct need not be the sole or primary cause of the complainant being coerced by a threat or debt bondage, but there must be a causal link to such a future result.[32] This revision excludes persons who may provide assistance to a complainant (e.g., housing, meals) that are unrelated to the coerced acts.[33] This change improves the proportionality of the revised criminal code.

Sixth, the revised trafficking in forced commercial sex offense authorizes enhanced penalties if the actor was reckless as to whether the complainant was under 18 years of age, or if the complainant was, in fact, under 12 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but trafficking in labor or commercial sex acts is not currently a "crime of violence."[34] By contrast, the revised trafficking in forced commercial sex offense provides a penalty enhancement based on recklessness as to whether the complainant was under the age of 18, or based on strict liability if the complainant was under the age of 12. This change improves the consistency and proportionality of the revised statutes.

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[29] Under the rule of imputation of knowledge for deliberate ignorance set forth in RCC § 22E-208, an actor who traffics a person with recklessness that the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage may be held liable, if the actor avoided confirming or failed to investigate whether the trafficked person will be coerced into engaging a commercial sex act, with the purpose of avoiding criminal liability.

[30] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into performing a commercial sex act, if there is no relationship between that errand and the commercial sex act that the person will perform, the taxi driver cannot be held liable for trafficking in forced commercial sex.

[31] D.C. Code § 22-1833.

[32] The result may be imminent or in the distant future, so long as the actor's conduct is causally linked and other elements of the offense are met. For example, an actor who drives people in a van to a District house and believes to a practical certainty that as a result they will perform commercial sex acts by coercive threats, either immediately or weeks later, may be guilty of trafficking in forced commercial sex.

[33] For example, there is not the required causal link where a waiter in a public restaurant serves a meal to a person, believing (due to an overheard conversation) to a practical certainty that the person will perform a commercial sex act under coercive threat later that week. Also, there would not be a causal link to a future commercial sex act, or liability for trafficking in forced commercial sex for a shelter driver who transports persons known to have performed commercial sex acts by coercive threats to a shelter.

[34] D.C. Code § 22-1331 (4).

Seventh, the revised RCC trafficking in forced commercial sex offense specifies what types of conduct are sufficient to "compel" a person to engage in prostitution.[35] Under Chapter 27, the current code makes it a crime "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"[36] or to "compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact,"[37] or to "forcibly abduct a child under 18 from his or her home or usual abode, or from the custody and control of the child's parents or guardian."[38] The current code also makes it a crime to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]"[39] The current code does not define the terms "threats," "duress," "detain," "force," "forcibly," "fraud," or "intimidation," and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the revised statute refers to the defined terms "coercive threat" and "debt bondage," and specifies that physical force that causes bodily injury, and administering a drug, intoxicant, or other substance are barred means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of revised statutes.

Eighth, the RCC trafficking in forced commercial sex offense requires a person to act with a "knowing" culpable mental state. Statutes under Chapter 27[40] that are replaced in whole or in part by the RCC's trafficking in forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC trafficking in forced commercial sex act offense specifies one consistent, defined culpable mental state of knowing. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[41] This change improves the clarity and consistency of the criminal code, and improves the proportionality of penalties.

Ninth, the RCC trafficking in forced commercial sex offense creates a standardized penalty and enhancements. The offenses under Chapter 27 that are replaced by the RCC's trafficking in forced commercial sex offense allow for a variety of penalties. Depending on which Chapter 27 offense an actor was prosecuted under, conduct that would constitute trafficking in forced commercial sex could be subject to maximum penalties ranging from 5 years[42] to 20 years.[43] In contrast, the RCC forced commercial sex offense applies a consistent penalty and enhancements. This change improves the consistency of the criminal code, and proportionality of the revised statutes.

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[35] D.C. Code § 22-2706.
[36] *Id.*
[37] *Id.*
[38] D.C. Code §22-2704.
[39] D.C. Code § 22-2708.
[40] D.C. Code § 22-2704; D.C. Code § 22-2705; D.C. Code 22-2706.
[41] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[42] D.C. Code § 22-2705.
[43] D.C. Code § 22-2704.

Beyond these nine changes to current District law, five other aspects of the revised trafficking in forced commercial sex acts may constitute a substantive change to current District law.

First, by reference to the RCC's definition of "coercive threat," trafficking in forced commercial sex includes trafficking a person, with intent that, as a result, the person will be compelled to engage in a commercial sex act under threat that any person will commit an offense against persons or a property offense."[44] The current "coercion" definition does not explicitly include threats to commit any offenses against persons or property offenses but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[45] The revised definition of "coercive threats" and the RCC crime of forced commercial sex together specify that a threat to commit any criminal offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised trafficking in forced commercial sex offense includes acting with intent that a person will administer a drug, intoxicant, or other substance to the complainant without the complainant's effective consent. The current trafficking statute does not explicitly include trafficking a person who will be administered a drug, intoxicant, or other substance without that person's effective consent. However, the statute includes the use of "coercion," which is defined to include force, and "facilitating or controlling a person's access to an addictive or controlled substance or restricting a person's access to prescription medication[.]"[46] Administering a drug, intoxicant, or other substance without effective consent may constitute force, or facilitation of a person's access to an addictive or controlled substance. There is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, the revised statute clarifies that trafficking a person with intent that the person will engage in or submit to a commercial sex act by means of administration of a drug, intoxicant, or other substance without effective consent constitutes trafficking in forced commercial sex. This change clarifies and may improve the proportionality of the revised statute.

Third, the revised trafficking in forced commercial sex statute replaces the word "harbor" with "houses." The current D.C. Code trafficking statute refers to "harboring" as one of many types of predicate conduct, including "recruit, entice, harbor, transport, provide, obtain, or maintain." "Harboring" is not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, in the revised statute the word "houses" replaces the word "harbor." The RCC reference to

[44] RCC § 22E-701.
[45] D.C. Code § 22-1831 (7).
[46] D.C. Code § 22-1831 (3)(F).

"houses" may be narrower than "harbor,"[47] although the term "houses" is intended to broadly refer to the provision of physical shelter, including temporary shelter. This change clarifies and may improve the proportionality of the revised statute.

Fourth, the revised trafficking in forced commercial sex statute requires that the actor had intent that the complainant would be caused to engage in or submit to a commercial sex act with a person other than the actor. The current statute does not specify whether the actor must have intent that the complainant engage in a commercial sex act with someone other than the actor, and there is no relevant DCCA case law. In contrast, the revised statute specifies that the actor must have had intent that the complainant would engage in a commercial sex act with someone other than the actor. This change improves the clarity of the revised criminal code, and reduces unnecessary overlap.

Fifth, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code trafficking in labor or commercial sex statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[48] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in commercial sex acts in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

In addition, one change to the trafficking in forced commercial sex statute is clarificatory, and not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[49] "Actor" is a defined term[50], which means "a person accused of any offense." The term "person" is also a defined term[51], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[47] The verb form of the word "harbor" is defined by Meriam-Webster's Dictionary as, "to give shelter or refuge to[.]" https://www.merriam-webster.com/dictionary/harbor
[48] D.C. Code §22-1837 (a)(2).
[49] D.C. Code § 22-1832.
[50] RCC § 22E-701.
[51] RCC § 22E-701.

RCC § 22E-1605. Sex Trafficking of a Minor or Adult Incapable of Consenting.

Explanatory Note. *This section establishes the sex trafficking of a minor or adult incapable of consenting offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, the person will be caused to engage in a commercial sex act, and with recklessness as to that person being under the age of 18, or incapable of appraising the nature of the commercial sex act or communicating unwillingness to engage in the commercial sex act. The revised sex trafficking of a minor or adult incapable of consenting offense replaces the current sex trafficking of children statute,[1] attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code,[2] and part of the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute.[3] To the extent that certain statutory provisions authorizing extended periods of supervised release[4] apply to the current sex trafficking of children statute, these provisions are replaced in relevant part by the revised sex trafficking of a minor or adult incapable of consenting statute.*

Paragraph (a)(1) specifies that sex trafficking of a minor or adult incapable of consenting requires that a person knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, another person. The words "entice, transport, provide, obtain, and maintain by any means" are intended to have the same meaning as under current law. The word "houses" is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would entice, house, transport, provide, obtain, or maintain another person.

Paragraph (a)(2) specifies that sex trafficking of a minor or adult incapable of consenting requires that the actor acted "with intent that" the trafficked person, as a result, would be caused to engage in or submit to a commercial sex act with or for another person. The term "commercial sex act" is a defined term.[5] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant would be caused to engage in a commercial sex act with another person. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually performs a commercial sex act, only that the actor believed to a practical

[1] D.C. Code § 22-1834.
[2] D.C. Code § 22-1837.
[3] D.C. Code § 22-2704.
[4] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current sex trafficking of children offense covers sexual acts or contacts with a minor, D.C. Code § 22-403.01 may authorize an extended period of supervised release.
[5] RCC § 22E-701.

certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the commercial sex act that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to engage in a commercial sex act.[6]

This paragraph also specifies that the actor must cause the complainant to engage in a commercial sex act with or for another person.[7] This element may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct for a third party.[8]

Paragraph (a)(3) specifies that the actor was reckless as to the trafficked person satisfying one of the elements listed in subparagraphs (a)(3)(A)-(C). Subparagraph (a)(3)(A) requires that the complainant is under the age of 18. Subparagraph (a)(3)(B) requires that the complainant is incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. Subparagraph (a)(3)(C) requires that the complainant is incapable of communicating unwillingness to engage in the commercial sex act, regardless of the complainant's state of mind. The "reckless" mental state in paragraph (a)(3) applies to subparagraphs (a)(3)(A)-(C), which requires that the actor consciously disregarded a substantial risk that the trafficked person is under the age of 18, incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent, or incapable of communicating unwillingness to engage in the commercial sex act.

Subsection (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides a penalty enhancement applicable to this offense. If the actor recklessly held the complainant, or caused the complainant to provide commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.[9] The penalty enhancement under paragraph (b)(2) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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

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[6] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into engaging in a commercial sex act, if there is no relationship between that errand and the commercial sex act, the taxi driver cannot be held liable for trafficking in forced commercial sex.

[7] An actor who traffics a person with intent that the person engage in a commercial sex act *with the actor* may be subject to liability under sex assault offenses defined under Chapter 13.

[8] Masturbation is not explicitly included in the definition of "commercial sex act." However, the term "commercial sex act" is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a "commercial sex act."

[9] This enhancement may apply if the combined time in which a person was held and engaged in commercial sex acts is greater than 180 days, even if the person did not engage in commercial sex acts for the entire time. If a person was held for 100 days, and engaged in commercial sex acts for 81 days, this penalty enhancement would apply.

Relation to Current District Law. *The RCC's sex trafficking of a minor or adult incapable of consenting offense clearly changes current District law in one main way with respect to the current sex trafficking of children offense. To the extent it replaces current D.C. Code § 22-2704, the revised sex trafficking of a minor or adult incapable of consenting offense clearly changes current District law in five main ways. The revised statute also clearly changes current District law by explicitly criminalizing trafficking adults who are unable to consent to commercial sex acts.*

First, the revised sex trafficking of a minor or adult incapable of consenting statute requires proof that a person was reckless as to the person trafficked being under 18. Subsection (a) of the current sex trafficking of children offense requires the actor to be "knowing or in reckless disregard of the fact that the person has not attained the age of 18 years," but does not define the culpable mental state terms.[10] However, subsection (b) of the current statute further states that "In a prosecution… in which the defendant had a reasonable opportunity to observe the person recruited, enticed… or maintained, the government need not prove that the defendant knew that the person had not attained the age of 18 years."[11] Consequently, the current statute's drafting is ambiguous as to whether "recklessness" always suffices to prove liability (as appears to be stated in subsection (a)) or whether a knowing culpable mental state always is required for liability except where there is a reasonable opportunity to view the complainant (as appears to be stated in subsection (b)). There is no case law on point, however legislative history indicates that the latter interpretation of the statute is correct,[12] and recklessness as to the complainant's age is insufficient for liability except when the actor has a reasonable opportunity to observe the complainant. Notably, D.C. Code § 22-2704 requires that the trafficked person is under the age of 18, but does not specify a culpable mental state for this element, and there is no relevant DCCA case law. In contrast, the RCC sex trafficking of a minor or adult incapable of consenting statute requires a culpable mental state of recklessness, a defined term, and omits the limitation about a reasonable opportunity to observe the child. It is not clear why reasonable observation, uniquely, is treated as being such strong evidence of age that a lower culpable mental state is required where there is such an opportunity.[13] Requiring recklessness as to a complainant being under 18 years of age is consistent with similar age-based circumstances required in other offenses in the RCC and current D.C. Code. This change improves the clarity and consistency of the revised statute.

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[10] D.C. Code § 22-1834.

[11] D.C. Code § 22-1834 (b).

[12] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 "Prohibition Against Human Trafficking Amendment Act of 2010" at 8. March 9, 2010. ("Section 104 Creates the crime of sex trafficking of children. A child is defined as under the age of 18 for commercial sex. The prosecution does not have to prove that coercion was used or that the defendant had actual knowledge of the minor's age. However, if the defendant did not have an opportunity to observe the victim, the government needs to prove the defendant had actual knowledge of the victim's age.").

[13] On the one hand, a reasonable opportunity to observe the complainant does not mean that an actor still could not reasonably mistake the complainant's age as being significantly older than 17 years old. On the other hand, other circumstances may provide an actor equally strong evidence of the complainant's age, even though he or she is never seen—e.g., a report from a trusted source as to the complainant apparently being a minor.

Second, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that a "knowingly" mental state applies to result elements of the offense. A knowing culpable mental state already is required for the similar sex trafficking of children offense.[14] However, D.C. Code § 22-2704 also makes it a crime to "secrete" or "harbor" a child under the age of 18 "for the purposes of prostitution."[15] The current code does not specify any culpable mental state for these elements of D.C. Code § 22-2704, and there is no relevant D.C. Court of Appeals (DCCA) case law. In contrast, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that the actor must knowingly recruit, entice, harbor, transport, provide, obtain, or maintain by any means, another person. This change improves the clarity and consistency of the revised statutes.

Third, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that the actor act "with intent" that the trafficked person will be caused to engage in a commercial sex act. A knowing culpable mental state is required for the current sex trafficking of children offense.[16] However, D.C. Code § 22-2704 requires that the actor secrete or harbor another person "for the purposes of prostitution." D.C. Code § 22-2704 does not further specify the meaning of "for the purposes" or specify (other) culpable mental states, and there is no relevant DCCA case law. In contrast, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that the actor must act "with intent" that the person will be caused to engage in a commercial sex act. This change improves the clarity and consistency of the revised statutes.

Fourth, the revised sex trafficking of a minor or adult incapable of consenting statute includes a penalty enhancement if the trafficked person was held or provides commercial sex acts for more a total of more than 180 days. The current sex trafficking of children offense contains this penalty enhancement.[17] However, D.C. Code § 22-2704 does not provide for heightened penalties. In contrast, the revised sex trafficking of a minor or adult incapable of consenting statute allows that the offense classification may be increased by one class if the trafficked person is held or caused to engage in commercial sex act for more than 180 days. This change improves the proportionality and consistency of the revised statutes.

Fifth, the revised statute criminalizes trafficking of an adult incapable of consenting to commercial sex acts. The current sex trafficking of a minor offense only applies to complainants under the age of 18.[18] Trafficking of an adult is criminalized under the trafficking in labor or commercial sex acts statute.[19] However, that statute requires intent that the complainant will be caused to engage in a commercial sex act by means of "coercion" or debt bondage. The statute does not explicitly cover trafficking of adults who are unable to appraise the nature of the commercial sex act, or who are unable

[14] D.C. Code § 22-1834. ("It is unlawful for an individual or a business knowingly to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person who will be caused as a result to engage in a commercial sex act knowing or in reckless disregard of the fact that the person has not attained the age of 18 years.").
[15] D.C. Code § 22-2704 (a)(2).
[16] D.C. Code § 22-1834.
[17] D.C. Code § 22-1834.
[18] D.C. Code § 22-1834.
[19] D.C. Code § 22-1833.

to communicate their consent to engage in or submit to a commercial sex act. By contrast, the revised statute clarifies that trafficking adults who are incapable of appraising the nature of the commercial sex act or of communicating unwillingness to engage in a commercial sex act is criminalized. This change closes a gap in current law, and improves the proportionality of the revise statute.

Beyond these five changes to current District law, two other aspects of the revised sex trafficking of a minor or adult incapable of consenting statute may constitute substantive changes to current District law.

First, the revised sex trafficking of a minor or adult incapable of consenting statute requires that the actor had intent that the complainant would be caused to engage in a commercial sex act *with or for another person.* The current statute does not specify whether the actor must have intent that the complainant engage in a commercial sex act with someone other than the actor, and there is no relevant DCCA case law. To resolve this ambiguity, the revised statute specifies that the actor must have had intent that the complainant will engage in a commercial sex act with someone other than the actor. This change improves the clarity of the revised statute, and reduces unnecessary overlap.

Second, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code sex trafficking of children statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[20] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in commercial sex acts in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

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

[20] D.C. Code §22-1837 (a)(2).

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

Explanatory Note. *This section establishes the benefitting from human trafficking offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly obtaining any benefit or property by participating in an association of two or more persons, with recklessness that the group is engaged in forced commercial sex, trafficking in forced commercial sex, sex trafficking of a minor or adult incapable of consenting, forced labor, or trafficking labor or services. The offense is divided into two penalty grades, depending on whether the benefit arose from a group's commission of forced commercial sex, sex trafficking, or sex trafficking of a minor or adult incapable of consenting; or forced labor or trafficking in labor. The benefitting from human trafficking offense replaces the benefitting financially from human trafficking statute[1] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[2]*

Paragraph (a)(1) specifies that first degree benefitting from human trafficking requires that the actor knowingly obtains any financial benefit or property. The term financial benefit includes services or intangible financial benefits. The term "property" is a defined term,[3] which includes anything of value. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would obtain a financial benefit or property.

Paragraph (a)(2) specifies that the actor must have obtained the property or financial benefit through participation in a group of two or more persons. The group may be comprised, at a minimum, of the actor and one other person.[4] The group need not have a united purpose and the members need not reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The actor must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Paragraph (a)(3) specifies that for first degree benefitting from human trafficking, the actor must have been reckless as to the group engaging in conduct that, in fact, constitutes either forced commercial sex under RCC § 22E-1602, trafficking in forced commercial sex under RCC 22E-1604, or sex trafficking of a minor or adult incapable of consenting under RCC § 22E-1605. The "reckless" culpable mental state requirement here means that the actor consciously disregarded a substantial risk that the group was engaged in the conduct that, in fact, constituting forced commercial sex, trafficking in forced commercial sex, or sex trafficking of a minor or adult incapable of consenting. The use of "in fact" indicates that the actor need not have any culpable mental state as to what the specific elements of the predicate crimes are or that they have been satisfied. It

[1] D.C. Code §22-1836.
[2] D.C. Code § 22-1837.
[3] RCC § 22E-701.
[4] This element may be satisfied in a case involving a single business comprised of two people who are engaged in human trafficking.

is not required that all members of the group, including the actor, actually engaged in conduct constituting either of these offenses.[5]

Paragraph (a)(4) specifies that the actor's participation in the group furthers, in any manner, the conduct constituting the human trafficking offense. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this element. Although it is not required that all members of the group actually engaged in conduct constituting a human trafficking offense, the actor's participation in the group must further, in any manner, the conduct that constitutes forced commercial sex, trafficking in forced commercial sex, or sex trafficking of a minor or adult incapable of consenting.[6]

Paragraph (b)(1) specifies that second degree benefitting from human trafficking requires that the actor knowingly obtains any financial benefit or property. The term financial benefit includes services or intangible financial benefits. The term "property" is a defined term,[7] which includes anything of value. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would obtain a financial benefit or property.

Paragraph (b)(2) specifies that the actor must have obtained the property or financial benefit through participation in a group of two or more persons. The group may be comprised, at a minimum, of the actor and one other person. The group need not have a united purpose and the members need not reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The actor must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Paragraph (b)(3) specifies that for second degree benefitting from human trafficking, the actor must have been reckless as to the group engaging in conduct that, in fact, constitutes either forced labor under RCC 22E-1601 or trafficking in labor under RCC 22E-1603. The "reckless" culpable mental state requirement here means that the actor consciously disregarded a substantial risk that the group was engaged in the conduct that, in fact, constituting either forced labor or trafficking in labor. The use of "in fact" indicates that the actor need not have any culpable mental state as to what the specific elements of the predicate crimes are or that they have been satisfied. It is not required

[5] For example, if a motel owner receives payment from a customer, with recklessness that the other person is using the hotel room to coerce people into engaging in commercial sex acts, the motel owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause any one to engage in commercial sex acts by means of coercive threats or debt bondage. *See, Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (motel owner was "associated" and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally*, John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

[6] For example, if A is on a sports team with B, who engages in sex trafficking, and B uses proceeds of the sex trafficking to pay for uniforms for the team, A is not guilty of benefitting from human trafficking even if he is aware that the uniforms were paid for by human trafficking. *See, United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016) (unpublished opinion) (holding that the *group* of which the accused is a part must engage in human trafficking).

[7] RCC § 22E-701.

that all members of the group, including the actor, actually engaged in conduct constituting either of these offenses.[8]

Paragraph (b)(4) specifies that the actor's participation in the group furthers, in any manner, the conduct constituting the human trafficking offense. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this element. Although it is not required that all members of the group actually engaged in conduct constituting a human trafficking offense, the actor's participation in the group must further, in any manner, the conduct that constitutes forced labor or trafficking in labor.[9]

Subsection (c) specifies the penalties applicable to this offense.

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

Relation to Current District Law. *The revised benefitting from human trafficking offense changes current District law in one main way.*

The revised benefitting from human trafficking offense is divided into two penalty grades depending on whether the group engaged in conduct constituting forced commercial sex, sex trafficking, or sex trafficking of a minor or adult incapable of consenting; or forced labor or trafficking in labor. The current benefitting financially from human trafficking offense only has one penalty grade, regardless of the predicate conduct. By contrast, the revised offense distinguishes benefits obtained from forms of human trafficking that involve commercial sex, and those that involve labor or services. Dividing the offense into two penalty grades improves the proportionality of the revised offense. This change improves the proportionality of the revised offense.

Two changes to the benefitting from human trafficking offense statute are clarificatory in nature and is not intended to substantively change current District law.

First, the revised statute no longer refers to participation in a "venture," and instead requires that the actor participated in a group of two or more persons. Omission of the word "venture" is clarificatory in nature and is not intended to change current District law.

Second, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[10] "Actor" is a defined term[11],

[8] For example, if a building owner receives rent payment from a customer, with recklessness that the other person is using the building to run a sweatshop in which people are coerced into providing labor, the building owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause anyone to provide labor by means of coercive threats or debt bondage. *See, Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (motel owner was "associated" and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally*, John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

[9] For example, if A is on a sports team with B, who engages in forced labor, and B uses proceeds of the forced labor to pay for uniforms for the team, A is not guilty of benefitting from human trafficking even if he is aware that the uniforms were paid for by human trafficking. *See, United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016) (unpublished opinion) (holding that the *group* of which the accused is a part must engage in human trafficking).

[10] D.C. Code § 22-1832.

[11] RCC § 22E-701.

which means "a person accused of any offense." The term "person" is also a defined term[12], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[12] RCC § 22E-701.

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

Explanatory Note. *This section establishes the misuse of documents in furtherance of human trafficking offense ("misuse of documents") for the Revised Criminal Code (RCC). This offense requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, with intent to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person. The misuse of documents in furtherance of human trafficking offense replaces the unlawful conduct with respect to documents in furtherance of human trafficking statute[1] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[2]*

Subsection (a) specifies the elements of first degree misuse of documents. Paragraph (a)(1) specifies that first degree misuse of documents requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, including a passport or other immigration document. The terms "destroys," "conceals," "removes," "confiscates," and "actual or purported government identification document" are intended to have the same meaning as under current law. "Possess" is a defined term per RCC § 22E-701 meaning "holds or carries on one's person; or has the ability and desire to exercise control over." The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain both that an actual or purported document was involved, and that he or she would destroy, conceal, remove, confiscate, or possesses the document.

Paragraph (a)(2) specifies that misuse of documents requires that the accused acted "with intent to" restrict the person's liberty to move or travel in order to maintain performance of a commercial sex act by that person. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person's liberty to move or travel. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually succeeded in restricting the person's liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

Subsection (b) specifies the elements of second degree misuse of documents. Subsection (b) specifies the penalty applicable to this offense. Paragraph (b)(1) specifies that first degree misuse of documents requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, including a passport or other immigration document. The terms "destroys," "conceals," "removes," "confiscates," and "actual or purported government identification document" are intended to have the same meaning as under current law. "Possess" is a defined term per RCC § 22E-701 meaning "holds or carries on one's person; or has the ability and desire to exercise control over." The paragraph specifies that a "knowingly" culpable mental state applies, which requires that

[1] D.C. Code §22-1835.
[2] D.C. Code § 22-1837.

the accused was practically certain both that an actual or purported document was involved, and that he or she would destroy, conceal, remove, confiscate, or possesses the document.

Paragraph (b)(2) specifies that misuse of documents requires that the accused acted "with intent to" restrict the person's liberty to move or travel in order to maintain labor or services by that person. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person's liberty to move or travel. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually succeeded in restricting the person's liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

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

Relation to Current District Law. *The revised misuse of documents statute changes current District law in two main ways.*

First, the revised misuse of documents offense is divided into two penalty grades depending on whether the actor misused documents to maintain a person's labor or services, or commercial sex acts. The current misuse of documents offense only has one penalty grade, regardless of whether the misuse of documents is related to forced labor or forced commercial sex. By contrast, the revised offense distinguishes misuse of documents in order to maintain a person's labor or services, or commercial sex acts. Dividing the offense into two penalty grades improves the proportionality of the revised offense. This change improves the proportionality of the revised offense.

Second, the revised misuse of documents offense requires that the accused destroys, conceals, removes, confiscates, or possesses any actual or purported *government* identification document, specifically including passports and immigration documents. The current statute refers broadly to "any actual or purported government identification document, including a passport or other immigration document, or any other actual or purported document."[3] There is no relevant DCCA case law construing these terms, although legislative history refers to "official papers."[4] By contrast, the revised offense clarifies that this offense only applies to government-issued identification documents, including immigration documents.[5] Misuse of other documents with intent to restrict someone's freedom of movement may constitute another crime under the RCC.[6] This change improves the clarity of the revised statute.

Beyond these two changes, three aspects of the revised misuse of documents statute may constitute substantive changes to current District law.

[3] D.C. Code §22-1835.
[4] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 "Prohibition Against Human Trafficking Amendment Act of 2010" at 8. March 9, 2010.
[5] For example, destroying a person's employee identification badge issued by a private employer does not constitute misuse of documents.
[6] See, e.g., § 22E-1402. Criminal Restraint (attempted); § 22E-2102 Unauthorized use of property.

First, the revised misuse of documents offense specifies that the offense requires "knowingly" destroying, concealing, removing, confiscating, or possessing a government identification document. The current statute clearly requires that the destruction, concealing, etc. of a document be done "knowingly," but the statute is ambiguous whether the "knowingly" mental state applies also to the nature of the document as a form of government identification. D.C. Court of Appeals (DCCA) case law does not address the issue.[7] By contrast, the revised offense clarifies the culpable mental state as to the nature of the document. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] This change improves the clarity of the revised statute.

Second, the revised misuse of documents offense specifies that the offense requires that that the accused acted "with intent" to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex acts by that person. The current statute does not specify any culpable mental state for this element, but merely requires that the accused acted "*to* prevent or restrict, or attempt to prevent or restrict . . . the person's liberty to move or travel[.]"[9] Case law does not address the issue. By contrast, the revised offense clarifies that the actor must act with intent to restrict movement. The phrase with intent to means that the person believes to a practical certainty that the complainant would be restricted in their movement, but actual proof of restriction is not required. "With intent" more clearly communicates the mental state requirement and encompasses the conduct indicated by the "attempt to" prong of the current statute. Anytime a person acts with intent to restrict a person's liberty, that person has also acted with intent to attempt to restrict a person's liberty. This change improves the clarity and consistency of the revised statute.

Third, the revised statute omits the words "without lawful authority." The current statute's covered conduct is, "knowingly to destroy, conceal, … document, of any person to prevent or restrict, or attempt to prevent or restrict, *without lawful authority*, the person's liberty to move or travel…" There is no case law interpreting the phrase "without lawful authority." In the RCC, if a person actually has the lawful authority to engage in conduct covered by the revised statute, general defenses would apply to this conduct the same as any other conduct that otherwise would appear to be a crime. This change improves the clarity of the revised statute.

Two other changes are clarificatory and are not intended to substantively change current District law.

First, the revised statute requires that the accused act with intent to restrict a person's liberty to move or travel. The current statute criminalizes acting with intent to prevent or "restrict . . . the person's liberty to move or travel[.]" It is unclear what it

[7] Although the statute and DCCA case law do not specify a culpable mental state, the Redbook Jury Instruction states that defendant must have "knowingly" destroyed, concealed, removed, or possessed an identification document. D.C. Crim. Jur. Instr. § 4-513.

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

[9] D.C. Code § 22-1835.

means to "prevent" a person's liberty to move or travel. The word "restrict" as used in the revised statute is intended to cover all conduct that would constitute "preventing" a person's freedom to move or travel.

Second, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[10] "Actor" is a defined term[11], which means "a person accused of any offense." The term "person" is also a defined term[12], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[10] D.C. Code § 22-1832.
[11] RCC § 22E-701.
[12] RCC § 22E-701.

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

Explanatory Note. *This section establishes the commercial sex with a trafficked person offense for the Revised Criminal Code (RCC). The commercial sex with a trafficked person offense is divided into two penalty gradations. Both grades require that the actor knowingly engage in a commercial sex act, and the penalty grades are distinguished based on the presence of one or more additional circumstances relating to whether the other party to the commercial sex act had been coerced or trafficked, and whether the other party was under the age of 18, or an adult incapable of consenting. There is no analogous offense under current District law. The current D.C. Code does not distinctly criminalize engaging in commercial sex acts with human trafficking victims.[1] To the extent that certain statutory provisions authorizing extended periods of supervised release[2] would apply to the commercial sex with a trafficked person, these provisions are replaced in relevant part by the revised commercial sex with a trafficked person statute.*

Subsection (a) establishes the elements for first degree commercial sex with a trafficked person. Paragraph (a)(1) specifies that the actor must engage in a "commercial sex act," a defined term.[3] The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[4] which here requires that the actor was practically certain that he or she is engaged in a commercial sex act.

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[1] It is possible that some conduct that constitutes first and second degree commercial sex with a trafficked person in the RCC could be prosecuted under the current D.C. Code as sexual abuse under an accomplice theory. Under this theory, by making a payment, the patron/accomplice would have encouraged the principal to coerce the commercial sex act, with the purpose to encourage the principal to succeed in coercing the commercial sex act.

It also is possible that some conduct that constitutes second degree commercial sex with a trafficked person in the RCC could also be prosecuted under the current D.C. Code as either first or second degree child sexual abuse, or first or second degree sexual abuse of a minor. A patron who engages in a commercial sex act with a person under 16 years of age would be guilty of either first degree child sexual abuse (if a sexual act) or second degree child sexual abuse (if a sexual contact). A patron who engages in a commercial sex act with a person 16 or 17 years of age would be guilty of sexual abuse of a minor, however, only if he or she is in a "significant relationship" (e.g., a teacher, religious leader, or uncle) to the minor. Conduct constituting second degree commercial sex with a trafficked person may also be prosecuted under a variety of other sex offenses (e.g., misdemeanor sexual abuse of a child or minor; sexual abuse of a secondary education student) in the current D.C. Code in some circumstances.

However, no current D.C. Code offenses distinctly account for the fact that a minor who engaged in commercial sex was trafficked, or that a person of any age engaged in commercial sex was trafficked by means of coercive threat or debt bondage.

[2] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the commercial sex with a trafficked person statute covers sexual acts or contacts without consent, D.C. Code § 22-403.01 would authorize an extended period of supervised release.

[3] RCC § 22E-701

[4] RCC § 22E-206 (b).

Paragraph (a)(2) specifies that first degree commercial sex with a trafficked person requires that a coercive threat,[5] explicit or implicit, or debt bondage, both defined terms,[6] was used to cause the other person to engage in the commercial sex act with the actor. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[7] which here requires that the actor was practically certain that a coercive threat or debt bondage was used to cause the other person to engage in the commercial sex act.

Paragraph (a)(3) specifies that first degree commercial sex with a trafficked person requires that the actor was reckless as to whether the other person was under the age of 18, or, in fact, the complainant was under 12 years of age. "Recklessness," a defined term,[8] here requires that the actor consciously disregarded a substantial risk that that was clearly blameworthy that the other person was under the age of 18. "In fact" is a defined term that here means no culpable mental state need be proven if the complainant is under 12 years of age.

Subsection (b) establishes the elements for second degree commercial sex with a trafficked person. Paragraph (b)(1) specifies that the actor must engage in a commercial sex act. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[9] which here requires that the actor was practically certain that he or she is engaged in a commercial sex act.

Paragraph (b)(2) specifies that two forms of second degree commercial sex with a trafficked person. Subparagraph (b)(2)(A) requires that an explicit or implicit "coercive threat," or "debt bondage," both defined terms[10], was used to cause the other person to engage in the commercial sex act with the actor. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[11] which here requires that the actor was practically certain that a coercive threat or debt bondage was used to cause the other person to engage in the commercial sex act. Subparagraph (b)(2)(B) requires that the other person had been recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[12] which here requires that the actor was practically certain that the other person had been recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. Subparagraph (b)(2)(B) also requires that the actor was reckless that

[5] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.
[6] RCC § 22E-701.
[7] RCC § 22E-206 (b).
[8] RCC § 22E-206 (d).
[9] RCC § 22E-206 (b).
[10] RCC § 22E-701.
[11] RCC § 22E-206 (b).
[12] RCC § 22E-206.

the complainant falls under one of the categories specified in sub-subparagraphs (b)(2)(B)(i)-(iii). Sub-subparagraph (b)(2)(B)(i) requires that the complainant is under the age of 18. Sub-subparagraph (b)(2)(B)(ii) requires that the complainant is incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. Sub-subparagraph (b)(2)(B)(iii) requires that the complainant was incapable of communicating unwillingness to engage in the commercial sex act. In addition, sub-subparagraph (b)(2)(B)(iv) requires that the complainant was, in fact, under the age of 12. This sub-subparagraph uses the term "in fact," which specifies that no culpable mental state is required as to the complainant being under the age of 12.

Relation to Current District Law. *The commercial sex with a trafficked person offense changes current District law by criminalizing the knowingly engaging in a commercial sex act with a victim of trafficking in forced commercial sex, forced commercial sex, or sex trafficking of a minor or adult incapable of consenting.*

The RCC statute distinctly criminalizes and punishes as a form of human trafficking knowingly engaging in a commercial sex act with a trafficked person. Under the current D.C. Code, engaging in a commercial sex act with another person, with knowledge that the other person has been coerced into engaging in the commercial sex act, or was trafficked for the purposes of engaging in commercial sex acts, is not distinctly criminalized. In situations where the complainant is under 16 years of age or an adult incapable of consenting, an actor engaging in such conduct may be liable under various sexual abuse charges under Chapter 30 of Title 22.[13] Under current D.C. Code § 22–2701, such conduct may be prosecuted as solicitation of prostitution and subject to a maximum 90 days imprisonment for a first offense. In contrast, the revised statute distinctly treats such conduct as a type of human trafficking offense and provides a correspondingly more serious penalty. This change the proportionality of the revised statutes.

[13] If A engages in a commercial sex act with B, knowing that a third party coerced B into engage in the commercial sex act, A is not guilty of a sexual assault offense. However, B may be guilty of a sexual assault offense.

RCC § 22E-1609. Forfeiture.

Explanatory Note. *This section establishes forfeiture rules for property involved in violations of offenses under this chapter. In addition to any penalties authorized by statutes in this chapter, a court may order any actor convicted of an offense under this chapter to forfeit property used or intended to be used to commit or facilitate commission of an offense under this chapter, or any property obtained as a result of commission of an offense under this chapter. The revised statute replaces the current forfeiture statute applicable to human trafficking offenses.*[1]

Relation to Current District Law. *The revised forfeiture statute makes changes current District law in one main way.*

The revised statute provides judicial discretion in determining whether and to what extent to require forfeiture. The current statute states that "the court shall order…" forfeiture. There is no DCCA case law on point, although generally the DCCA has recognized constitutional restrictions on asset forfeitures that are excessive.[2] By contrast, the revised statute states that "the court may order…" forfeiture. Providing judicial discretion allows the court to determine a proportionate forfeiture, conscientious of constitutional and sub-constitutional considerations of what would be an excessive loss.

One change is clarificatory and is not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[3] "Actor" is a defined term[4], which means "a person accused of any offense." The term "person" is also a defined term[5], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[1] D.C. Code § 22-1838.
[2] Any forfeiture must be proportional under the excessive fines clause of the U.S. Constitution. *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 560-61 (D.C. 1998).
[3] D.C. Code § 22-1832.
[4] RCC § 22E-701.
[5] RCC § 22E-701.

RCC § 22E-1610. Reputation or Opinion Evidence.

Explanatory Note. *This section establishes evidentiary rules that prohibits the use of reputation or opinion evidence of past sexual behavior of an alleged victim in prosecutions for forced commercial sex, as prohibited by RCC § 22E-1602, trafficking in forced commercial sex, as prohibited by RCC § 22E-1604; sex trafficking of a minor or adult incapable of consenting, as prohibited by § 22E-1605; benefitting from human trafficking, as prohibited by § 22E-1606; and commercial sex with a trafficked person, as prohibited by RCC § 22E-1608. This section is nearly identical to current D.C. Code § 22-1839, but has been amended to apply to prosecutions of forced commercial sex and commercial sex with a trafficked person, which are not currently criminalized under the human trafficking chapter.*

Relation to Current District Law. *The revised reputation or opinion evidence statute changes current District law in one main way.*

The revised reputation or opinion evidence statute bars evidence of past sexual behavior of an alleged victim in prosecutions for forced commercial sex, as prohibited under RCC § 22E-1602 and commercial sex with a trafficked person, as prohibited under RCC § 22E-1608. Under current law, coercing a person to engage in a commercial sex act and engaging in a commercial sex act with a trafficked person are not separately criminalized. However, the current reputation or opinion evidence statute applies to prosecutions for "trafficking in commercial sex," "sex trafficking of children," and "benefitting financially from human trafficking[.]"[1] By contrast, the revised reputation or opinion evidence statute clarifies that it also applies to prosecutions of the RCC's forced commercial sex and commercial sex with a trafficked person offenses. It would be inconsistent to bar reputation or opinion evidence of an alleged victim's past sexual behavior in prosecutions for other offenses, but allow them in a prosecution for forced commercial sex or commercial sex with a trafficked person. This change improves the consistency and proportionality of the revised statute.

One aspect of the revised reputation or opinion evidence statute may constitute a substantive change to current District law.

The revised statute states that when a "person" is accused of an offense listed in the statute, reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. The RCC defines "person" to include businesses and other legal persons.[2] The current statute only refers to a person being accused of an offense, but that term is not defined.[3] It is unclear whether the current statute applies in cases in which a *business* is accused of an offense listed in the statute, and there is no relevant D.C. Court of Appeals case law on point. By contrast, the revised statute clarifies that the reputation

[1] D.C. Code § 22-1839.
[2] RCC § 22E-701.
[3] Cf. D.C. Code §22-3201 (2A). "'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.

or opinion evidence rules apply when a business is accused of offenses listed under the statute. This change improves the clarity and consistency of the revised statute.

One change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The current statute cross references statutes in the current D.C. Code. The revised statute changes the cross references other statutory provisions to match the revised human trafficking offenses in the RCC. The RCC evidentiary rule applies to RCC §§ 22E-1602, 22E-1604, 22E-1605, and 22E-1608, instead of current D.C. Code §§ 22-1833, 22-1834, and 22-1836. This is a technical change that does not otherwise change the reputation or opinion evidence statute.

RCC § 22E-1611. Civil Action.

Explanatory Note. *This section authorizes victims of offenses under RCC § 22E-1601, § 22E-1602, § 22E-1603, § 22E-1604, § 22E-1605, § 22E-1606, § 22E-1607, or § 22E-1608 to bring a civil action in D.C. Superior Court for damages and injunctive relief. This section is nearly identical to current D.C. Code § 22-1840, but has been amended to authorize victims of all trafficking offenses included in the RCC to bring a civil action, and to change the statute of limitations.*

This section authorizes a victim of any offense under RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, or 22E-1608 to bring a civil action against any person who may be charged as a perpetrator of that offense. It is not required that the defendant in the civil action has actually been charged or convicted of that offense. This language shall not be construed to limit civil liability for other entities that may be held vicariously liable, even if they did not directly engage in conduct constituting an offense under this chapter.[1]

Relation to Current District Law. *The revised civil action statute changes current District law in two main ways.*

First, the revised civil action authorizes victims of commercial sex with a trafficked person as defined under RCC § 22E-1608 to bring a civil action. There is no analogous offense under current law, and accordingly the current civil action statute does not authorize victims of this offense to bring a civil action. By contrast, the revised civil action statute allows victims of commercial sex with a trafficked person to bring civil actions. It would be inconsistent to authorize civil actions for violations of other human trafficking offenses, but not the victims of commercial sex with a trafficked person offense. This change improves the consistency of the revised statute.

Second, the revised civil action statute changes the statute of limitations for bringing civil actions under this section. The current statute says that the statute of limitations shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a human trafficking offense, or if the plaintiff is a minor, until the plaintiff reaches the age of majority, whichever is later. By contrast, the revised civil statute extends the time within which a victim can bring a civil action if the offense occurred when the victim was under the age of 35, and generally allows civil suits to be brought within 5 years of when the victim knew, or should have known, of the offense. This revision expands the period in which victims of trafficking offenses may bring civil actions in accordance with changes under the Sexual Abuse Statute of Limitations Elimination Amendment Act of 2017. This change improves the proportionality and consistency of the revised statute.

In addition to these two changes, two other revisions may constitute substantive changes to current District law.

[1] *See*, *Boykin v. District of Columbia*, 484 A.2d 560, 561–62 (D.C. 1984) ("Under the doctrine of *respondeat superior*, an employer may be held liable for the acts of his employees committed within the scope of their employment.") (citing *Penn Central Transportation Co. v. Reddick*, 398 A.2d 27, 29 (D.C.1979)).

The revised civil action authorizes victims of forced commercial sex as defined under RCC § 22E-1602 to bring a civil action. The current code does not explicitly criminalize forced commercial sex, and it is unclear whether the use of coercion or debt bondage to compel a person to engage in a commercial sex act constitutes forced labor or services under the current statute. Therefore, it is unclear whether the current civil action statute provides a civil cause of action if a person uses coercive threats or debt bondage to compel a person to engage in a commercial sex act. It would be inconsistent to authorize civil actions for violations of other human trafficking offenses, but not the victims of the forced commercial sex offense. This change improves the consistency of the revised criminal code.

Secondly, the revised civil action statute specifies that a victim of a trafficking offense may bring a civil action against any person who may be charged as a perpetrator of that offense. The current statute does not specify against whom civil actions may be brought, and there is no relevant DCCA case law. This revision clarifies that victims of an offense under this chapter may bring a civil action against a person who may be charged as a perpetrator of that offense.

In addition, one change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The revised statute changes cross references to other statutory provisions to match the revised human trafficking offenses in the RCC. The current statute cross references statutes in the current D.C. Code. The revised statute authorizes victims of offenses defined under RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, and 22E-1608. This is a technical change that does not otherwise change the civil action statute.

RCC § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.

Explanatory Note. *The Limitations on Liability and Sentencing for RCC Chapter 16 Offenses ("limitations on liability statute") provides two limitations on liability to offenses under this chapter. First, the limitations on liability statute bars charging a person as an accomplice to a Chapter 16 offense, if the principal had previously committed a Chapter 16 offense against that person within 3 years of the conduct by the principal constituting the offense. Second, the limitations on liability statute bars charging a person with conspiracy to commit a Chapter 16 offense if another party to the conspiracy had previously committed a Chapter 16 offense against that person within 3 years of the formation of the conspiracy.*

Subsection (a) bars charging a person as an accomplice to a Chapter 16 offense if the principal had previously committed a Chapter 16 offense against that person. This subsection only bars accomplice liability, and victims of trafficking offenses may still be charged and convicted as principals.

Subsection (b) bars charging a person with conspiracy to commit a Chapter 16 offense if any party to the conspiracy had previously committed a Chapter 16 offense against that person. This subsection only bars charges of conspiracy to commit a Chapter 16 offense, and victims of trafficking offenses may still be charged and convicted with actually committing or attempting to commit a Chapter 16 offense.[1]

Relation to Current District Law. *The limitations on liability statute changes current District law in two main ways.*

First, the RCC's limitation on liability statute changes current law by barring charging a person as an accomplice to a Chapter 16 offense if prior to that offense, the principal committed a Chapter 16 offense against that person within 3 years prior to the conduct by the principal constituting the offense. Under current law, there are no restrictions on accomplice liability for victims of trafficking offenses. By contrast, this revision prevents criminal liability for victims of offenses under this chapter who subsequently aid or assist principals in committing additional offenses under this chapter. This subsection only bars accomplice liability, and victims of trafficking offenses may

[1] Subsections (b) and (c) recognize that in many instances, victims of human trafficking offenses are highly vulnerable and may be co-opted by perpetrators into assisting in committing further trafficking offenses. Although these victims may not necessarily be able to satisfy a common law duress defense, they often have diminished culpability, and imposing accomplice or conspiracy liability may be disproportionately severe. These subsections seek to balance protections for vulnerable victims of human trafficking offenses who are co-opted by perpetrators, while still permitting criminal liability for persons who commit trafficking offenses as principals. Other jurisdictions have enacted provisions limiting liability for victims of trafficking offenses. E.g., N.M. Stat. Ann. § 30-52-1 ("In a prosecution pursuant to this section, a human trafficking victim shall not be charged with accessory to the crime of human trafficking."). In addition, the Reporter's Notes accompanying the American Law Institute's draft for sexual assault and related offense for the Model Penal Code notes that some human trafficking victim's advocates say that "enforcement practices often traumatize victims and expose them to even greater hardship and danger." Council Draft No. 8 (Dec. 17, 2018). The note cites to 22 U.S.C. § 7101(b)(19) which states that "Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked[.]"

still be charged and convicted as principals. This change recognizes the vulnerability many victims of human trafficking have to further manipulation that may fall short of a general defense of duress. This revision improves the proportionality of the revised statute.

Second, the RCC's limitation on liabilities statute changes current law by barring charging a person with conspiracy to commit an offense under Chapter 16 if within 3 years prior to the formation of the conspiracy, a party to the conspiracy had committed a Chapter 16 offense against that person. Under current law, there are no restrictions on conspiracy liability for victims of trafficking offenses. By contrast, this revision prevents criminal liability for victims of offenses under this chapter who subsequently conspire with parties that previously committed a trafficking offense against that person. This subsection only bars charges of conspiracy to commit a Chapter 16 offense, and victims of trafficking offenses may still be charged and convicted with actually committing or attempting to commit a Chapter 16 offense. This change recognizes the vulnerability many victims of human trafficking have to further manipulation that may fall short of a general defense of duress. This revision improves the proportionality of the revised statute.

RCC § 22E-1613. Civil Forfeiture.

Explanatory Note. *This section establishes civil asset forfeiture rules for conveyances and money that are intended to be used, or are used, to commit RCC human trafficking offenses. The RCC replaces all prostitution offenses that involve non-consensual commercial sex acts with human trafficking offenses. The civil forfeiture statute in part replaces the current forfeiture statute applicable to prostitution and related offenses,[1] and all seizures and forfeitures under this section shall be pursuant to D.C. Law § 20-278. This statute both changes current law by allowing asset forfeiture as to all human trafficking offenses, and preserves current District law by ensuring that offenses involving non-consensual prostitution are still subject to forfeiture.*

Subsection (a) establishes the types of property that are subject to civil forfeiture under the revised statute. Paragraph (a)(1) applies to any property that is, in fact, a conveyance, including aircraft, vehicles, or vessels. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the property is a conveyance. There are two alternative bases for forfeiture of a conveyance in paragraph (a)(1). The first requires that the conveyance is possessed with intent to facilitate commission of an offense under Chapter 16 of the RCC. "Possess" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over." "Intent" is a defined term in RCC § 22E-206 that here means a person was practically certain that a conveyance would be used to facilitate commission of an RCC human trafficking offense. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the person's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the conveyance was used to facilitate commission of an RCC human trafficking offense, just that a person believed to a practical certainty [2]OBJ

The alternative basis for forfeiture of a conveyance in paragraph (a)(1) is a conveyance which is, "in fact," used to facilitate the commission of an RCC human trafficking offense. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the conveyance was used to facilitate the commission of an RCC human trafficking offense. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[3]

Paragraph (a)(2) applies to any property that is, "in fact," money, coins, and currency. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the property is money, coins, or currency. There are two alternative bases for forfeiture of money, coins, and currency in paragraph (a)(2). The first requires that the money, coins, or currency are possessed with intent to facilitate

[1] D.C. Code § 22-2723.
[2] This issue is discussed in detail later in the commentary to this revised statute.
[3] *See, e.g.,* D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

commission of an offense under Chapter 16 of the RCC. "Possess" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over." The culpable mental state requirement of "intent" and the strict liability requirements of "in fact" are the same in paragraph (a)(2) as they are in paragraph (a)(1).

The alternative basis for forfeiture of money, coins, or currency in paragraph (a)(2) is if it is, "in fact," used to facilitate the commission of an RCC human trafficking offense. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the money, coins or currency were used to facilitate the commission of an RCC human trafficking offense. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[4]

Paragraph (b) establishes that the seizures and forfeitures under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.

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

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

First, the revised human trafficking civil forfeiture statute specifies that human trafficking offenses are subject to civil asset forfeiture. The current D.C. Code generally specifies that alleged violations of a "forfeitable offense" can give rise to civil asset forfeiture.[5] Human trafficking offenses are not included in the definition of "forfeitable offense," and alleged violations of human trafficking offenses are not explicitly subject to civil forfeiture. However, the definition of "forfeitable offense" does include prostitution offenses, including prostitution offenses involving non-consensual conduct,[6] that can give rise to forfeiture under D.C. Code § 22-2723. In contrast, the revised forfeiture statute changes law by clarifying that all human trafficking offenses are subject to civil asset forfeiture. This change improves the proportionality and consistency of the revised statutes.

Second, the revised human trafficking forfeiture provision applies to money, coins, and currency which are used, or intended to be used, "to facilitate the commission" of an RCC human trafficking offense. The current D.C. Code prostitution forfeiture statute, which applies in part to prostitution offenses involving non-consensual conduct,[7]

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[4] *See, e.g.,* D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

[5] D.C. Code § 41-301.

[6] Current Chapter 27 of the D.C. Code, which defines prostitution-related offenses, includes several offenses that criminalize nonconsensual commercial sex acts. For example, D.C. Code § 22-2706 makes it a crime to "[use] threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact[.]" Compelling a person to engage in or submit to nonconsensual commercial sex acts is criminalized as a human trafficking offense under Chapter 16 of the RCC, not as a prostitution-related offense.

[7] Current Chapter 27 of the D.C. Code, which defines prostitution-related offenses, includes several offenses that criminalize nonconsensual commercial sex acts. For example, D.C. Code § 22-2706 makes it a crime to "[use] threats or duress, to detain any individual against such individual's will, for the purpose of

applies to conveyances that are used, or intended to be used, "to facilitate a violation" of the current D.C. Code prostitution statutes[8] and to currency that is used, or intended to be used, "in violation" of the current D.C. Code prostitution statutes.[9] "In violation" appears to be narrower than "to facilitate the commission," but there is no D.C. Court of Appeals (DCCA) case law on this issue. In contrast, the revised forfeiture provision applies to currency that is used, or possessed with intent to be used, "to facilitate the commission" of the RCC human trafficking offenses, which is consistent with the scope of conveyances subject to forfeiture. It is inconsistent to include in forfeiture conveyances that are used, or possessed with intent to be used, "to facilitate the commission" of a trafficking offense, but to limit forfeiture of currency to currency that is used, or possessed with intent to be used "in violation" of a trafficking offense. This change improves the clarity, consistency, and proportionality of the revised statute.

Beyond these two substantive changes to current District law, two other aspects of the revised forfeiture statute may constitute substantive changes to current District law.

First, the RCC definition of "intent to" applies to the revised forfeiture provision. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are "intended for use" in a prostitution offense.[10] The meaning of "intended to" is unclear and there is no DCCA case law on this issue.[11] Resolving this ambiguity, the revised human trafficking forfeiture provision applies the RCC definition of "intent" in RCC § 22E-206. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the property would be used in a prostitution offense.[12]

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prostitution or a sexual act or sexual contact[.]" Compelling a person to engage in or submit to nonconsensual commercial sex acts is criminalized as a human trafficking offense under Chapter 16 of the RCC, not as a prostitution-related offense.

[8] D.C. Code Ann. § 22-2723(a)(1) ("(a) The following are subject to forfeiture: (1) All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense.").

[9] D.C. Code Ann. § 22-2723(a)(2) ("(a) The following are subject to forfeiture: . . . (2) All money, coins, and currency which are used, or intended for use, in violation of a prostitution-related offense.").

[10] D.C. Code § 22-2723(a)(1), (a)(2).

[11] The words "intended to" as used in the current prostitution forfeiture statute may refer to what was commonly known as "specific intent." However, even if this is the case, current District case law is unclear as to whether "specific intent" may be satisfied by mere knowledge, or if conscious desire is required. Compare, *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984) (""[a] specific intent to kill exists when a person acts with the purpose . . . of causing the death of another,") with *Peoples v. United States*, 640 A.2d 1047, 1055-56 (D.C. 1994) (proof that the appellant, who set fire to a building "knew" people inside a would suffer injuries sufficient to infer that the appellant "had the requisite specific intent to support his convictions of malicious disfigurement").

[12] Relying on the RCC definition of "intent" may produce an additional change in current District law. Under the RCC, the "intent" mental state may be satisfied by knowledge of a circumstance or result. The RCC also provides that knowledge of a circumstance may be imputed if a person is reckless as to whether the circumstance exists, and with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied to this forfeiture provision, if an owner does *not* know that property is to be used to violate the trafficking in forced commercial sex offense, but was reckless as to this fact, and avoided investigating whether this circumstance exists in order to avoid criminal liability, the imputation rule may allow a fact finder to impute knowledge to the owner. It is unclear under current District law whether a similar rule of imputation would apply. Current D.C. Code §

Applying the RCC definition of "intent" does not change the mental state requirements for forfeiture in D.C. Law 20-278.[13] This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC establishes that strict liability is a distinct basis for the forfeiture of property. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are "are used" in a prostitution offense.[14] It is unclear whether "are used" applies strict liability. There is no DCCA case law on this issue. Resolving this ambiguity, the revised human trafficking forfeiture provision, by use of the phrase "in fact," clarifies that strict liability is a distinct basis for the forfeiture of property. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[15] This change improves the clarity, consistency, and proportionality of the revised statutes.

The remaining changes are clarificatory and are not intended to substantively change current District law.

First, the revised forfeiture provision deletes the language "to transport." The current D.C. Code prostitution forfeiture provision includes "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense." The term "conveyances" sufficiently communicates an object designed to transport. The verb "to transport" is unnecessary and deleting it improves the clarity of the revised statutes.

Second, the revised forfeiture provision deletes the language "in any manner." The current D.C. Code prostitution forfeiture provision includes "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense." "To facilitate" is sufficiently broad to encompass all methods of facilitation, particularly since the revised statute, as is discussed above, no longer specifies "to transport." Deleting "in any manner" improves the clarity of the revised statutes.

Third, the revised forfeiture provision deletes the term "property." The current D.C. Code prostitution forfeiture provision states that "All seizures and forfeitures of property under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278."[16] The term "property" is unnecessary because paragraphs (a)(1) and

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41-306 states that "[n]o property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission." However, this provision applies when an actual *act or omission* is the basis for forfeiture. It is unclear whether an owner's willful blindness as to *intended* uses of property still authorizes civil forfeiture. If this provision does apply even when property has not yet been used, the term "willfully blind" is undefined, and it is unclear how it differs from the deliberate ignorance provision under the RCC.

[13] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

[14] D.C. Code § 22-2723(a)(1), (a)(2).

[15] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

[16] D.C. Code § 22-2723(b).

(a)(2) of the revised provision and of the current forfeiture provision,[17] limit the provision to types of property—vehicles and money. This change improves the clarity of the revised statutes.

[17] D.C. Code § 22-2723(a)(1), (a)(2).

RCC § 22E-1801. Stalking.

Explanatory Note. *This section establishes the stalking offense for the Revised Criminal Code (RCC). The offense prohibits patterns of behavior that significantly intrude on a person's privacy or autonomy and threaten a long-lasting impact on a person's quality of life. The offense replaces the current stalking offense and related provisions in D.C. Code §§ 22-3131 - 3135.*

Paragraph (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a particular complainant. "Purposely," a term defined in RCC § 22E-206, here requires a conscious desire to engage in a pattern of misconduct.[1] A course of conduct does not have to consist of identical conduct, but the conduct must share an uninterrupted purpose[2] and must consist of one or more of the activities listed in subparagraphs (a)(1)(A) – (D).[3] The behavior must be directed at a specific person, not merely be disturbing to the general public.[4] The pattern may be established by any combination of conduct described in subparagraphs (a)(1)(A) – (D).

Subparagraph (a)(1)(A) provides that one means of committing stalking is physically following or physically monitoring a specific individual. The term "physically following" is defined in RCC § 22E-701 and means maintaining close proximity to a complainant, near enough to see or hear the complainant's activities person as they move from one location to another.[5] "Physically monitoring" is also defined in RCC § 22E-701 and means appearing in close proximity to someone's residence, workplace, or school, to detect the person's whereabouts or activities. Such following or monitoring may be accomplished by means of a third party,[6] however, the revised stalking statute does not reach unauthorized electronic surveillance.[7] Per the rules of interpretation in RCC § 22E-

[1] A person does not commit a stalking offense by merely knowing that they are engaging in a pattern of conduct toward the complainant. Consider, for example, a person who communicates to a large audience, such as a television broadcast or an upload to YouTube. That person may be practically certain that the complainant will watch the broadcast, and negligent as to the fact that the complainant will be distressed by the content, but not consciously desire that the complainant watch. Consider also a divorced couple attending a family event, such as a wedding or a funeral. One former spouse may be practically certain that they are maintaining close proximity to the other as they move from the church to the reception hall, and negligent as to the fact that their very presence is distressing, but not consciously desire to physically follow them.

[2] A person does not commit a stalking offense by harming a complainant on two occasions that are unrelated or interrupted by a period of reconciliation. Consider, for example, in February of a given year Sister A and Sister B argue about what to watch on television and A assaults B; from March through September, they get along well; but in October they argue about who has to do the dishes and A assaults B again. Sister A has committed two assaults in violation of RCC § 22E-1202 but has not committed a stalking offense.

[3] The common purpose does not have to be nefarious. For example, a person might persistently follow someone with the goal of winning their affection.

[4] Conduct in a public place that causes a person to reasonably fear a crime is likely to occur may be punishable as disorderly conduct. RCC § 22E-4201.

[5] The phrase "close proximity" does not require that the defendant be near enough to reach the complainant. Distances may vary widely, depending on facts including crowd density, noise, and height. Examples may include walking a couple of stores down the street from the complainant or driving near the complainant in a vehicle.

[6] *See* RCC § 22E-211 (Liability for causing crime by an innocent or irresponsible person).

[7] Unauthorized electronic surveillance is addressed in RCC § 22E-1802, Electronic Stalking.

207, the "purposely" culpable mental state also applies to this element. The accused must consciously desire to physically follow or monitor the complainant.[8]

Subparagraph (a)(1)(B) provides that another means of committing stalking is falsely personating a complainant. For example, an actor may commit a stalking offense by falsely posing as the complainant in an online forum and making statements that intentionally or negligently inflict fear or emotional stress on that complainant. Per the rules of interpretation in RCC § 22E-207, the "purposely" culpable mental state also applies to this element. The accused must consciously desire to falsely personate the complainant.

Subparagraph (a)(1)(C) provides that a third means of committing stalking is to persistently contact someone without their effective consent. Per the rules of interpretation in RCC § 22E-207, the "purposely" culpable mental state requires that the accused consciously desire to contact the specific individual.[9] The method of communication is irrelevant, whether it be in person speech, electronic correspondence, or messages sent through a third party.[10] Subparagraph (a)(1)(C) does not reach communications *about* the specific individual to other (third) persons.[11] This restriction on communication is content-neutral, and prohibits all contact beyond the complainant's effective consent, irrespective of tenor and tone.

Subparagraph (a)(1)(D) provides that a fourth means of committing stalking is to commit, solicit, or attempt Criminal Threats,[12] Theft,[13] Identity Theft,[14] Arson,[15] Criminal Damage to Property,[16] Criminal Graffiti,[17] Trespass,[18] Breach of Home Privacy,[19] or Indecent Exposure.[20] "In fact," a defined term,[21] is used to indicate that

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[8] For example, the accused must act with the purpose of appearing at the target's home, office, or school and with the purpose of watching them. A person who does not know the location is one that the target frequents, or who knowingly but not purposely frequents, a location where the target is does not commit a stalking offense.

[9] Consider, for example, Person A calls a phone number intending to reach Person B and Person C unexpectedly answers the phone. Person A did not purposely engage in a pattern of stalking conduct.

[10] Consider, for example, Person A contacts Person B's family, friends, coworkers, and neighbors to complain about unpaid alimony. If Person A simply voices a negative opinion *about* Person B, that speech will not amount to stalking. However, if Person A repeatedly instructs Person B's friends to relay a message *to* Person B, with the intent or effect of frightening Person B, Person A has committed the offense of stalking.

[11] For example, a person who posts disparaging remarks about a former spouse on her own Facebook page, without tagging the subject of the post, does not commit stalking. *But see Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts). Note, however, that communications about the specific individual that amount to a criminal threat may constitute a separate basis for finding stalking conduct per subparagraph (a)(1)(C).

[12] RCC § 22E-1204.

[13] RCC § 22E-2101.

[14] RCC § 22E-2205.

[15] RCC § 22E-2501.

[16] RCC § 22E-2503.

[17] RCC § 22E-2504.

[18] RCC § 22E-2601.

[19] RCC § 22E-4205.

[20] RCC § 22E-4206.

[21] RCC § 22E-207.

there is no separate or additional culpable mental state required as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Paragraph (a)(2) specifies that the person must be negligent as to the fact that the course of conduct is without effective consent. The term "negligent" is defined in RCC § 22E-206 and here requires that the actor should be aware of a substantial risk that the contact[22] is without the complainant's effective consent[23] and that the actor's conduct is clearly blameworthy.[24] The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701.

Paragraph (a)(3) requires that the conduct described in paragraph (a)(1) have either the intent or the effect of causing the victim to experience fear or distress. Under (a)(3)(A), a person commits stalking when they act "with intent to" cause someone fear or significant distress. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause someone fear or significant distress. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such fear or significant distress occurred, just that the defendant believed to a practical certainty that such fear or significant distress would result.[25] Under (a)(3)(B), a person commits stalking when they negligently cause fear or significant distress, even if they did not subjectively intend to do so.[26] "Negligently" is a defined term and, applied here, means the actor should be aware of a substantial risk that the pattern of conduct will frighten or significantly distress that particular individual[27] and be clearly blameworthy

[22] It is the contact and not the content that must be without effective consent. Compare, for example, a complainant who notifies the defendant to cease all communication (e.g., "Do not call me again.") with a complainant who asks the defendant to cease certain *offensive* communication (e.g., "Do not call me 'a jerk' again.").

[23] Consider, for example, a person who is told by a love interest's parent, "Never contact my daughter again." If the person reasonable believes that this is the command only of the parent and not the love interest, disobeying the command will not amount to stalking.

[24] For example, a complainant may convey their desire to not be contacted either directly, by telling the person to stop, or indirectly through an attorney, government entity, or a third party. In some instances, blocking electronic communications may also suffice to notify to the accused that further communication is unwelcome. On some communication platforms, electronic blocking is obvious to the person who has been blocked. On other platforms, the user's profile may appear to vanish. On others, the blocking (or muting) is not made apparent to the person who was blocked at all.

[25] Consider, for example, Person A sends multiple messages to Person B threatening to "beat him up." Person B is unafraid because he has been specially trained as a fighter. Person A has, nevertheless, may have committed a stalking offense against Person B.

[26] Consider, for example, Person A secretly follows Person B from place to place, hoping Person B will not notice, but Person B does notice and becomes afraid. Person A has committed stalking, if Person B's fear was objectively reasonable. Consider also, a person incessantly contacts an ex-lover after being asked to stop, with the intention of reconciling. Although the person did not intend to cause any undue fear or distress, the unwanted communication nevertheless amounts to stalking, if it negligently does cause such a harm.

[27] For example, if the actor reasonably but mistakenly believes that the victim of the stalking conduct will be unbothered by the pattern of conduct, the actor has not acted negligently. RCC § 22E-206. The fact that another reasonable person might find the same consequence alarming is inconsequential.

under the circumstances.[28] Sub-subparagraphs (a)(3)(A)(i) and (a)(3)(B)(i) specify fear of physical harm or confinement to any person[29] is one of two alternative emotional injuries that may establish stalking liability. The term "safety" is defined in the statute to mean ongoing security from significant intrusions on one's bodily integrity or bodily movement. Sub-subparagraphs (a)(3)(A)(ii) and (a)(3)(B)(ii) also provide that "significant emotional distress" is a second type of emotional injury that may establish stalking liability. "Significant emotional distress" is a defined term that means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. The distress must rise significantly above the level of uneasiness, nervousness, unhappiness, or similar feelings commonly experienced in day to day living.[30]

Paragraph (b)(1) specifically excludes from stalking liability certain speech about social issues that is usually constitutionally protected speech.[31] The term "public matter" has the meaning indicated in Supreme Court case law. Stalking statutes are often vulnerable to constitutional challenges, as written and as applied.[32] The paragraph makes clear that the stalking statute does not punish activities such as participating in a labor strike, advocating a boycott, publishing harsh reviews of a restaurant, acting as a whistleblower, or criticizing a city official's fitness for office. Although such applications of the stalking statute likely would be constitutionally invalid without this statutory language, codifying the exception provides better notice to the public and criminal justice system actors. Pursuant to (b)(1), a person who is a law enforcement officer,[33] District official, [34] candidate for elected office, or employee of a business that is open to the public is expected to tolerate the opinions of the community they serve, at least while they are on duty.[35] However, depending on the facts in a particular case, the First Amendment may offer broader or narrower protection than the speech highlighted in this special exception. Free speech on matters of public concern is not limited to speech

[28] RCC § 22E-206.
[29] This includes fear that the stalker will physically harm the victim, a member of the victim's family, or a stranger.
[30] RCC § 22E-701.
[31] Speech on public issues should be "uninhibited, robust, and wide-open…[because such] speech occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 444 (2011) (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Connick v. Myers*, 461 U.S. 138 (1983) (internal quotation marks omitted)).
[32] There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek, but the "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring); *see also State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977). The revised statute's prior notification requirement is not itself enough to render the statute constitutional as applied. *See, e.g., State v. Pierce*, 152 N.H. 790 (2005).
[33] Defined in RCC § 22E-701.
[34] Defined in RCC § 22E-701.
[35] *See White v. Muller*, 2017 D.C. Super. LEXIS 14 (concluding that 47 text messages that a journalist sent to a Councilmember were not protected because they "do not reference any particular policy or subject matter" and are instead "personal in nature, belittling, and appear to be [an] attempt to intimidate…").

directed at political figures and businesses nor is it limited to communications that occur while those persons are engaged in their official duties.[36]

Paragraph (b)(2) specifically excludes from stalking liability persons who are engaged in activities that are vital to a free press and to the fair administration of justice. A journalist, law enforcement officer, professional investigator (licensed or unlicensed), attorney, process server, *pro se* litigant, or compliance investigator who is acting within the reasonable scope of his or her professional duties or court obligations does not commit a stalking offense.[37]

Subsection (c) provides that where conduct is of a continuing nature, each 24-hour period constitutes one occasion. [38]

Subsection (d) provides the penalties for the offense. [*See* Fourth Draft of Report #41.]

Paragraph (d)(2) authorizes four penalty enhancements. If one or more of the enhancements is alleged and proven beyond a reasonable doubt,[39] the penalty classification is increased by one class. Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" indicates that the accused is strictly liable with respect to whether the enhancement applies.

Subparagraph (d)(2)(A) authorizes an enhancement if the defendant violated a court order or condition of release prohibiting or restricting contact with the complainant by committing the stalking offense. The accused is strictly liable with respect to whether a court order or condition of release prohibited or restricted contact with the complaining witness.[40] The term "court order" includes any judicial directive, oral or written, that restricts contact with the stalking victim.[41] A condition of release may be imposed by a court or by the United States Parole Commission.[42]

Subparagraph (d)(2)(B) authorizes an enhancement for any person who has a prior stalking or electronic stalking conviction within ten years of the instant offense.

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[36] *See Gray v. Sobin*, 2014 D.C. Super. LEXIS 1, *12.

> The Supreme Court has defined speech on a matter of public concern as speech that either can be fairly considered as relating to any matter of political, social, or other concern to the community or is on a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

(Internal quotation marks omitted.) (quoting *Snyder v. Phelps*, 562 U.S. 443 (2011); *City of San Diego v. Roe*, 543 U.S. 77 (2004); *Rankin v. McPherson*, 483 U.S. 378 (2004)).

[37] The revised statute anticipates that some legal pleadings, correspondence and negotiations will be distressing. Whether conduct exceeds the scope of a person's duties as an attorney or unrepresented litigant is fact-sensitive.

[38] *See also Whylie v. United States*, 98 A.3d 156, 158 (D.C. 2014) (finding that all conduct (1400 phone calls) that occurred before entry of a restraining order constituted one course of conduct, while all conduct that occurred after the entry of the restraining order (800 phone calls) constituted another).

[39] RCC § 22E-605 requires that an enhancement be charged and proven beyond a reasonable doubt.

[40] A good faith belief that the order was expired or vacated is not a defense.

[41] Examples include stay away orders, civil protection orders, family court orders, civil injunctions, and consent decrees. The order must clearly address prohibitions on contact with the specified person. An order to stay away from a particular location, without reference to the specific individual will not suffice.

[42] Regarding the legal authority to impose such conditions, see *Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014).

This includes any criminal offense against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of stalking or electronic stalking under RCC § 22E-1801 and 1802.[43]

Subparagraph (d)(2)(C) authorizes an enhancement for stalking conduct that causes the affected persons to incur expenses that amount to more than $5,000. "Financial injury" is a defined term that includes all reasonable monetary costs, debts, or obligations that were sustained as a result of the stalking.[44] This provision does not affect the sentencing court's discretion with respect to ordering restitution. The government's decision to not seek a penalty enhancement does not preclude the government from seeking reimbursement under the restitution statute.[45]

Subparagraph (d)(2)(D) authorizes a minor victim enhancement, which includes two distinct culpable mental states. First, the actor is strictly liable as to whether he or she is an adult who is at least four years older than the complainant. It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was something less than four years. Second, the actor must recklessly disregard the fact that the victim is a minor. The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 18 years of age and be clearly blameworthy under the circumstances.[46]

Paragraph (d)(3) disallows stacking a repeat offender penalty enhancement[47] on top of a penalty enhancement for a prior stalking conviction.

Paragraph (e)(1) cross-references applicable definitions in the RCC.

Paragraph (e)(2) defines "District official" to have the meaning specified for "public official" in D.C. Code § 1-1161.01(47)(A) – (H).

Paragraph (e)(3) defines "safety" means ongoing security from significant intrusions on one's bodily integrity or bodily movement.[48]

Relation to Current District Law. *The revised stalking statute clearly changes current District law in five main ways.*

First, the revised statute limits stalking liability for non-threatening communications to those communications that occur without the complainant's effective consent. Given that current D.C. Code § 22-3133(a)(3) provides for stalking liability when the defendant does not have any subjective awareness of the impact of his or her non-threatening speech, the defendant may be guilty of stalking while never having been

[43] The term "comparable offense" is defined in RCC § 22E-701.
[44] RCC § 22E-701.
[45] *See* D.C. Code § 16-711.
[46] *See* RCC § 22E-206. For example, a 20-year-old who knows that the target of the stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary. On the other hand, a person may engage in pattern of unwelcome communication toward an anonymous person online, without having any reason to suspect that it is operated by a child.
[47] RCC § 22E-606.
[48] *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019) (explaining, "'Fear for safety' means fear of significant injury or a comparable harm...seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community.").

aware that their non-threatening speech was unwanted.[49] In contrast, the revised statute requires that, although the complaining witness does not have to affirmatively notify the actor to cease following, monitoring, falsely personating, or criminal behavior,[50] non-criminal speech does not become a predicate for stalking unless the defendant is at least negligent as to the fact that it is unwelcome. This requirement effectively transforms future communications into a verbal act of ignoring the victim's directive to be left alone and invading the victim's privacy. The revised statute thereby criminalizes behavior that is calculated to torment without reaching other legitimate speech.[51] This change improves the clarity, proportionality, and, perhaps, the constitutionality of the revised statutes.[52]

Second, the revised stalking statute provides as a possible basis of liability that a person negligently causes the targeted person to fear for his or her safety or that of another person, or to suffer significant emotional distress. Current D.C. Code § 22-3133(a) provides as one possible basis of liability that there be a course of conduct that "the person should have known *would cause* a reasonable person in the individual's circumstances" to experience fear for safety or emotional distress.[53] The DCCA has held that this element is satisfied where the defendant's conduct is "objectively frightening

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[49] In Montana, Roman McCarthy received a five-year sentence after mailing two letters to his ex-wife, neither of which she opened but which nonetheless caused her emotional distress. Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 Mich. L. Rev. 607, 608 (2015) (citing *State v. McCarthy*, 980 P.2d 629 (Mont. 1999)).

[50] In these instances, "[r]ecommending that a victim confront or try to reason with the individual who is stalking him or her can be dangerous and may unnecessarily increase the victim's risk of harm." *See Revised Model Code* at page 52.

[51] The "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring). There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. *See State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977). Bill collectors, global warming activists, well-intentioned family members, personal coaches, and religious leaders are among the many persons who may purposely make repeated communications to a specific individual, with messages that they know or should know will cause the hearer significant emotional distress.

[52] The revised statute's prior notification requirement is not itself enough to render the statute constitutional as applied. *See, e.g., State v. Pierce*, 152 N.H. 790 (2005).

[53] In *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017), the Supreme Court of Illinois held that identical language violates due process. The court explained:

> [T]he proscription against "communicat[ions] to or about" a person that negligently would cause a reasonable person to suffer emotional distress criminalizes certain types of speech based on the impact that the communication has on the recipient…Therefore, it is clear that the challenged statutory provision must be considered a content-based restriction because it cannot be justified without reference to the content of the prohibited communications. *See Reed*, 576 U.S. at ——, 135 S.Ct. at 2227; *see also Matal v. Tam*, 582 U.S. ——, ——, 137 S.Ct. 1744, 1764–65, 198 L.Ed.2d 366 (2017) (plurality opinion) (holding that the 'disparagement clause,' which prohibits federal registration of a trademark based on its offensive content, violates the first amendment).
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> *See also State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

and alarming." [54] In contrast, under the revised statute an actor is liable for causing an unintended harm only if: (1) he or she should have been aware of a substantial risk that conduct would cause fear for safety or be distressing to *the complainant* and nevertheless be clearly blameworthy under the circumstances, and (2) the complainant did experience significant emotional distress.[55] This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[56] even though it is highly unusual to provide criminal liability for merely negligent conduct.[57] The lack of any subjective awareness by the accused, however, is offset to some degree by the new requirement that the complainant actually experience harm.[58] Requiring actual harm may also better reflect the Council's prior stated intent that stalking liability be focused on harms to targeted individuals rather than communications and behaviors that are inappropriate but do not actually cause distress.[59] This change improves the clarity, consistency, and proportionality of District statutes and may ensure constitutionality.

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[54] *Atkinson v. United States*, 121 A.3d 780, 786-87 (D.C. 2015); *see also Beachum v. United States*, 189 A.3d 715 (D.C. 2018) (affirming a conviction for negligently causing emotional distress where the defendant's conduct scared the complainant).

[55] In *State v. Ryan*, 969 So. 2d 1268, 1271 (La. Ct. App. 2007), a Louisiana court reversed a stalking conviction that was based on the defendant driving back and forth in front of the Wrights' house several times over the course of a day to collect firewood from a tree trimming crew, causing Mrs. Wright emotional distress. The trial court had found, "There's no prior contact whatsoever between these people; nobody knew one another here," but concluded, "[A]s I've stated before, the suspicious conduct in a neighborhood causes a certain amount of—degree of emotional distress especially with the womenfolk."

[56] RCC § 22E-206.

[57] *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

> Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Staples*, 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F.3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288).

[58] *See Republic of Sudan, Ministry of External Affairs, et al. v. James Owens, et al.*, No. 17-SP-837, 2018 D.C. App. (Sep. 20, 2018) (noting civil liability for negligent infliction of emotional distress requires some limiting principles to avoid "virtually infinite liability"); *Williams v. Baker*, 572 A.2d 1062, 1069 (D.C. 1990) (en banc).

[59] D.C. Code § 22-3131 explains that the current stalking statute aims to protect victims of stalking from grief and violence, as opposed to protecting the public from conduct that is generally alarming or distressing.

> (a) The Council finds that stalking is a serious problem in this city and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm…(b)…The Council recognizes that stalking includes a pattern of

Third, the revised statute limits liability for "monitoring" to in-person monitoring at a person's residence, workplace, or school. Current law defines a course of stalking conduct to include acts to "monitor" and "place under surveillance."[60] These terms are not defined and the DCCA has not interpreted their meaning.[61] In contrast, the revised stalking statute defines "physically monitoring" to mean being in the immediate vicinity of the person's residence, workplace, or school, with intent to detect the person's whereabouts or activities.[62] Limiting monitoring to locations where the specific individual is obliged to be and there is a heightened expectation of privacy avoids prosecutions for "mutual stalking"[63] and may help ensure first amendment protections for conduct in public spaces is not burdened.[64] The revised code punishes indirectly observing or recording someone's location or activities as a separate offense focused on nonconsensual electronic monitoring.[65] This change eliminates unnecessary gaps and overlap between criminal offenses.

Fourth, the revised statute does not specifically authorize multiple convictions for stalking and identity theft based on the same facts. Current D.C. Code § 22-3134(d) provides that, "A person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct." Although there is no case law on point, this language appears to categorically authorize multiple convictions for identity theft and stalking based on the same act or course of conduct. In contrast, the revised stalking statute does not contain such a concurrent sentencing provision and treats identity theft the same as other criminal conduct that may subject a person to stalking liability. There is no apparent reason for specially treating identity theft in this manner, and there may be situations where convictions for identity theft and stalking based on the same acts or course of conduct should merge. The revised code includes a comprehensive merger provision in its general part that applies to charges for identity theft (and other predicate crimes) and stalking arising from the same act or course of

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following or monitoring *the victim*, or committing violent or intimidating acts *against the victim*, regardless of the means.

(Emphasis added.) Notably, behavior that alarms the general public may be separately punished as disorderly conduct in D.C. Code § 22-1321 and corresponding RCC § 22E-4201.

[60] D.C. Code § 22-3132(8)(a).

[61] At least one other state has interpreted monitoring to include a wide variety of relatively conduct, including "keeping track of" an individual's online activity. *See People v. Gauger*, 2-15-0488, 2018 WL 3135087, at *3 (Ill. App. Ct. June 27, 2018) (affirming a stalking conviction where a defendant impersonated the victim's friends on Facebook and downloaded photographs of her family).

[62] RCC § 22E-1801(d).

[63] Consider, for example, a recently divorced couple that continues to attend the same church services, each experiencing significant emotional distress upon seeing the other. If the revised statute included churches, both people may be said to have committed stalking.

[64] Reasonable time, place, and manner restrictions may be imposed upon constitutionally protected speech in some circumstances, and several District statutes reflect these considerations. *See, e.g.*, D.C. Code § 22-1314.02 (regarding obstruction of access to or disruption of medical facilities).

[65] RCC § 22E-1802. *See also* D.C. Code § 22-3531, Voyeurism, which makes it unlawful to secretly monitor a person who is (A) Using a bathroom or rest room; (B) Totally or partially undressed or changing clothes; or (C) Engaging in sexual activity.

conduct.[66] This change improves the proportionality of penalties and the consistency of the code.

Fifth, the revised statute provides a distinct penalty enhancement for having one prior stalking or electronic stalking conviction that increases the penalty by one class. The current D.C Code penalty provisions for stalking include distinct enhancements for a second offense[67] and a third offense.[68] The revised statute retains the second-strike enhancement but eliminates the third-strike enhancement. Instead, the RCC's general repeat offender penalty enhancement may apply when a defendant has two or more prior convictions for a comparable offense.[69] This change improves the consistency and proportionality of District statutes.

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

First, the revised statute specifies that stalking may be committed by falsely personating the complainant or committing Criminal Threats,[70] Theft,[71] Identity Theft,[72] Arson,[73] Criminal Damage to Property,[74] Criminal Graffiti,[75] Trespass,[76] Breach of Home Privacy,[77] or Indecent Exposure.[78] Current D.C. Code § 22-3132(8) defines a "course of conduct" for the stalking statute and provides an extensive list of activities that already appear to be criminal, such as efforts to "threaten,"[79] "[i]nterfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so,"[80] and "[u]se another individual's personal identifying information."[81] The DCCA has not addressed whether the conduct listed in the current stalking statute's definition of a "course of conduct" requires proof equal to corresponding criminal offenses or how such conduct differs from corresponding criminal offenses. The revised statute specifies that only conduct constituting a criminal threat or a specified property offense in the RCC is predicate conduct for stalking, replacing the corresponding general references to threats, property damage, and misuse of personal information in the current statute.[82] This change improves the clarity and consistency of District statutes.

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[66] *See* RCC § 22E-212. A stalking offense may reasonably account for the predicate offenses in some cases and not in others.
[67] D.C. Code § 22-3134(b)(2).
[68] One or more of the convictions must have been jury-demandable. D.C. Code § 22-3134(c).
[69] RCC §§ 22E-606(a) and (b).
[70] RCC § 22E-1204.
[71] RCC § 22E-2101.
[72] RCC § 22E-2205.
[73] RCC § 22E-2501.
[74] RCC § 22E-2503.
[75] RCC § 22E-2504.
[76] RCC § 22E-2601.
[77] RCC § 22E-4205.
[78] RCC § 22E-4206.
[79] D.C. Code § 22-3132(8)(A).
[80] D.C. Code § 22-3132(8)(B).
[81] D.C. Code § 22-3132(8)(C).
[82] For example, "threaten" in the current stalking statute generally corresponds to the criminal threat offense codified at RCC § 22E-1204. "Interfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so," generally corresponds to the offenses of theft

Second, the revised statute provides stalking liability for communications "about" a person only when such communications are otherwise criminal.[83] Current law defines a course of stalking conduct to include both communications to a person and communications about a person without distinction.[84] The current language appears to capture all speech that a person should know would cause an individual to feel alarmed, disturbed, or distressed.[85] However, the current stalking statute also states that it "does not apply to constitutionally protected activity."[86] To resolve ambiguities as to the constitutional scope of the offense, the revised stalking statute more narrowly proscribes speech that is not merely insensitive to the subject of the commentary but also has the intent or effect of tormenting the listener[87] or threatening bodily harm. This approach may be more consistent with the Council's prior stated intent, as there are many distressing communications "about" an individual that do not amount to the "severe intrusions on the victim's personal privacy and autonomy" that the current statute aims to curtail.[88] This change improves the clarity, proportionality, and perhaps the constitutionality of the revised statutes.

(RCC § 22E-2101), unauthorized use of property (RCC § 22E-2102; arson (RCC § 22E-2501), damage to property (RCC § 22E-2503), graffiti (RCC § 22E-2504), trespass (RCC § 22E-2601), and trespass of motor vehicle (RCC § 22E-2602). "Use another individual's personal identifying information" generally corresponds with references to the offenses of forgery (RCC § 22E-2204) and identity theft (RCC § 22E-2205).

[83] Providing stalking liability for other communications "about" a person may criminalize publicizing matters of public concern, or "public shaming." For example, a victim who posts six signs to raise public awareness about the identity of her rapist may be liable for stalking under existing law if that victim knew that it would reasonably cause the perpetrator to suffer emotional distress. *See* Amy Brittain and Maura Judikis, *'The man who attacked me works in your kitchen': Victim of serial groper took justice into her own hands*, Washington Post, January 31, 2019.

[84] D.C. Code § 22-3132(8)(C).

[85] D.C. Code § 22-3133(a)(3)(B). Consider, for example, a person who exposes another person's extramarital affair to several other people. Although the revelation may be disturbing or distressing, it is not the kind of behavior that is typically considered stalking behavior and it is likely protected as free speech. *United States v. Stevens*, 559 U.S. 460, 479 (2010) ("*Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation." (emphasis in original)). Civil tort remedies, including monetary damages and injunctive relief, exist for defamation, invasion of privacy – false light, tortious interference, intentional infliction of emotional distress, and negligent infliction of emotional distress.

[86] D.C. Code § 22-3133(b).

[87] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (upholding a conviction where the defendant published tweets tagging a specific individual; concluding the tweets are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *and People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague); *see also State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

[88] D.C. Code § 22-3131(a); *see also Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) (holding that nonconsensual one-to-one communications that impinge on the privacy rights of the recipient are not protected under the first amendment); *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (invalidating language in the state's stalking statute identical to the District's current law as overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's

Third, the revised statute excludes stalking liability for communications concerning political and public matters to on-duty law enforcement officers, District officials, candidates for elected office, or employees of businesses that serve the public.[89] The current stalking statute provides no specific exceptions for particular types of communications or recipients, but states that the statute "does not apply to constitutionally protected activity."[90] While the DCCA has not directly addressed First Amendment challenges to the stalking statute, the issue has been litigated in D.C. Superior Court in the context of communications to a member of the D.C. Council.[91] To resolve ambiguities as to the constitutional scope of the offense, the revised stalking statute explicitly recognizes an exercise of free speech that is especially common in Washington, D.C.: contacting elected representatives to urge or criticize political action.[92] The revised code provides that expressions of opinion about public issues are not a basis for stalking liability,[93] while cautioning the reader that harassing and insulting one-to-one communications[94] sent after hours may not enjoy the same protection.[95] The exception also applies to employees of businesses that serve the public, who may be the subject of distressing criticism of their goods or services. This change improves the clarity, proportionality, and perhaps the constitutionality of the revised statutes.

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plainly legitimate sweep.); *State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

[89] RCC § 22E-1801(e)(2).

[90] D.C. Code § 22-3133(b).

[91] *See White v. Muller*, 2017 D.C. Super. LEXIS 1, *10 (concluding that 47 text messages that a journalist sent to a Councilmember were not protected because they "do not reference any particular policy or subject matter" and are instead "personal in nature, belittling, and appear to be [an] attempt to intimidate…").

[92] For example, Senator Kamala Harris recently urged her 1.73 million Twitter followers, "Save this number to your favorites: (202) 224-3121. Call your Senators in the morning and tell them to oppose Kavanaugh. Call them in the afternoon. Leave a message at night. Keep making your voice heard." Kamala Harris (@kamalaharris), Twitter (September 7, 2018, 11:02 AM), *https://twitter.com/KamalaHarris/status/1038125246778368001*.

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> '[A]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.' *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988). Speech on 'public issues should be uninhibited, robust, and wide-open…[because such] speech occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.*' Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1215, 179 L. Ed. 2d 172 (2011) (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)) (internal quotation marks omitted).
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> *Gray v. Sobin*, 2014 D.C. Super. LEXIS 1, *11.

[94] In contrast, blocking speech on a public forum constitutes viewpoint discrimination that violates the First Amendment. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018) (disallowing President Trump to block users from his @realdonaldtrump Twitter page).

[95] *See White v. Muller*, 2017 D.C. Super. LEXIS 1, *14 (distinguishing insulting text messages sent to an elected official's phone and critical posts about the official on a public social media page or at a community meeting.); *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act…raise[s] no question under that instrument."); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Fourth, the revised statute more precisely specifies the nature of the social harm in stalking to be a course of conduct that causes "ongoing" safety concerns or emotional distress. The current stalking statute requires proof that the defendant engaged in a "course of conduct," a defined term that refers to conduct "on 2 or more occasions" but is silent as to whether or how the conduct on these occasions is related.[96] The current stalking statute does not define the meaning of "safety" and its definition of "emotional distress"[97] is silent on whether such distress is of an ongoing nature. The DCCA has explained only that each term requires a severe degree of intrusion.[98] To resolve these ambiguities, the revised code defines the terms "safety" and "significant emotional distress" as *ongoing* fear or distress.[99] Because stalking is most commonly understood to mean an obsessive, protracted pursuit,[100] the revised statute's definitions refer to both the degree and the duration of the harm. This change improves the clarity of the revised statute.

Fifth, the revised definition of "financial injury" more precisely defines the types of expenses that will trigger a penalty enhancement. Current D.C. Code § 22-3132(5) includes expenses incurred by the complainant, member of the complainant's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the complainant. In contrast, the revised definition includes expenses incurred by any natural person,[101] but requires that the expenses be reasonably incurred by the criminal conduct. Additionally, the revised definition includes more examples in the non-exhaustive list of costs, such as the cost of clearing a debt and "lost compensation," which includes employment benefits and other earnings. These changes clarify and improve the consistency of District statutes.

Sixth, the revised stalking statute excludes liability for conduct that is authorized by a court order or District statute, regulation, rule, or license;[102] or that is reasonably within the scope of a person's specific, lawful commercial purpose or employment duty. Current D.C. Code § 22-3133(b) contains a general statement that the offense "does not apply to constitutionally protected activity," but otherwise is silent as to whether other activities are excluded. The DCCA has not addressed whether a person's bona fide action pursuant to their occupational duties is excepted from stalking liability.[103] However, to resolve these ambiguities as to the constitutional scope of the offense, the revised statute specifically excludes from stalking liability activities that, despite being distressing, are generally recognized as legitimate occupational activities. Even if the

[96] D.C. Code § 22-3132(8).
[97] D.C. Code § 22-3132(4).
[98] *See Coleman v. United States*, 202 A.3d 1127 (D.C. 2019).
[99] RCC §§ 22E-1801(d)(8) and (9).
[100] Merriam-Webster.com, *"stalking"*, 2018, *available at* https://www.merriam-webster.com/dictionary/stalking (defining stalking as 1 : to pursue by stalking; 2 : to go through (an area) in search of prey or quarry stalk the woods for deer; 3 : to pursue obsessively and to the point of harassment).
[101] Expenses incurred by the court system or another entity are excluded from the calculation of financial injury.
[102] For example, a *pro se* litigant may need to send distressing communications in connection with a pending case. *See, e.g.*, Eugene Volokh, *How I Was a Criminal Defendant in a N.J. Harassment Case*, REASON (August 22, 2019).
[103] Notably, in *White v. Muller*, 2017 D.C. Super. LEXIS 1, the court's analysis did not focus on the fact that Muller had duties as a member of the press so much as the status of White as a Councilmember.

current and RCC stalking statutes' general statements regarding the protection of constitutional activities provide adequate notice that certain activities do not constitute stalking, such statements do not obviously extend to activities beyond the First Amendment.[104] Without a clear exclusion, such legitimate activities may constitute stalking.[105] This change improves the clarity, proportionality and perhaps the constitutionality of the revised offense.

Seventh, the revised statute extends jurisdiction for stalking only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3135(b) states that jurisdiction extends to communications if "the specific individual lives in the District of Columbia" and "it *can be* electronically accessed in the District of Columbia" (emphasis added). The DCCA has not interpreted the meaning of this phrase. The revised statute does not extend jurisdiction to harms where the accused and the complainant and all relevant action occurs outside the District, even though the complainant is a District resident.[106] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[107] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[108] and such an extension, if intended, may be unconstitutional.[109] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Eighth, the revised statute requires the actor engage in a course of conduct negligent as to the fact that it is without the complainant's effective consent. The current D.C. Code does not codify any general defenses and the DCCA has not decided whether an effective consent defense applies to the District's stalking statutes. In contrast, the RCC specifies that a person does not commit a stalking offense when non-criminal conduct was invited, welcomed, or consensual. This change clarifies and may improve the proportionality of the revised statute.

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

First, the revised statute separately criminalizes only conduct that intends or causes another to experience fear for safety or emotional distress. Current D.C. Code § 22-3133(a) specifically refers to conduct that would cause another person to "feel

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[104] Many of the professional activities excepted in the RCC stalking statute, e.g., a private investigator, are not constitutionally protected activities. Notably, the District's current voyeurism statute contains an exception for monitoring by law enforcement. D.C. Code § 22-3531(e)(1).

[105] The intent requirements in the current and revised stalking statutes do not necessarily exempt persons engaged in bona fide, legitimate occupational activities. For example, a process server may need to repeatedly lie in wait near someone's home and workplace to hand-serve that person with a distressing pleading. Similarly, a business owner monitoring an employee's compliance with worker safety laws may cause the person some degree of emotional unrest.

[106] For example, Person A resides in Toronto and sends Person B a threatening text message each time she visits the Canada from her home in Washington, DC. Current law may be understood to mean that A has committed a stalking offense in the District, simply because the messages *can be* accessed here.

[107] *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

[108] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).

[109] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

seriously alarmed, disturbed, or frightened" without defining these terms. Current D.C. Code §22-3133(a) also refers to fear for "safety," undefined, and "emotional distress" which is defined.[110] The DCCA has explained that serious alarm, disturbance, and fright should be understood as mental harms comparable to fear for one's safety or significant emotional distress.[111] Accordingly, the revised stalking statute eliminates a distinct reference to conduct that causes a person to "feel seriously alarmed, disturbed, or frightened" because such results are adequately captured in the statute by other terminology.[112] This change improves the clarity of District statutes.

Second, the revised statute does not specially codify a statement of legislative intent for the stalking offense. Current D.C. Code § 22-3131 codifies a lengthy statement of legislative intent that, e.g., "urges intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences." [113] No other criminal offense in the current D.C. Code contains a comparable statement of legislative intent.[114] Instead, the DCCA routinely uses the Council's legislative documents (e.g., Committee reports) to determine legislative intent. The revised stalking statute relies upon the usual sources of legislative intent rather than a special codified statement. This change improves the clarity and consistency of the revised statutes.

Third, the revised statute applies standardized definitions for the "purposefully" and "with intent" culpable mental states required for stalking liability. The current stalking statute requires that the accused "purposefully engages in a course of conduct," and provides alternative culpable mental state requirements of acting "with the intent" or "[t]hat the person knows" would cause an individual a specified harm. However, the terms "purposely," "with the intent," and "knows," are not defined and it is unclear to what extent that mental state applies to the language that follows. There is no DCCA case law on point. The revised statute uses the RCC's general provisions that define "purposefully" and "with intent"[115] and specify that culpable mental states apply until the

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[110] Under D.C. Code § 22-3132(4), "emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

[111] *Coleman v. United States*, 202 A.3d 1127, 1139 (D.C. 2019),.

[112] *See* Merriam-Webster.com, *"alarmed"*, 2018, *available at* https://www.merriam-webster.com/dictionary/alarmed (defining alarmed as feeling a sense of danger : urgently worried, concerned, or frightened); Merriam-Webster.com, *"disturbed"*, 2018, *available at* https://www.merriam-webster.com/dictionary/disturbed (defining disturbed as showing symptoms of emotional illness); Merriam-Webster.com, *"frightened"*, 2018, *available at* https://www.merriam-webster.com/dictionary/frightened (defining frightened as feeling fear : made to feel afraid).

[113] The statement of legislative intent appears to be based on model language recommended by the National Center for Victims of Crime. *See Revised Model Code*, at page 24.

[114] The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.1.1 specifies that "findings" and "purposes" sections are strongly discouraged because they may create confusion or ambiguity in the law.

[115] RCC § 22E-206. Note that the RCC definition of "with intent" requires that a person "believes that conduct is practically certain to cause the result," which is the same standard as for "knowing." Also, proof that a person acts purposely, consciously desiring to cause the result, will meet the culpable mental state requirement that a person act "with intent" per RCC § 22E-206(f)(3). Consequently, the revised stalking statute's use of "with intent" appears to match the requirements of both "with the intent" and "knows" in current D.C. Code § 22-3133(a)(1) and (a)(2).

occurrence of a new culpable mental state in the offense.[116] These changes clarify and improve the consistency of District statutes.

Fourth, the definition of "safety" in the revised offense clarifies, but does not change, District law. The current statute uses the phrase "fear for safety" but does not define it. In *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019), the District of Columbia Court of Appeals explained, "'Fear for safety' means fear of significant injury or a comparable harm...seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community." This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

[116] RCC § 22E-207(a).

RCC § 22E-1802. Electronic Stalking.

Explanatory Note. *This section establishes the electronic stalking offense and penalty for the Revised Criminal Code (RCC). The offense prohibits patterns of behavior that significantly intrude on a person's privacy or autonomy and threaten a long-lasting impact on a person's quality of life. Together with the revised stalking offense,*[1] *the offense replaces the current stalking offense and related provisions in D.C. Code §§ 22-3131 - 3135.*

Paragraph (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a particular complainant. As applied here, "purposely," a term defined in RCC § 22E-206, requires a conscious desire to engage in a pattern of misconduct. A course of conduct does not have to consist of identical conduct, but the conduct must share an uninterrupted purpose[2] and must consist of one or both of the activities listed in subparagraphs (a)(1)(A) and (a)(1)(B). The behavior must be directed at a specific person, not merely surveilling the general public.

Subparagraph (a)(1)(A) provides that one means of committing electronic stalking is creating an original image or audio recording of a specific individual.[3] The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. The image may be created remotely.[4] Unlike the defined term "sound recording,"[5] the phrase "audio recording" does not require fixation onto a material object, and may include an electronic file. Per the rules of interpretation in RCC § 22E-207, the "purposely" culpable mental state also applies to this element of the offense. That is, the accused must consciously desire to create an image or audio recording.

Subparagraph (a)(1)(B) provides that another means of committing electronic stalking is to access equipment or software that is designed to trace a complainant's movements from one location to another.[6] The term "monitoring equipment or software" is defined in RCC § 22E-701 and means equipment or software with location tracking capability, including global positioning system and radio frequency identification technology. The equipment or software must be installed on property that is "property of another," which is a defined term in RCC § 22E-701.[7] Per the rules of interpretation in

[1] RCC § 22E-1801. [Previously numbered RCC § 22E-1206.]

[2] It is the purpose, not the conduct, that must be uninterrupted. The common purpose does not have to be nefarious. For example, a person might persistently monitor someone with the goal of ensuring the they are not engaging in risking or dangerous behavior.

[3] The offense excludes creating a derivative image (e.g., taking a photograph of a photograph, capturing a screenshot) or hacking into a trove of pre-existing images. A person who takes a derivative image without permission may commit unauthorized use of property, in violation of RCC § 22E-2102. A person who commits a computer hacking crime may be subject to punishment under 18 U.S.C. § 1030. The word "derivative" has its common meaning: "having parts that originate from another source." Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

[4] For example, by using of a fixed camera, aerial drone, or a third person.

[5] RCC § 22E-701.

[6] A parent who overtly or covertly traces their child's movements may be able to avail herself of the parental defense in RCC § 22E-408(a)(1).

[7] Property of another may include a motor vehicle, bicycle, clothing, or accessory.

RCC § 22E-207, the "purposely" culpable mental state also applies to this element. That is, the accused must consciously desire to electronically track the complainant's location.

Paragraph (a)(2) specifies that the person must be negligent as to the fact that the course of conduct is without effective consent. The term "negligent" is defined in RCC § 22E-206 and here requires that the actor should be aware of a substantial risk that the contact[8] is without the complainant's effective consent[9] and that the actor's conduct is clearly blameworthy.[10] The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701.

Paragraph (a)(3) requires that the conduct described in paragraph (a)(1) be committed with either the intent or the effect of causing the victim to experience fear or distress. Under (a)(3)(A), a person commits electronic stalking when they act "with intent to" cause someone fear or significant emotional distress. "Intent" is a defined term in RCC § 22E-206 that, applied here, means the actor was practically certain that his or her conduct would cause someone fear or significant emotional distress. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such fear or significant distress occurred, just that the defendant believed to a practical certainty that such fear or significant emotional distress would result.[11] Under (a)(3)(B), a person commits electronic stalking when they negligently cause fear or significant distress, even if they did not subjectively intend to do so.[12] "Negligently" is a defined term and, applied here, means the actor should be aware of a substantial risk that the pattern of conduct will frighten or significantly distress that particular individual[13] and be clearly blameworthy

[8] It is the contact and not the content that must be without effective consent. Compare, for example, a complainant who notifies the defendant to cease all communication (e.g., "Do not call me again.") with a complainant who asks the defendant to cease certain *offensive* communication (e.g., "Do not call me 'a jerk' again.").

[9] Consider, for example, a person who is told by a love interest's parent, "Never contact my daughter again." If the person reasonable believes that this is the command only of the parent and not the love interest, disobeying the command will not amount to stalking.

[10] For example, a complainant may convey their desire to not be contacted either directly, by telling the person to stop, or indirectly through an attorney, government entity, or a third party. In some instances, blocking electronic communications may also suffice to notify to the accused that further communication is unwelcome. On some communication platforms, electronic blocking is obvious to the person who has been blocked. On other platforms, the user's profile may appear to vanish. On others, the blocking (or muting) is not made apparent to the person who was blocked at all.

[11] Consider, for example, Person A livestreams video footage of Person B singing in her car, in the hopes of causing profound humiliation and emotional distress. Person B is surprised but overall enjoys the attention and praise she receives from the online audience. Person A, nevertheless, may have committed an electronic stalking offense against Person B.

[12] Consider, for example, Person A surreptitiously places a tracking device in Person B's shoe, hoping Person B will not notice, but Person B does notice and becomes afraid. Person A has attempted electronic stalking, if Person B's fear was objectively reasonable.

[13] For example, if the actor reasonably but mistakenly believes that the victim of the electronic stalking conduct will be unbothered by the pattern of conduct, the actor has not acted negligently. RCC § 22E-206. The fact that another reasonable person might find the same consequence alarming is inconsequential.

under the circumstances.[14] Sub-subparagraphs (a)(3)(A)(i) and (a)(3)(B)(i) specify fear of physical harm or confinement to any person[15] is one of two alternative emotional injuries that may establish stalking liability. The term "safety" is defined in subsection (f) and refers to ongoing security from significant intrusions on one's bodily integrity or bodily movement. Sub-subparagraphs (a)(3)(A)(ii) and (a)(3)(B)(ii) also provide that "significant emotional distress" is a second type of emotional injury that may establish electronic stalking liability. "Significant emotional distress" is a defined term that means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. The suffering must rise significantly above the level of uneasiness, nervousness, unhappiness or the like which is commonly experienced in day to day living.[16]

Subsection (b) clarifies that not all patterns of behavior that have the intent or effect of causing significant emotional distress are subject to prosecution.

Paragraph (b)(1) specifies that a person does not commit an electronic stalking offense if they are acting with the permission of one of the people depicted in an audio recording.[17]

Paragraph (b)(2) specifically excludes from electronic stalking liability persons who are engaged in activities that are vital to a free press and to the fair administration of justice. A journalist, law enforcement officer, professional investigator (licensed or unlicensed), attorney, process server, *pro se* litigant, or compliance investigator who is acting within the reasonable scope of their professional duties or court obligations does not commit an electronic stalking offense.[18]

Subsection (c) provides that where conduct is of a continuing nature, each 24-hour period constitutes one occasion.[19]

Subsection (d) provides the penalties for the offense. [*See* Fourth Draft of Report #41.]

Paragraph (d)(2) authorizes four penalty enhancements. If one or more of the enhancements is alleged and proven beyond a reasonable doubt,[20] the penalty classification is increased by one class. Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" indicates that the accused is strictly liable with respect to whether the enhancement applies.

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[14] RCC § 22E-206.

[15] This includes fear that the stalker will physically harm the victim, a member of the victim's family, or a stranger.

[16] RCC § 22E-701; *Coleman v. United States*, 202 A.3d 1127, 1145 (D.C. 2019).

[17] For example, a person does not commit the offense by recording his or her own phone call. A conference calling company does not commit the offense by recording a call at the direction of the moderator. And, a security company does not commit the offense by hosting surveillance footage on its website at the request of the property owner.

[18] The revised statute anticipates that some legal pleadings, correspondence and negotiations will cause significant emotional distress. Determining whether conduct exceeds the scope of a person's duties as an attorney or unrepresented litigant is a fact-sensitive inquiry.

[19] *See also Whylie v. United States*, 98 A.3d 156, 158 (D.C. 2014) (finding that all 1400 phone calls that occurred before entry of a restraining order constituted one course of conduct, while all 800 phone calls that occurred after the entry of the restraining order constituted another).

[20] RCC § 22E-605 requires that an enhancement be charged and proven beyond a reasonable doubt.

Subparagraph (d)(2)(A) authorizes an enhancement if the defendant violated a court order or condition of release prohibiting or restricting contact with the complainant by committing the electronic stalking offense. The accused is strictly liable with respect to whether a court order or condition of release prohibited or restricted contact with the complainant. A good faith belief that the order was expired or vacated is not a defense. The term "court order" includes any judicial directive, oral or written, that restricts contact with the stalking victim.[21] A condition of release may be imposed by a court or by the United States Parole Commission.[22]

Subparagraph (e)(2)(B) authorizes an enhancement for any person who has a prior stalking or electronic stalking conviction within ten years of the instant offense. This includes any criminal offense against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of stalking or electronic stalking under RCC § 22E-1801 and 1802.[23]

Subparagraph (d)(2)(C) authorizes an enhancement for electronic stalking conduct that results in expenses amounting to more than $5,000. "Financial injury" is a defined term that includes all reasonable monetary costs, debts, or obligations that were sustained as a result of the electronic stalking.[24] This provision does not affect the sentencing court's discretion with respect to ordering restitution. The government's decision to not seek a penalty enhancement does not preclude the government from seeking reimbursement under the restitution statute.[25]

Subparagraph (d)(2)(D) authorizes a minor victim enhancement, which includes two distinct culpable mental states. First, the actor is strictly liable as to whether he or she is an adult who is at least four years older than the complainant. It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was something less than four years. Second, the actor must recklessly disregard the fact that the victim is a minor. The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 18 years of age and be clearly blameworthy under the circumstances.[26]

Paragraph (d)(3) disallows stacking a repeat offender penalty enhancement[27] on top of a penalty enhancement for a prior stalking conviction.

Paragraph (e)(1) cross-references applicable definitions in the RCC.

Paragraph (e)(2) defines "safety" to mean ongoing security from significant intrusions on one's bodily integrity or bodily movement.[28]

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[21] Examples include stay away orders, civil protection orders, family court orders, civil injunctions, and consent decrees. The order must clearly address prohibitions on contact with the specified person. An order to stay away from a particular location, without reference to the specific individual will not suffice.

[22] Regarding the legal authority to impose such conditions, see *Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014).

[23] The term "comparable offense" is defined in RCC § 22E-701.

[24] RCC § 22E-701.

[25] *See* D.C. Code § 16-711.

[26] *See* RCC § 22E-206. For example, a 20-year-old who knows that the target of the stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary.

[27] RCC § 22E-606.

Relation to Current District Law. *The revised electronic stalking statute clearly changes current District law in five main ways.*

First, the revised code separately punishes electronic stalking as a stand-alone offense. Current D.C. Code § 22-3132 defines a course of stalking conduct to include acts that "monitor" and "place under surveillance."[29] However, these terms are not defined and the DCCA has not interpreted their meaning.[30] In contrast, the revised code distinguishes between "physically monitoring"[31] in violation of the revised stalking statute[32] and electronically stalking in violation of RCC § 22E-1802. Different exclusions from liability and penalties apply to each offense.[33] This change improves the clarity and proportionality of the revised offenses and eliminates unnecessary gaps and overlap in District law.

Second, the revised stalking and electronic stalking statutes provide as a possible basis of liability that a person negligently causes the targeted person to fear for his or her safety or that of another person, or to suffer significant emotional distress. Current D.C. Code § 22-3133(a) provides as one possible basis of liability that there be a course of conduct that "the person should have known *would cause* a reasonable person in the individual's circumstances" to experience fear for safety or emotional distress (emphasis added).[34] The DCCA has held that this element of stalking is satisfied where the

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[28] *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019) (explaining, "'Fear for safety' means fear of significant injury or a comparable harm…seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community.").

[29] D.C. Code § 22-3132(8)(a).

[30] At least one other state has interpreted monitoring to include a wide variety of relatively nonintrusive conduct, including "keeping track of" an individual's online activity. *See People v. Gauger*, 2-15-0488, 2018 WL 3135087, at *3 (Ill. App. Ct. June 27, 2018) (affirming a stalking conviction where a defendant impersonated the victim's friends on Facebook and downloaded photographs of her family).

[31] RCC § 22E-701 defines "physically monitoring" to mean being in the immediate vicinity of the person's residence, workplace, or school, with intent to detect the person's whereabouts or activities.

[32] RCC § 22E-1801. [Previously numbered RCC § 22E-1206.]

[33] *Compare* RCC §§ 22E-1801(b)(2) *with* 1802(b)(2). *Compare* RCC §§ 22E-1801(e)(1) *with* 1802(e)(1).

[34] In *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017), the Supreme Court of Illinois held that identical language violates due process. The court explained:

> [T]he proscription against "communicat[ions] to or about" a person that negligently would cause a reasonable person to suffer emotional distress criminalizes certain types of speech based on the impact that the communication has on the recipient…Therefore, it is clear that the challenged statutory provision must be considered a content-based restriction because it cannot be justified without reference to the content of the prohibited communications. *See Reed*, 576 U.S. at ——, 135 S.Ct. at 2227; *see also Matal v. Tam*, 582 U.S. ——, ——, 137 S.Ct. 1744, 1764–65, 198 L.Ed.2d 366 (2017) (plurality opinion) (holding that the 'disparagement clause,' which prohibits federal registration of a trademark based on its offensive content, violates the first amendment).

See also People v. Morocho, 1-15-3232, 2019 WL 2438619 (Ill. App. Ct. June 10, 2019); *State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

defendant's conduct is "objectively frightening and alarming."[35] In contrast, under the revised statute an actor is liable for causing an unintended harm only if: (1) they should have been aware of a substantial risk that conduct would cause fear for safety or be distressing to *the complainant* and nevertheless conducted themselves in a manner that is clearly blameworthy under the circumstances, and (2) the complainant did experience significant emotional distress.[36] This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[37] even though it is highly unusual to provide criminal liability for merely negligent conduct.[38] The broad scope of the offense due to the lack of any requirement of subjective awareness by the accused, however, is offset to some degree by the new requirement that the complainant actually experience harm.[39] Requiring actual harm may also better reflect the Council's prior stated intent that stalking liability be focused on harms to targeted individuals rather than communications and behaviors that are inappropriate but do not actually cause distress.[40]

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[35] *Atkinson v. United States*, 121 A.3d 780, 786-87 (D.C. 2015); *see also Beachum v. United States*, 189 A.3d 715 (D.C. 2018) (affirming a conviction for negligently causing emotional distress where the defendant's conduct scared the complainant).

[36] In *State v. Ryan*, 969 So. 2d 1268, 1271 (La. Ct. App. 2007), a Louisiana court reversed a stalking conviction that was based on the defendant driving back and forth in front of the Wrights' house several times over the course of a day to collect firewood from a tree trimming crew, causing Mrs. Wright emotional distress. The trial court had found, "There's no prior contact whatsoever between these people; nobody knew one another here," but concluded, "[A]s I've stated before, the suspicious conduct in a neighborhood causes a certain amount of—degree of emotional distress especially with the womenfolk."

[37] RCC § 22E-206.

[38] *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

> Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Staples*, 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F.3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288).

[39] *See Republic of Sudan, Ministry of External Affairs, et al. v. James Owens, et al.*, No. 17-SP-837, 2018 D.C. App. (Sep. 20, 2018) (noting civil liability for negligent infliction of emotional distress requires some limiting principles to avoid "virtually infinite liability"); *Williams v. Baker*, 572 A.2d 1062, 1069 (D.C. 1990) (en banc).

[40] D.C. Code § 22-3131 explains that the current stalking statute aims to protect victims of stalking from grief and violence, as opposed to protecting the public from conduct that is generally alarming or distressing.

> (a) The Council finds that stalking is a serious problem in this city and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm…(b)…The Council recognizes that stalking includes a pattern of

This change improves the clarity, consistency, and proportionality of District statutes and may ensure constitutionality.

Third, the revised statutes do not specifically authorize multiple convictions for stalking and identity theft based on the same facts. Current D.C. Code § 22-3134(d) provides that, "A person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct." Although there is no case law on point, this language appears to categorically authorize multiple convictions for identity theft and stalking (or conduct constituting electronic stalking) based on the same act or course of conduct. In contrast, the revised stalking and electronic stalking statutes do not contain such a concurrent sentencing provision. There is no apparent reason for specially treating identity theft in this manner, and there may be situations where convictions for identity theft, stalking, and electronic stalking based on the same acts or course of conduct should merge.[41] The revised code includes a comprehensive merger provision in its general part that applies to charges for identity theft and stalking arising from the same act or course of conduct.[42] This change improves the proportionality of penalties and the consistency of the code.

Fourth, the revised statute provides a distinct penalty enhancement for having one prior stalking or electronic stalking conviction that increases the penalty by one class. The current D.C Code penalty provisions for stalking include distinct enhancements for a second offense[43] and a third offense.[44] The revised statute retains a repeat offender enhancement in the statute for when a person has one prior but eliminates the additional third-strike enhancement. Instead, the RCC's general repeat offender penalty enhancement may apply when a defendant has two or more prior convictions for a comparable offense.[45] This change improves the consistency and proportionality of District statutes.

Fifth, the revised offense includes a one-party consent exclusion that is largely consistent with the District's wiretapping law. The current stalking statutes in D.C. Code §§ 22-3131 – 3135 do not carve out an exclusion from liability for a person who records their own communications with others. Although the District is a one-party consent

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following or monitoring *the victim*, or committing violent or intimidating acts *against the victim*, regardless of the means.

(Emphasis added.) Notably, behavior that alarms the general public may be separately punished as disorderly conduct in D.C. Code § 22-1321 and corresponding RCC § 22E-4201.

[41] RCC § 22E-2205 (Identity Theft) prohibits possessing personal identifying information without effective consent. Personal identifying information, such as a credit card number, may be obtained by physically or electronically monitoring someone.

[42] *See* RCC § 22E-212. A stalking offense may reasonably account for the predicate offenses in some cases and not in others.

[43] D.C. Code § 22-3134(b)(2) increases the maximum penalty 5 times, from 12 months to 5 years when a person has one prior conviction within the last 10 years.

[44] D.C. Code § 22-3134(c) increases the maximum penalty 10 times, from 12 months to 10 years when a person has two prior convictions within the last 10 years, one or more of the convictions must have been jury-demandable.

[45] RCC § 22E-606.

jurisdiction,[46] self-recording may be punished as stalking if the actor knows it would reasonably cause the other party to suffer emotional distress.[47] In contrast, the revised electronic monitoring statute excepts conduct where there was one-party consent. This change corrects a misalignment of the stalking and wiretapping laws, a misalignment that is often overlooked or misunderstood by the general public.[48] The revised statute improves the clarity, consistency, and proportionality of the revised code.

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

First, the revised statute more precisely specifies the nature of the social harm in electronic stalking to be a course of conduct that causes "ongoing" safety concerns or emotional distress. The current stalking statute requires proof that the defendant engaged in a "course of conduct," a defined term that refers to conduct "on 2 or more occasions" but is silent as to whether or how the conduct on these occasions is related.[49] The current stalking statute does not define the meaning of "safety" and its definition of "emotional distress"[50] is silent on whether such distress is of an ongoing nature. The DCCA has explained only that each term requires a severe degree of intrusion.[51] To resolve these ambiguities, the revised statute defines the terms "safety" and "significant emotional distress" as *ongoing* fear or distress.[52] Because stalking is most commonly understood to mean an obsessive, protracted pursuit,[53] the revised statutes' definition refers to both the degree and the duration of the harm. This change improves the clarity of the revised statutes.

Second, the revised definition of "financial injury" more consistently and precisely defines the types of expenses that will trigger a penalty enhancement. Current D.C. Code § 22-3132(5) includes all expenses incurred by the complainant, member of the complainant's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the complainant. It is unclear, however, whether there are any reasonableness limitations under the current statute to what may be considered financial injury.[54] To resolve this ambiguity, the revised definition includes

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[46] *See* D.C. Code § 23-542(b)(2); *see also, e.g.*, Jena McGregor, *Can you record your boss at work without him or her knowing?*, WASHINGTON POST (August 14, 2018) (concerning Omarosa Manigualt Newman's recordings of President Trump in the White House).
[47] *See* D.C. Code § 3133(a)(2)(C).
[48] *See, e.g.*, Benjamin Freed, *Under DC Law, Ryan Lizza Didn't Need to Ask Scaramucci's Permission to Record Phone Call*, THE WASHINGTONIAN (August 10, 2017).
[49] D.C. Code § 22-3132(8).
[50] D.C. Code § 22-3132(4).
[51] *See Coleman v. United States*, 202 A.3d 1127, 1139 (D.C. 2019).
[52] RCC §§ 22E-1801(d)(8) and (9).
[53] Merriam-Webster.com, *"stalking"*, 2018, *available at* https://www.merriam-webster.com/dictionary/stalking (defining stalking as 1 : to pursue by stalking; 2 : to go through (an area) in search of prey or quarry stalk the woods for deer; 3 : to pursue obsessively and to the point of harassment).
[54] E.g., it is unclear whether the purchase of a new house or hiring a bodyguard would be included under the current statute, insofar as it may be "incurred as a result of the stalking" but not be objectively reasonable.

expenses incurred by any natural person,[55] but requires that the expenses be reasonably incurred by the criminal conduct. Additionally, the revised definition includes more examples in the non-exhaustive list of costs, such as the cost of clearing a debt and "lost compensation," which includes employment benefits and other earnings. These changes clarify and improve the consistency of District statutes.

Third, the revised penalty enhancement requires $5,000 in financial injury. Current D.C. Code § 22-3134(b)(4) specifies that the maximum term of imprisonment for a stalking offense may be increased from one year to five years, if the person "caused more than $2,500 in financial injury." The revised code resets the dollar value thresholds for property offenses to include $500, $5,000, $50,000, and $500,000.[56] To improve the consistency of the revised stalking and electronic stalking offenses, the threshold for financial injury has been doubled from $2,500 to $5,000.

Fourth, the revised stalking and electronic stalking statutes exclude liability for conduct that is reasonably within the scope of a person's journalistic, law enforcement, legal, or other specified duties. Current D.C. Code § 22-3133(b) contains a general statement that the offense "does not apply to constitutionally protected activity," but otherwise is silent as to whether other activities are excluded. The DCCA has not addressed whether a person's bona fide action pursuant to their occupational duties is excepted from stalking liability.[57] To resolve these ambiguities as to the constitutional scope of the offense, the revised statutes specifically exclude from stalking and electronic stalking liability activities that, despite being distressing, are generally recognized as legitimate occupational activities. Even if the current and RCC stalking statutes' general statements regarding the protection of constitutional activities provide adequate notice that certain activities do not constitute stalking, such statements do not obviously extend to activities beyond the First Amendment.[58] Without a clear exclusion, such legitimate activities may constitute stalking or electronic stalking.[59] This change improves the clarity, proportionality and perhaps the constitutionality of the revised offenses.

Fifth, the revised statute limits jurisdiction for stalking and electronic stalking only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3135(b) states that jurisdiction extends to communications if "the specific individual lives in the District of Columbia" and "it *can be* electronically accessed in the District of Columbia" (emphasis added). The DCCA has not interpreted the meaning of this phrase. The revised statute does not extend jurisdiction to harms where the accused and the complainant and all relevant action occurs outside the District, even though the

[55] Expenses incurred by the court system or another entity are excluded from the calculation of financial injury.

[56] *See, e.g.*, RCC §§ 22E-2101 (Theft), 22E-2301 (Extortion), 22E-2401 (Possession of Stolen Property).

[57] Notably, in *White v. Muller*, 2017 D.C. Super. LEXIS 1, the court's analysis did not focus on the fact that Muller had duties as a member of the press so much as the status of White as a Councilmember.

[58] Many of the professional activities excepted in the RCC stalking statute, e.g., a private investigator, are not constitutionally protected activities. Notably, the District's current voyeurism statute contains an exception for monitoring by law enforcement. D.C. Code § 22-3531(e)(1).

[59] The intent requirements in the current and revised stalking statutes do not necessarily exempt persons engaged in bona fide, legitimate occupational activities. For example, a photojournalist may approach and photograph a defendant or victim leaving a courthouse, knowingly exacerbating their distress. Similarly, a business owner monitoring an employee's compliance with worker safety laws may knowingly cause the person some degree of emotional unrest.

complainant is a District resident.[60] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited by courts to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[61] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[62] and such an extension, if intended, may be unconstitutional.[63] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Sixth, the revised statute requires the actor engage in a course of conduct negligent as to the fact that it is without the complainant's effective consent. The current D.C. Code does not codify any general defenses and the DCCA has not decided whether an effective consent defense applies to the District's stalking statutes. In contrast, the RCC specifies that a person does not commit a stalking offense when non-criminal conduct was invited, welcome, or consensual. This change clarifies and may improve the proportionality of the revised statute.

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

First, the revised statute separately criminalizes only conduct that intends or causes another to experience fear or emotional distress. Current D.C. Code § 22-3133(a) specifically refers to conduct that would cause another person to "feel seriously alarmed, disturbed, or frightened" without defining these terms. Current D.C. Code §22-3133(a) also refers to fear for "safety," undefined, and "emotional distress," which is defined.[64] The DCCA has explained that serious alarm, disturbance, and fright should be understood as mental harms comparable to fear for one's safety or significant emotional distress.[65] Accordingly, the revised stalking and electronic stalking statutes eliminate a distinct reference to conduct that causes a person to "feel seriously alarmed, disturbed, or frightened" because such results are adequately captured in the statute by other terminology.[66] This change improves the clarity of District statutes.

Second, the revised statutes do not specially codify a statement of legislative intent for the stalking and electronic stalking offenses. Current D.C. Code § 22-3131 codifies a lengthy statement of legislative intent that, e.g., "urges intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal

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[60] For example, Person A resides in Toronto and sends Person B a threatening text message each time she visits the Canada from her home in Washington, DC. Current law may be understood to mean that A has committed a stalking offense in the District, simply because the messages *can be* accessed here.

[61] *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

[62] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).

[63] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

[64] Under D.C. Code § 22-3132(4), "emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

[65] *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019).

[66] *See* Merriam-Webster.com, *"alarmed,"* 2018, *available at* https://www.merriam-webster.com/dictionary/alarmed (defining alarmed as feeling a sense of danger : urgently worried, concerned, or frightened); Merriam-Webster.com, *"disturbed,"* 2018, *available at* https://www.merriam-webster.com/dictionary/disturbed (defining disturbed as showing symptoms of emotional illness); Merriam-Webster.com, *"frightened,"* 2018, *available at* https://www.merriam-webster.com/dictionary/frightened (defining frightened as feeling fear : made to feel afraid).

consequences."[67] No other criminal offense in the current D.C. Code contains a comparable statement of legislative intent.[68] Instead, the DCCA routinely uses the Council's legislative documents (e.g., Committee reports) to determine legislative intent. The revised stalking and electronic stalking statutes rely upon the usual sources of legislative intent rather than a special codified statement. This change improves the clarity and consistency of the revised statutes.

Third, the revised statutes apply standardized definitions for the "purposely" and "with intent" culpable mental states required for stalking and electronic stalking liability. The current stalking statute requires that the accused "purposely engages in a course of conduct," and provides alternative culpable mental state requirements of acting "with the intent" or "[t]hat the person knows" would cause an individual a specified harm. However, the terms "purposely," "with the intent," and "knows," are not defined and it is unclear to what extent that mental state applies to the language that follows. There is no DCCA case law on point. The revised statute uses the RCC's general provisions that define "purposefully" and "with intent"[69] and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[70] These changes clarify and improve the consistency of District statutes.

Fourth, the definition of "safety" in the revised offense clarifies, but does not change, District law. The current statute uses the phrase "fear for safety" but does not define it. In *Coleman v. United States*,[71] the District of Columbia Court of Appeals explained, "'Fear for safety' means fear of significant injury or a comparable harm...seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community." This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

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[67] The statement of legislative intent appears to be based on model language recommended by the National Center for Victims of Crime. *See Revised Model Code*, at page 24.

[68] The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.1.1 specifies that "findings" and "purposes" sections are strongly discouraged because they may create confusion or ambiguity in the law.

[69] RCC § 22E-206. Note that the RCC definition of "with intent" requires that a person "believes that conduct is practically certain to cause the result," which is the same standard as for "knowing." Also, proof that a person acts purposely, consciously desiring to cause the result, will meet the culpable mental state requirement that a person act "with intent" per RCC § 22E-206(f)(3). Consequently, the revised stalking statute's use of "with intent" appears to match the requirements of both "with the intent" and "knows" in current D.C. Code § 22-3133(a)(1) and (a)(2).

[70] RCC § 22E-207(a).

[71] 202 A.3d 1127 (D.C. 2019).

RCC § 22E-1803. Voyeurism.

Explanatory Note. *This section establishes the voyeurism offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits observing or recording a person who is privately undressing or engaging in sexual conduct without permission.*[1] *The offense replaces the current misdemeanor voyeurism offense in D.C. Code § 22-3531.*[2]

Subsection (a) specifies the requirements of first degree voyeurism, which requires creating a recording of private behavior without permission.

Paragraph (a)(1) specifies that the person must act at least knowingly.[3] Subparagraphs (a)(1)(A) and (a)(1)(C) prohibit capturing visual images, whereas subparagraph (a)(1)(B) prohibits capturing visual images or audio recording. The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. The image may be created remotely.[4] Unlike the defined term "sound recording,"[5] the phrase "audio recording" does not require fixation onto a material object and may include an electronic file. The image or audio recording must be creating an original depiction of a specific individual.[6]

Subparagraph (a)(1)(A) prohibits capturing images of a someone's exposed private areas[7] or a person in their underwear.[8] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are capturing an image of one the itemized areas.

Subparagraph (a)(1)(B) prohibits capturing images or audio recordings of a person while they are engaging in a sexual act or masturbation. The term "sexual act" is defined in RCC § 22E-701. Unlike the electronic stalking offense,[9] it is not a defense that one party consented to the recording. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are capturing an image or audio recording of one the itemized activities.

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[1] *See Valenzuela-Castillo v. United States*, 180 A.3d 74, 76-77 (D.C. 2018) (explaining that the voyeurism statute's legislative aim is to "prohibit persons from spying on their neighbors, guests, tenants, or others in places and under circumstances where there is an expectation of privacy, that is, in a home, bedroom, bathroom, changing room, and similar locations and under one's clothing.")

[2] The felony voyeurism offense in D.C. Code § 22-3531(f)(2) is replaced by RCC § 22E-1804, Unauthorized Disclosure of a Sexual Recording.

[3] "Knowingly" is defined in RCC § 22E-206.

[4] For example, by using of a fixed camera, aerial drone, or a third person.

[5] RCC § 22E-701.

[6] The offense excludes creating a derivative image (e.g., taking a photograph of a photograph, capturing a screenshot) or hacking into a trove of pre-existing images. A person who takes a derivative image without permission may commit unauthorized use of property, in violation of RCC § 22E-2102. A person who commits a computer hacking crime may be subject to punishment under 18 U.S.C. § 1030. The word "derivative" has its common meaning: "having parts that originate from another source." Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

[7] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman. It excludes the chest of a transmasculine man.

[8] The words "nude" and "undergarment-clad" modify each word in the list that follows. Consider, for example, a person who angles a camera to photograph underneath a woman's dress or skirt.

[9] RCC § 22E-1802.

Subparagraph (a)(1)(C) prohibits capturing images of someone while they are urinating or defecating. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are capturing an image of urination or defecation.

Paragraph (a)(2) requires that the person act without the complainant's effective consent to being recorded. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant has not given effective consent to being recorded.[10]

Paragraph (a)(3) uses the term "in fact" to specify that there is no culpable mental state required as to whether a person in the complainant's circumstances would reasonably expect that such a recording would not occur. A person does not commit an offense where it is objectively unreasonable to expect privacy under the circumstances.[11] Whether a person's expectation of privacy is reasonable depends on all of the surrounding circumstances,[12] including the time, place,[13] the complainant's manner of dress,[14] the complainant's body position,[15] and efforts to communicate that privacy is expected.[16] A person may know that they will be observed and nevertheless reasonably expect to not be recorded.[17]

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[10] Consider, for example, a couple of exhibitionists who are having sex against a window that is visible from the street. A person does not commit second degree voyeurism by photographing the exhibition unless it is proven that the person is practically certain that the couple does not want to be recorded.

[11] Consider, for example, a couple of exhibitionists who are having sex against a window that is visible from the street. A person does not commit second degree voyeurism by photographing the exhibition unless it is proven that the couple has a reasonable expectation of privacy.

[12] This language is meaningfully distinct from the phrasing "while the person is *in a place* where he or she would have a reasonable expectation of privacy," that appears in other state statutes. *See State v. Glas* (2002) 147 Wash.2d 410, 54 P.3d 147 (holding that the voyeurism statute, as written, does not cover intrusions of privacy in public places and, thus, does not prohibit "upskirt" photography).

[13] *See, e.g., State v. Frost*, 634 N.E.2d 272 (Ohio Ct. App. 1994) (holding a defendant was not guilty of voyeurism by acts of observing bikini-clad women on public beach with binoculars from his vehicle, while engaging in masturbation).

[14] For example, a person who exposes their undergarment-clad buttocks by sagging their pants in a public place does not have a reasonable expectation that their buttocks will not be photographed.

[15] The more public the place and the more likely it is that people will take photographs there, the more conscientious and personally responsible one must be about what they do and do not expose. For example, a woman who exposes her underwear by sitting on the steps of the Lincoln Memorial knowing many people are photographing the historic landmark does not have a reasonable expectation that her underwear will not be photographed. *Compare,* Justin Jouvenal and Miles Parks, *Voyeur charges dropped against photographer at Lincoln Memorial*, WASHINGTON POST (October 9, 2014) *with* Perry Stein, *Man charged with voyeurism after allegedly filming under a girl's dress at Whole Foods*, WASHINGTON POST (October 1, 2019).

[16] For example, a person may post a "Do Not Disturb" sign on a hotel room door or call out "Occupied!" when a bathroom door will not lock, or put a sock on their doorknob to tell their roommate to come back later.

[17] For example, a person may not expect that a sexual partner will observe their body but not record it. *See also* Derek Hawkins, *Former Playmate sentenced for Snapchat body-shaming of naked woman at gym*, WASHINGTON POST (May 25, 2017).

Subsection (b) specifies the requirements of second degree voyeurism, which requires directly observing[18] private behavior without permission. The word "directly" includes observations made with the aid of a device such as binoculars, a telescope, or any nonrecording electronic device to enhance their ability to see. It does not include viewing an image that another person recorded.

Paragraph (b)(1) specifies that the person must act at least knowingly. "Knowingly" is a defined term[19] and applied here means that the person must be practically certain that they are looking at the complainant engaging in the specified private behavior. Paragraph (b)(1) prohibits observing a person's exposed private areas[20] or a person in their underwear.[21] It also prohibits observing a person while they are engaging in a sexual act or masturbation or while they are urinating or defecating. The term "sexual act" is defined in RCC § 22E-701.

Paragraph (b)(2) requires that the person act without the complainant's effective consent to being observed. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant has not given effective consent to being viewed.

Paragraph (b)(3) uses the term "in fact" to specify that there is no culpable mental state required as to whether a person in the complainant's circumstances would reasonably expect that such an observation would not occur. A person does not commit an offense where it is objectively reasonable to expect privacy under the circumstances.[22] Whether a person's expectation of privacy is reasonable depends on all of the surrounding circumstances, including the time, place, the complainant's manner of dress,[23] the complainant's body position,[24] and efforts to communicate that privacy is expected.[25]

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[18] The word "observe" includes direct and indirect observations. For example, watching a livestream of a video feed, without recording it, is sufficient.

[19] "Knowingly" is defined in RCC § 22E-206.

[20] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman. It excludes the chest of a transmasculine man.

[21] The words "nude" and "undergarment-clad" modify each word in the list that follows. Consider, for example, a person who angles a camera to photograph underneath a woman's dress or skirt.

[22] Consider, for example, a couple of exhibitionists who are having sex against a window that is visible from the street. A person does not commit third degree voyeurism by watching the exhibition unless it is proven that the couple has a reasonable expectation of privacy.

[23] For example, a person who exposes their undergarment-clad buttocks by sagging their pants in a public place does not have a reasonable expectation that their buttocks will not be viewed.

[24] For example, a woman who exposes her underwear by sitting on the steps of the Lincoln Memorial at a time when many people are photographing the historic landmark does not have a reasonable expectation that her underwear will not be seen. *Compare*, Justin Jouvenal and Miles Parks, *Voyeur charges dropped against photographer at Lincoln Memorial*, WASHINGTON POST (October 9, 2014) *with* Perry Stein, *Man charged with voyeurism after allegedly filming under a girl's dress at Whole Foods*, WASHINGTON POST (October 1, 2019).

[25] For example, a person may post a "Do Not Disturb" sign on a hotel room door or call out "Occupied!" when a bathroom door will not lock, or put a sock on their doorknob to tell their roommate to come back later.

Subsection (c) provides the penalty for each gradation of the revised offense. [*See* Fourth Draft of Report #41.] Paragraph (c)(3) specifies that the penalty classification may be increased by one penalty class if it is proven beyond a reasonable doubt[26] that the defendant was reckless as to the fact that the complainant was a minor. The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 18 years of age and be clearly blameworthy under the circumstances.[27]

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

Relation to Current District Law. *The revised voyeurism offense clearly changes current District law in eight main ways.*

First, the revised voyeurism offense punishes observing a person's nude or undergarment-clad private area without their permission. Current D.C. Code § 22-3531(d) makes it unlawful to electronically record a person's private area without express and informed consent, under circumstances in which that person has a reasonable expectation of privacy. However, the statute does not provide any liability for merely observing a private area, without recording, unless the victim is also using the bathroom, undressing, or engaging in sexual activity. Accordingly, a person who strategically positions himself or angles a mirror to look up the skirts of passersby does not commit an offense. In contrast, the revised statute criminalizes all upskirting behavior that violates a reasonable expectation of privacy, even if the accused does not produce a recorded image. This change may eliminate an unnecessary gap in law.[28]

Second, the revised statute does not require that an observation be covert. Current D.C. Code § 22-3531(b) requires that the accused act with "the purpose of secretly or surreptitiously observing" the complainant. This requirement may exclude liability for a person who overtly views a complainant by intruding into a bedroom, peering over a bathroom stall,[29] or lifting a dress.[30] In contrast, the revised offense punishes any hostile observation that occurs without the complainant's effective consent, if the victim has a

[26] RCC § 22E-605.

[27] *See* RCC § 22E-206. For example, a 20-year-old who knows that the target of the stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary. On the other hand, a person may engage in pattern of unwelcome communication toward an anonymous person online, without having any reason to suspect that it is operated by a child.

[28] *But see Valenzuela-Castillo v. United States*, 180 A.3d 74, 85 (D.C. 2018) (J. Easterly, *dissenting*) (reasoning that the legislative history of the voyeurism statute indicates that it was not meant to encompass simple viewing).

[29] The DCCA has held that a person "occupies a hidden observation post" in violation of the statute when he furtively sneaks into a bathroom and looks underneath a stall, even if the victim is then able to see him. *See Valenzuela-Castillo v. United States*, 180 A.3d 74, 75 (D.C. 2018); *but see* Judge Easterly's dissent (reasoning that one does not "occupy" a "hidden" "post" by merely changing their body position in a public space). However, the court has not addressed whether a person who more overtly bursts into a bathroom or bedroom commits the offense.

[30] *See, e.g.,* Dana Hedgpeth, *Fairfax police seek man they say chased woman, tried to take photos by lifting her skirt*, WASHINGTON POST (September 12, 2019). Chasing a woman and lifting her skirt would also be punished as offensive physical contact under RCC § 22E-1205.

reasonable expectation of privacy under the circumstances. This change eliminates an unnecessary gap in law and clarifies the revised offense.

Third, the revised voyeurism and unauthorized disclosure of a sexual recording[31] offenses establish four distinct penalties for attempting, observing, recording, and distributing. Current D.C. Code § 22-3531 includes only two sentencing gradations. Under current law, a person is subject to up to one year in jail if they "occupy a hidden observation post or to install or maintain a peephole, mirror, or any electronic device for the purpose of secretly or surreptitiously observing" the complainant using the bathroom, undressing, or engaging in sexual activity.[32] A person is subject to the same one-year penalty if they electronically record those observations[33] or create a recording of the complainant's private area.[34] And, a person is subject to a maximum penalty of five years in prison if they disseminate or attempt to disseminate any such recording "directly or indirectly, by any means."[35] In contrast, the revised statute punishes creating a recording more severely than observations alone and relies on the general part's common definition of attempt[36] and penalty for an attempt[37] to define and penalize attempts the same as for other revised offenses.[38] Distribution of a recording is punished as unauthorized disclosure of a sexual recording, under RCC § 22E-1804. This change improves the consistency and proportionality of the revised offense.

Fourth, the revised offense includes an enhancement for recklessly committing voyeurism against a child. When the current voyeurism statute was enacted, the Council considered including a penalty enhancement for offenses against any person who is under 18 years of age.[39] At least one advocacy group recommended deferring the decision about enhancements to the Criminal Code Reform Commission.[40] The revised statute includes an enhancement but requires proof that the defendant was reckless as to the fact that the victim was underage.[41] A person who is practically certain that they are

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[31] RCC § 22E-1804.
[32] D.C. Code §§ 22-3531(b) and (f)(1).
[33] D.C. Code §§ 22-3531(c) and (f)(1).
[34] D.C. Code §§ 22-3531(d) and (f)(1).
[35] D.C. Code § 22-3531(f)(2).
[36] RCC § 22E-301(a).
[37] RCC § 22E-301(c)(1).
[38] Under the revised statute, using an observation post, peephole, or mirror is punished only if it amounts to attempted third degree voyeurism and attempting to disseminate a recording is punished as attempted first degree voyeurism. *See, e.g., State v. Million*, 63 Ohio App. 3d 349 (1989) (explaining, although evidence that defendant used hand-held mirror to look underneath stall did not support voyeurism conviction if adjacent stall was unoccupied, it might have supported attempted voyeurism conviction if the following stall was occupied).
[39] *Freundel v. United States*, 146 A.3d 375, 382 (D.C. 2016) (explaining, "[T]wo versions of the statute that were then under consideration…one version provided for different penalties depending on whether the victim was a minor or an adult.").
[40] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 175, testimony of Richard Gilbert on behalf of the District of Columbia Association of Criminal Defense Attorneys ("We believe the decision to punish such a crime more severely if the victim is a minor should be deferred as a subject to be considered by the proposed Reform Commission.").
[41] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 175, testimony of Richard Gilbert on

observing or recording a child inflicts a more egregious social harm than a person who invades the privacy of an adult.[42] Similar enhancements appear in other RCC offenses against persons, such as sexual assault and related provisions in Chapter 13. This change improves the consistency and proportionality of the revised offenses.

Fifth, the revised statute applies the culpable mental state definitions in the RCC's general part. None of the mental states in the current statute are defined in the D.C. Code.[43] In contrast, the revised statute specifies a defined mental state for every conduct, result, and circumstance element of the offense. First, the revised statute requires that the person know—that is, be practically certain—that they are observing, recording, or distributing an image or audio recording of the complainant without the complainant's effective consent. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[44] Second, the revised statute requires that a person who distributes an image or audio recording be at least reckless as to the fact that the image or audio recording was created unlawfully. Courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[45] Third, the revised statute holds an observer or recorder strictly liable with respect to whether the complainant has a reasonable expectation of privacy under the circumstances and holds a distributer strictly liable with respect to whether the conduct that created the image or recording amounts to second degree voyeurism. Although applying strict liability to statutory elements that

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behalf of the District of Columbia Association of Criminal Defense Attorneys ("It is not at all clear to us that such penalty enhancements based upon the age or other characteristic of the victim are [sic.] must necessarily be enshrined in statutes as opposed to factors to be considered at sentencing. However, we join PDS in believing that any such enhancements should be limited to situations in which that characteristic is foreseeable and/or contributes to the commission of the crime.").

[42] Some instances of voyeurism against children—i.e. possession and distribution of images that are sexual in nature—will overlap and merge with the offenses of possession of an obscene image of a minor and trafficking an obscene image of a minor. *See* RCC §§ 22E-214, 22E-1805, and 22E-1806.

[43] Current D.C. Code § 22-3531(b) specifies that a person who occupies a hidden observation post or who installs or maintains a mirror, peephole, or electronic device, must act with the purpose of secretly or surreptitiously observing another person. Current D.C. Code § 22-3531(c) does not specify a culpable mental state for a person who records another person engaging in private behavior. Current D.C. Code § 22-3531(d) specifies that a person who records another person's private area must capture the image intentionally, however, it is unclear whether the person must also intend to violate the subject's reasonable expectation of privacy or express and informed consent. Finally, current D.C. Code § 22-3531(f)(2) specifies that a person is guilty of a felony if they distribute or attempt to distribute a recording that they know or should know was taken in violation subsection (b), (c), or (d).

[44] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[45] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

distinguish innocent from criminal behavior is strongly disfavored by courts[46] and legal experts[47] for any non-regulatory crimes, it may be difficult or impossible in many cases to prove that a distributer knew the elements of second degree voyeurism or that an observer or recorder was practically certain that the victim reasonably expected privacy. This change improves the clarity and consistency of the revised offense.

Sixth, the revised offense narrows the exclusions from liability in four ways. First, D.C. Code § 22-3531(e)(1) excludes liability for "[a]ny lawful law enforcement, correctional, or intelligence observation or surveillance." The revised offense does not include an exclusion for law enforcement officers or investigators and instead relies on the general defense for execution of a public duty.[48] This change improves the consistency and proportionality of the revised offense. Second, D.C. Code § 22-3531(e)(2) excludes liability for "[s]ecurity monitoring in one's own home." This phrasing broadly exempts any person who places covert security cameras in a bathroom or guestroom and records guests engaging in private, sexual activity. In contrast, under the revised statute, offense liability attaches in any location in which the victim's expectation of privacy is reasonable under the circumstances.[49] Third, D.C. Code § 22-3531(e)(3) excludes liability for "[s]ecurity monitoring in any building where there are signs prominently displayed informing persons that the entire premises or designated portions of the premises are under surveillance." In contrast, under the revised statute, signage is one of many factors that the factfinder may consider when determining whether the complainant's expectation of privacy is reasonable under the circumstances. Fourth, D.C. Code § 22-3531(e)(4) excludes liability for "[a]ny electronic recording of a medical procedure which is conducted under circumstances where the patient is unable to give consent." This phrasing broadly exempts any person who records a patient, even if it is done without the doctor's permission and even if the patient expressly objects to the recording before being rendered unable to do so.[50] In contrast, the revised code includes an emergency health professional defense[51] which is available only to doctors and their

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

[47] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[48] RCC § 22E-402.

[49] For example, using a "nanny cam" to observe a house sitter in one's own kitchen may not amount to voyeurism whereas using that same camera to observe that same house sitter in one's own shower may constitute an offense.

[50] For example, a rogue hospital employee could install a hidden camera in an operating room.

[51] RC § 22E-408(a)(3).

designees during an in which it would be too difficult to obtain consent. These changes eliminate unnecessary gaps in law.

Seventh, the revised code defines the term "effective consent."[52] Current D.C. Code §§ 22-3531(c)(1) and (d) require that the person act without the victim's "express and informed consent." This phrase is not defined by statute and District case law has not interpreted its meaning in the context of the voyeurism statute. The RCC definition of "effective consent" does not require that consent be express or informed, only that it not be induced by physical force, an explicit or implicit coercive threat, or deception.[53] This change improves the proportionality of the revised offense.

Eighth, the revised statute partially clarifies the appropriate unit of prosecution for the voyeurism offense. Although is not obvious from the organization of the D.C. Code whether the voyeurism offense is intended to protect individual victims or to ensure public order,[54] the DCCA has explained that its purpose is to protect the victim of the observation or recording.[55] The RCC classifies voyeurism as an offense against persons, clarifying that the statute permits separate punishments for separate victims[56] and does not permit separate punishments for each copy of an image or for each recipient. Other unit of prosecution issues[57] are not addressed in the statutory language or accompanying commentary but may be addressed in the RCC's general part.[58] This change clarifies and improves the proportionality the revised offense.

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

First, unlike current D.C. Code §§ 22-3531(b)(2) and (c)(1)(B), the revised offense does not separately criminalize observations of a person who is "[t]otally or partially undressed or changing clothes." The word "undressed" and the phrase

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[52] RCC § 22E-701.

[53] "Consent" is also a defined term in RCC § 22E-701.

[54] Current D.C. Code § 22-3531 appears in Subtitle I of Title 22 of the D.C. Code, which is titled simply, "Criminal Offenses." The offense is sandwiched between property offenses such as trespass, repealed public order offenses such as vagrancy, and general provisions such as use of "District of Columbia" by certain persons and the fines for criminal offenses.

[55] *See Freundel v. United States*, 146 A.3d 375, 379 (D.C. 2016) (stating, "The provision by its terms is directed at protecting individual privacy.")

[56] *See Freundel v. United States*, 146 A.3d 375, 384 (D.C. 2016); *see also State v. Mason*, 410 P.3d 1173 (Wash. Ct. App. 2018).

[57] For example, creating a single recording of multiple people together in the nude may constitute a single offense or multiple offenses. *See Freundel v. United States*, 146 A.3d 375, 382-83 (D.C. 2016) ("Because each victim was recorded undressing separately, we need not decide whether multiple punishments would be permissible based on a single recording depicting more than one victim at the same time."). Watching two people engage in a single sex act together may constitute a single offense or multiple offenses. *See, e.g., State v. Diaz-Flores*, 148 Wash. App. 911 (2009). Taking multiple photos of the same person in succession or taking multiple videos of the same conduct from different angles may constitute a single offense or multiple offenses. *See, e.g., State v. Boyd*, 137 Wash. App. 910 (2007) (finding two photographs of the same victim did not establish multiple acts of voyeurism but rather a continuing course of conduct). Recording one person over multiple days may constitute a single offense or multiple offenses. *See, e.g.*, RCC §§ 22E-1801(c) and 1802(c) which provide, "Where conduct is of a continuing nature, each 24-hour period constitutes one occasion."

[58] [Further Commission recommendations are forthcoming.]

"changing clothes" are not defined in the current statute and District case law has not addressed their meaning. Broadly construed, "undressed" may include a person who has removed their clothing but concealed their body using a blanket, robe, or towel. Broadly construed, "changing clothes" may include changing outerwear. The revised statute clarifies that photographing a person who is sleeping under the covers or changing their jacket does not amount to voyeurism.[59] This change improves the clarity of the revised offense.

Second, unlike current D.C. Code §§ 22-3531(b)(2) and (c)(1)(B), the revised offense does not separately criminalize observations of a person who is "using a bathroom or restroom." The phrase—which is commonly used as a euphemism for urinating or defecating—is not defined in the statute and District case law has not addressed its meaning. Broadly construed, the phrase may capture conduct that is not voyeuristic in nature.[60] The revised statute prohibits recording a person who is using the bathroom only if that person's nude or undergarment-clad private areas are exposed or if the person is urinating or defecating. Other private bathroom behaviors that involve sexual conduct, nudity, or the removal of clothing are separately protected under the other subsections of the revised code.

Third, the revised statute defines the term "image" and specifies that the creation of a derivative image does not amount to voyeurism. D.C. Code § 22-3531(d)(1) makes it unlawful to "capture an image" of a person's private area without permission. The term "image" is not defined in the statute and District case law has not addressed its meaning. It is unclear whether "capture an image" has the same meaning as "electronically record" in § 22-3531(c)(1). It is also unclear whether "image" includes both refers to both "visual" and "aural images."[61] It is also unclear whether the term "image" includes a "series of images"[62] or a derivative image (e.g., a photograph of a photograph, a screenshot). To resolve this ambiguity, the revised code defines the term "image" to mean a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. This definition broadens the offense by including images that are captured without an electronic device (such as those captured using a mechanical camera) but narrows the offense by excluding images that are hand-drawn or illustrated on an electronic device (such as a tablet). The definition also clarifies that a film or video constitutes a single image, not a series of images. And, the statutory language specifies that derivative images are not included. This change clarifies the revised offense and improves the consistency of the revised offenses.

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[59] A person who places a recording device in a changing room but only captures people changing clothes without exposing their private areas or underwear may nevertheless commit attempted voyeurism. *See generally* RCC § 22E-301.

[60] E.g., posting a bathroom selfie that shows a stranger in the background applying makeup, filming a hallway that shows people entering and exiting a bathroom, creating an audio recording of a person singing in the shower or talking to herself. *See, e.g.*, Charles V. Bagli and Vivian Yee, *Robert Durst of HBO's 'The Jinx' Says He 'Killed Them All,'* NEW YORK TIMES (March 15, 2015) (discussing documentary filmmakers recording a suspected murderer muttering inculpatory statements to himself in the bathroom).

[61] *See* § 22-3531(a)(1). The revised offense does not criminalize creating an "aural image" of a person's private areas or of a person undressing.

[62] *See* D.C. Code § 22-3531(f)(2).

Fourth, the revised statute defines the type of sexual activity that may not be viewed or recorded without permission. D.C. Code §§ 22-3531(b)(3) and (c)(1)(C) use the term "sexual activity," without defining it. District case law has not addressed its meaning. Broadly construed, the term may include conduct short of penetration, such as kissing or caressing. The revised code defines the term "sexual act" to include direct contact between one person's genitalia and another person's genitalia, mouth, or anus.[63] And, the revised voyeurism offense prohibits observing or recording a person who is engaging in a sexual act or masturbation. This change improves the clarity and consistency of the revised offense.

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

The revised offense is prosecuted by the United States Attorney for the District of Columbia ("USAO"). Current D.C. Code § 22-3531(g) grants prosecutorial authority to the Attorney General for the District of Columbia. However, the DCCA has held that the offense must be prosecuted by USAO under the Home Rule Act.[64]

[63] RCC § 22E-701.

[64] *See In re Perrow*, 172 A.3d 894 (D.C. 2017) (explaining that voyeurism is distinguishable from "Peeping Tom" conduct punished as disorderly conduct, because it requires intent to observe, record, or photograph).

RCC § 22E-1804. Unauthorized Disclosure of a Sexual Recording.

Explanatory Note. *This section establishes the unauthorized disclosure of a sexual recording offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits distributing sexually explicit images of a person without permission. The offense replaces the non-consensual pornography chapter in D.C. Code §§ 22-3051 – 3057 and the felony voyeurism offense in D.C. Code § 22-3531(f)(2).*[1]

Paragraph (a)(1) specifies that a person must act at least knowingly with respect to a distribution or display. "Knowingly" is a defined term[2] and, applied here, means that the person must be practically certain that they are distributing, displaying, or making available online an image or audio recording to a third person who is not the complainant.[3] The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[4] The phrase "make accessible on an electronic platform" does not require proof that the material was actually accessed or viewed.[5] The word "user" excludes technical administrators that have access to all files hosted on the website.[6]

Subparagraph (a)(1)(A) prohibits dissemination of images. The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format. Per the rules of interpretation in RCC § 22E-207, the actor must know—that is, be practically certain—that what they are distributing or displaying is an image of the complainant's nude genitals or anus; or nude or undergarment-clad[7] pubic area, buttocks, or female breast[8] below the top of the areola.

Subparagraph (a)(1)(B) prohibits dissemination of images or audio recordings. The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. Unlike the defined term "sound recording,"[9] the phrase "audio recording" does not require fixation onto a material object and may include an electronic file. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that what they are distributing or displaying is an image or audio recording of the complainant engaging in or submitting to

[1] The misdemeanor voyeurism offense is replaced by RCC § 22E-1803, Voyeurism.
[2] RCC § 22E-206.
[3] *See Roberts v. United States*, 17-CF-431, 2019 WL 4678119, at *6 (D.C. Sept. 26, 2019) (holding a defendant must have disclosed a sexual image to a third party).
[4] Consider, for example, a person who brings a computer to a repairman for service, with an agreement or understanding that the repairman will not browse and open his private files.
[5] For example, a person may commit an offense by publishing the image on their own public website, on a peer-to-peer social networking platform, or on the dark web, even if no one else ever views the page.
[6] For example, a person who uploads an image of the complainant to their own cloud account, without granting access to any other user, does not commit an offense, even though a cloud service administrator or information technology specialist may have access to it.
[7] Although some swimwear, formal wear, or other garments may be more revealing than some underwear, the word "undergarment" does not include such garments.
[8] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman. It excludes the chest of a transmasculine man.
[9] RCC § 22E-701.

a sexual act, masturbation, or sadomasochistic abuse.[10] The terms "sexual act" and "sadomasochistic abuse" defined in RCC § 22E-701.

Paragraph (a)(2) requires that the actor engage in conduct without the complainant's effective consent. A person does not commit an offense by distributing an image of herself or by distributing an image with permission from the person who is depicted. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant does not give effective consent to disseminating the image or recording.

Paragraph (a)(3) specifies two alternative requirements for liability.

Subparagraph (a)(3)(A) imposes liability where an actor and the complainant reached an explicit or implicit agreement that the image or audio recording would not be shared.[11] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that such an agreement applied at the time of the distribution or display. Subparagraph (a)(3)(A) requires an intent to alarm[12] or to sexually abuse, humiliate, harass, or degrade the complainant,[13] or an intent to receive financial gain as a result of the distribution or display. "Intent" is a defined term in RCC § 22E-206 that, applied here, means the actor was practically certain that his or her conduct would cause one of the specified harms to the complainant or result in a financial benefit. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such harm or financial benefit occurred, just that the defendant believed to a practical certainty that it would result.

Subparagraph (a)(3)(B) imposes liability where a person obtains the image or recording by any of four unlawful means as defined in the RCC: voyeurism, theft, unauthorized use of property, or extortion. For example, a person who obtains a photograph by stealing a DVD, hacking a cloud server, texting an image from someone else's phone, or secretly recording a consensual encounter, commits a new offense by sharing the image or audio recording with others. Subparagraph (a)(3)(B) uses the term "in fact" to specify that there is no culpable mental state required as to whether the defendant's conduct constitutes a predicate offense. Subparagraph (a)(3)(B) does not require intent to harm or gain financially.

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[10] Consider, for example, a woman who, upon noticing her boyfriend has a DVD with another woman's name on it, steals the DVD and asks her best friend to watch it for her. Because the woman was merely suspicious, and not practically certain, about the contents, she has not committed unauthorized disclosure of a sexual recording. *But see* RCC § 22E-2101, Theft.

[11] *See* Report on Bill 20-903, the "Criminalization of Non-Consensual Pornography Act of 2014," Council of the District of Columbia Committee on the Judiciary and Public Safety (November 12, 2014) at Page 5 ("Explicit warning not to share a sexual image is not necessary to create an understanding…within the context of a romantic or similarly close relationship where it is the norm to send these images between the parties... [However,] such an understanding does not exist where a sexual image is sent unsolicited without any prior agreement or understanding in place.").

[12] Per its ordinary meaning, "alarm" includes efforts to "disturb," "excite," or "strike with fear." Merriam-Webster.com, *"alarm"*, 2020, *available at* https://www.merriam-webster.com/dictionary/alarm.

[13] For example, a person may commit an offense by posting a homemade sex tape out of revenge after a bad breakup, with intent to harass or humiliate their ex-partner.

Subsection (b) establishes two exclusions from liability for the unauthorized disclosure of a sexual recording offense. Paragraph (b)(1) provides that the statute does not apply to any licensee[14] under the Communications Act of 1934, such as a radio, television, or phone service provider.[15] Paragraph (b)(2) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16]

Subsection (c) establishes an affirmative defense for the innocent display or distribution of a prohibited image.[17] The actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[18] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. The recipient of the display or distribution must be someone that the actor reasonably believes to be a "law enforcement officer, prosecutor, attorney, school administrator;" or someone with a responsibility for the health, welfare, or supervision of one of the people depicted or involved in the creation of the image or recording.

Subsection (d) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.] Paragraph (d)(2) establishes a penalty enhancement for mass dissemination or publication online.

Subsection (e) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised unauthorized disclosure of a sexual recording statute clearly changes current District law in eleven main ways.*

First, the revised statute criminalizes disseminating images that were obtained unlawfully by the actor. The current non-consensual pornography offenses require that "[t]here was an agreement or understanding between the person depicted and the person disclosing that the sexual image would not be disclosed." [19] This requirement does not provide liability for distribution of an image that was taken without the victim's knowledge or permission.[20] In contrast, the revised statute provides liability for

[14] The term "licensee" is defined in paragraph (e)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[15] *See* D.C. Code § 22-2201(d).

[16] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[17] Per RCC § 22E-201, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

[18] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

[19] D.C. Code §§ 22-3052(a)(2) and 22-3053(a)(2).

[20] For example, a person could snoop through a lover's smartphone, discover nude photographs from another suitor, steal a screenshot, and post it online without incurring any criminal liability. *See, e.g.*, *State v. VanBuren*, 214 A.3d 791 (Vt. 2019). Or, a person could hack into a celebrity's cloud server and publish their nude photographs online, subject only to federal computer crime laws. *See* 18 U.S.C. § 1030; *see also* Laura M. Holson, *Hacker of Nude Photos of Jennifer Lawrence Gets 8 Months in Prison*, NEW YORK TIMES (August 30, 2018). This conduct does not amount to stalking (RCC § 22E-1801) or electronic stalking (RCC § 22E-1802), unless it occurs on multiple occasions with the intent or effect of causing

dissemination of images or audio recordings that were illegally obtained by specified means. Exposing intimate images or audio recordings against a person's will fundamentally deprives that person of her right to privacy.[21] A victim whose image has been disseminated without consent suffers the same privacy violation and negative consequences of exposure, regardless of the disseminator's objective.[22] The revised statute punishes exploiting a stranger as severely as exploiting a former partner.[23] This change eliminates an unnecessary gap in law.

Second, the revised statute specifies more precisely which types of audio and visual recordings are protected. First, the current non-consensual pornography offense prohibits distribution of "one or more sexual images,"[24] whereas the current felony voyeurism offense prohibits the distribution of any "image or series of images or sounds or series of sounds" of a "private area."[25] In contrast to the current non-consensual pornography statute, the revised statute recognizes a right to privacy in sexual audio recordings,[26] that is more consistent with the scope of the revised voyeurism statute.[27] Second, the current non-consensual pornography offense defines the term "sexual image" to mean "a photograph, video, or other visual recording,"[28] whereas the current felony voyeurism statute does not define the term "image" but does require that the image be electronic.[29] It is unclear whether the current non-consensual pornography offense requires the image to be an electronic recording. To resolve this ambiguity, the revised statute applies the RCC's definition of "image,"[30] which excludes drawings and illustrations, consistent with the current non-consensual pornography offense. These changes improve the clarity and consistency of the revised offense and reduce unnecessary gaps in liability.

Third, the revised statute applies a more consistent definition of the type of sexual content that is protected. First, the current non-consensual pornography offense defines

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significant emotional distress. This conduct does not amount to voyeurism (RCC § 22E-1803), unless it surreptitiously recorded by the same person who is distributing it. This conduct does not amount to extortion (RCC § 22E-2301), unless there is some demand for action in exchange for the recordings.

[21] *People v. Austin*, 123910, 2019 WL 5287962, at *4 (Ill. Oct. 18, 2019).

[22] *Id*. at *19.

[23] *See People v. Austin*, 123910, 2019 WL 5287962, at *4 (Ill. Oct. 18, 2019) ("[C]riminal liability here does not depend on "whether the image was initially obtained with the subject's consent; rather, it is the absence of consent to the image's distribution that renders the perpetrator in violation of the law.").

[24] D.C. Code §§ 22-3052(a), 22-3053(a), and 22-3054(a).

[25] D.C. Code § 22-3531.

[26] For example, such recordings may be of sexual encounters and masturbation (e.g., phone sex), consistent with the current voyeurism offense.

[27] The revised offense does not refer to "one *or more* images" or to a "*series of* images" or "*series of* sounds," to avoid confusion with respect to the appropriate unit of prosecution. A series of images taken in rapid succession may constitute a single course of conduct whereas a compilation of images taken weeks or months apart may be appropriately charged as separate counts. *See, e.g., State v. Boyd*, 137 Wash. App. 910 (2007) (finding two photographs of the same victim on the same day did not establish multiple acts of voyeurism but rather a continuing course of conduct).

[28] D.C. Code § 22-3051(7). (Emphasis added.)

[29] D.C. Code §§ 22-3531(c)(1) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record…").

[30] RCC § 22E-701.

the term "sexual image" to include a depiction of "an *unclothed* private area"[31] and defines "private area" to mean "the genitals, anus, or pubic area of a person, or the *nipple* of a developed female breast, *including the breast of a transgender female*."[32] The current voyeurism statute defines "private area" differently as "the naked *or undergarment-clad* genitals, pubic area, anus, or *buttocks*, or female *breast below the top of the areola*."[33] In contrast to the current non-consensual pornography statute, the revised statute recognizes a privacy right warranting criminal sanction in the more expansive list of depictions of the human body described in the voyeurism statute. Second, the current non-consensual pornography statute protects depictions of "sexual conduct," including masturbation and "[s]adomasochistic sexual activity for the purpose of sexual stimulation,"[34] whereas the current felony voyeurism statute protects depictions of "sexual activity"[35] or "using a bathroom or restroom,"[36] without defining those terms. The meaning of the term "sexual activity" is unclear and may include conduct short of penetration, such as kissing or sadomasochistic contact. Similarly, the term "using a bathroom" is unclear and could include activities such as grooming, blowing one's nose, or applying makeup. Resolving these ambiguities, the revised statute includes depictions of a "sexual act," as defined in RCC § 22E-701,[37] masturbation, and sadomasochistic activity, that is more consistent with the detailed list in the current non-consensual pornography statute. The revised statute does not include depictions of urination or defecation unless they depict the complainant's nude or undergarment-clad private areas. These changes improve the clarity and consistency of the revised offense and reduce unnecessary gaps in liability.

Fourth, the revised statute clarifies the type of intended harm required for disclosure of an image that was lawfully obtained. The current nonconsensual pornography statutes in D.C. Code §§ 22-3052(a)(3) and 22-3053(a)(3) require a showing that the accused distributed the sexual image "with the intent to harm the person depicted" or for financial gain. The term "harm" is defined in the statute to mean "any injury, whether physical or nonphysical, including psychological, financial, or reputational injury."[38] To resolve these ambiguities, the revised statute more precisely requires intent to "alarm or sexually abuse, humiliate, harass, or degrade the complainant." These injuries are required in other RCC offenses.[39] This change improves the consistency of the revised statutes.

Fifth, the revised offense does not include a categorical exclusion from liability for commercial images. D.C. Code § 22-3055(a)(2) provides that the non-consensual pornography chapter shall not apply to "[a] person disclosing or publishing a sexual image that resulted from the voluntary exposure of the person depicted in a public or

[31] D.C. Code § 22-3051(7). (Emphasis added.)
[32] D.C. Code § 22-3051(4). (Emphasis added.)
[33] D.C. Code § 3531(a)(2). (Emphasis added.)
[34] D.C. Code §§ 22-3051(6); 22-3101(5).
[35] D.C. Code §§ 22-3531(b)(3) and (c)(1)(C).
[36] D.C. Code §§ 22-3531(b)(1) and (c)(1)(A).
[37] The revised code defines the term "sexual act" to include direct contact between one person's genitalia and another person's genitalia, mouth, or anus.
[38] D.C. Code § 22-3051(2).
[39] See RCC § 22E-701 (defining "sexual act" and "sexual contact").

commercial setting." This blanket exception appears to eliminate any protection for people who agree to participate in a commercial recording, even if the recording was for a limited audience.[40] In contrast, the revised statute provides liability for commercial images if the other elements of the offense, including a reasonable expectation of privacy, are met. The revised offense recognizes that effective consent as to distribution may be limited and puts the privacy rights of models and sex workers on par with other citizens. This change eliminates an unnecessary gap in law.

Sixth, the revised offense does not punish attempts to commit unauthorized distribution as severely as a completed offense. The current felony voyeurism statute applies the same five-year penalty to a person who "distributes or disseminates, or attempts to distribute or disseminate."[41] Although the current non-consensual pornography offense requires this element, the statute nonetheless punishes "making a sexual image available for viewing even if the image is not actually viewed by anyone other than the defendant and the person depicted in the image."[42] In contrast, the revised statute requires that the person "distribute or display" the image to another person who actually views it. Attempts to distribute an image would remain criminal, but subject to a lower penalty. The revised statute relies on the general part's common definition of attempt[43] and penalty for an attempt[44] to define and penalize attempts the same as for other revised offenses. This change improves the consistency[45] and proportionality of the revised offense.

Seventh, under the revised statute, a person is not liable for redistributing an image that was disclosed by someone else. The current felony voyeurism statute makes it unlawful to distribute images "that the person knows or has reason to know were taken in violation of" the voyeurism statute.[46] The current non-consensual pornography chapter makes it unlawful to distribute an image "obtained from a third party or other source…with conscious disregard that the sexual image was obtained as a result of" a violation of the non-consensual pornography statute.[47] In contrast, the revised statute punishes redistribution only if the person acted as a co-conspirator or as an accomplice.[48]

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[40] *See, e.g.*, Katie Van Syckle, *22 Women Say They Were Exploited by Porn Producers: Their lawsuit, a rare look into an opaque industry, seeks $22 million in damages,* NEW YORK TIMES (Aug. 29, 2019); Adeel Hassan and Katie Van Syckle, *Porn Producers Accused of Fooling Women Get Sex Trafficking Charges: Young women say that they responded to ads seeking models and were tricked into performing*, NEW YORK TIMES (Oct. 13, 2019).

[41] D.C. Code § 3531(f)(2).

[42] *See* D.C. Code §§ 22-3051 – 3054; *Roberts v. United States*, 17-CF-431, 2019 WL 4678119, at *6 (D.C. Sept. 26, 2019) (requiring that the defendant "exhibit" the image to a third party but not requiring that the third party see it).

[43] RCC § 22E-301(a).

[44] RCC § 22E-301(c)(1).

[45] Similarly, in the revised criminal threats offense, the verb "communicates" is intended to be broadly construed, encompassing all speech and other messages that are received and understood by another person. RCC § 22E-1204. In *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), the DCCA recognized that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

[46] D.C. Code § 22-3531(f)(2).

[47] D.C. Code § 22-3054(a).

[48] *See* RCC §§ 22E-210 and 22-302.

The revised statute's language avoids punishing a person who shares an image as severely as the person who is responsible for the original privacy intrusion.[49] This change improves the consistency and proportionality of the revised statutes.

Eighth, the revised offense expands liability for publication online. First, the current felony voyeurism punishes an actor who "distributes or disseminates, or attempts to distribute or disseminate" an image that was obtained through voyeurism.[50] The terms "distribute" and "disseminate" are not defined in the statute and District case law has not addressed their meaning. Second, the current non-consensual pornography statutes specify that it is unlawful to make pornographic material "available for viewing by uploading to the Internet"[51] and define "Internet" to mean "an electronically available platform by which sexual images can be disseminated to a wide audience."[52] The term "wide audience" is not defined in the statute and District case law has not addressed its meaning. In contrast, the revised statute clarifies that uploading material to any online forum that is accessible by a user other than the complainant or defendant is sufficient, even if no other person actually accesses or views it and the electronic platform is not accessible by a "wide audience." This change simplifies the revised offense and avoids litigation over whether an online forum is available to a "wide audience." It also improves the logical organization of the revised statute by making unauthorized disclosure of a sexual recording a lesser-included version of the enhanced offense.

Ninth, the revised statute establishes a penalty enhancement for large-scale unauthorized distribution of images. Under the current felony voyeurism statute, distribution of sexual images obtained through voyeurism is punishable by up to five years of in prison, irrespective of audience size.[53] Under the current non-consensual pornography statutes, distribution of sexual images obtained by consent is punishable by either 180 days in jail[54] or three years in prison,[55] depending on how widespread the disclosure is. Publication to six or more people or to the internet is punishable by three years. In contrast, the revised statute includes two penalty levels through the enhancement in subsection (d)(2), consistent with the current non-consensual pornography chapter's penalty distinction between distribution to a few people versus distribution to a large audience or online forum. This change improves the consistency and proportionality of the revised statutes.

Tenth, the revised statute excludes liability for a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act. The current nonconsensual pornography statute, D.C. Code § 22-

[49] Consider, for example, Classmate A posts a partially-nude locker room photograph of a student on Twitter, commenting, "How ugly! She should be ashamed!" Classmate B retweets it, commenting, "Wow, what an invasion of privacy! YOU should be ashamed!" Under current law, Classmates A and B face the same punishment.
[50] D.C. Code § 22-3531(f)(2).
[51] D.C. Code § 22-3051(5).
[52] D.C. Code § 22-3051(3). The definition includes "social media" and "smartphone applications" but excludes "text messages." In some cases, this may be a distinction without a difference. Many social media platforms and smartphone applications have a direct messaging feature that is virtually identical to Short Message Service.
[53] D.C. Code § 22-3531(f)(2).
[54] D.C. Code § 22-3052(b).
[55] D.C. Code § 22-3053(b).

3055(b), provides that: "Nothing in this chapter shall be construed to impose liability on an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person." However, the current non-consensual pornography offenses do not include an exception for other telecommunications services provider such as radio stations, television broadcasters, and phone service providers, and the current felony voyeurism offense does not include an exception for any service provider. In contrast to these statutes' limited or absent exclusions for commercial service providers, the revised statute makes clear that there is no criminal liability for a company or employee who merely facilitates the transmission of an image or sound at a user's request. This change improves the consistency and proportionality of the revised offense.

Eleventh, the revised code defines and uses the term "effective consent" instead of using other, undefined references to "consent." The current nonconsensual pornography offenses, through D.C. Code §§ 22-3052(a)(1), 22-3053(a)(1), and 22-3054(a)(1) require that "the person depicted did not *consent* to the disclosure of the sexual image." (Emphasis added.) The current voyeurism offense, in D.C. Code §§ 22-3531(c)(1) and (d), requires that the person act without the victim's "express and informed consent." The terms "consent" "express consent" and "informed consent" are not defined in the D.C. Code and District case law has not interpreted their meaning in the context of the non-consensual pornography and voyeurism statutes. In contrast, the revised statute uses the defined term "effective consent."[56] The RCC definition of "effective consent" does not require that consent be express or informed—however those terms are defined—only that the consent not be induced by physical force, an explicit or implicit coercive threat, or deception.[57] This change improves the consistency and proportionality of the revised offense.

Beyond these eleven changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute applies standardized definitions as to the culpable mental states required for unauthorized disclosure liability. Current nonconsensual pornography statutes in D.C. Code §§ 22-3052 – 3054 specify that a person must "knowingly disclose" or "knowingly publish" a sexual image and require that the actor proceed "with the intent to harm the person depicted or to receive financial gain." However, the terms "knowingly" and "with intent" are not defined for the statute, and it is unclear whether the "knowingly" mental state applies to the elements that follow concerning agreement and consent. The current voyeurism statute, in D.C. Code § 22-3531(f)(2), does not specify any culpable mental state as to distribution, but it does require that "the person knows or has reason to know" the images were obtained unlawfully. To resolve these ambiguities, the revised statute uses the RCC's general provisions that define "knowingly" and "with intent"[58] and specify that there is no additional culpable mental state required with respect to an actor's underlying criminal conduct. Applying a

[56] RCC § 22E-701.
[57] For more information on the meaning of "effective consent" in the RCC, see entries for "consent" and "effective consent" in RCC § 22E-701.
[58] RCC § 22E-206.

knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[59] These changes clarify and improve the consistency of District statutes.

Second, the revised statute extends jurisdiction for unauthorized disclosure liability only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3057 states: "A violation of § 22-3052, § 22-3053, or § 22-3054 shall be deemed to be committed in the District of Columbia if any part of the violation takes place in the District of Columbia, including when either the person depicted or the person who disclosed or published the sexual image *was a resident of*, or located in, the District of Columbia at the time that the sexual image was made, disclosed, or published." (emphasis added.) However, authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[60] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[61] and the DCCA has not addressed the issue. To resolve this ambiguity, the revised statute does not extend jurisdiction to harms where the accused and the complainant and all relevant action occurs outside the District, even though the complainant is a District resident. Some authorities have questioned whether a purported extension of jurisdiction as in the current statute is unconstitutional.[62] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Third, the revised statute clarifies the scope of the affirmative defense. The current non-consensual pornography chapter establishes an affirmative defense that applies "if the disclosure or publication of a sexual image is made in the public interest, including the reporting of unlawful conduct, the lawful and common practices of law enforcement, or legal proceedings."[63] The current felony voyeurism statute does not include a comparable affirmative defense provision.[64] The phrase "in the public interest" is not defined in the statute and District case law has not yet addressed its meaning. To resolve this ambiguity, the revised affirmative defense requires that a defendant demonstrate they distributed the image or audio recording to someone they reasonably believed to be a law enforcement officer, prosecutor, attorney, school administrator, or person with a responsibility for the health, welfare, or supervision of someone depicted in the image or involved in the creation of the image. It also requires that the person

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[59] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[60] *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

[61] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).

[62] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

[63] D.C. Code § 22-3056.

[64] D.C. Code § 22-3531(f)2).

intended only "to report possible illegal conduct or seek legal counsel from an attorney." This revised language recognizes that a person in public life enjoys a right to sexual privacy and protection.[65] This change clarifies the revised statute and may eliminate an unnecessary gap in law.

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

First, the revised statute does not specify that the victim must be an "identified or identifiable person." The current nonconsensual pornography statutes in D.C. Code §§ 22-3052(a), 22-3053(a), and 22-3054(a) state: "It shall be unlawful in the District of Columbia for a person to knowingly [disclose or publish] one or more sexual images of another identified or identifiable person." However, this language does not appear in the current felony voyeurism statute, in D.C. Code § 22-3531(f)(2). Legislative history suggests that this phrase was included to make clear that a person is liable for non-consensual pornography whether the victim is named ("identified") or the victim's face is depicted ("identifiable").[66] However, District case law has held that a person is "identified or identifiable" even if they are not named and even if they are not recognizable by others.[67] Because the revised statute already makes clear that it applies only to images of a specific complainant—and not anonymous images—the phrase "identified or identifiable" is stricken as superfluous. This change clarifies the revised offense.

Second, the revised statute does not specify that a person is liable for distributing images "directly or indirectly, by any means."[68] This language is surplusage.

[65] For example, a defendant might argue under the current statute that the public has an interest in viewing a sexual recording of a politician or a movie star that undermine that celebrity's public denials of infidelity. However, such conduct would not be covered by the revised statute's affirmative defense.

[66] *See* Report on Bill 20-903, the "Criminalization of Non-Consensual Pornography Act of 2014," Council of the District of Columbia Committee on the Judiciary and Public Safety (November 12, 2014) at Page 5 (providing a hypothetical and explaining, "The photo is a sexual image because it shows the nipple of [the victim's] developed female breast, who is identifiable by her face in the photo. If her face was cropped out of the photo, however, she would still be identified by the use of her first name in the email subject line and the reference to her employment at the school.").

[67] In *Roberts v. United States*, 216 A.3d 870, 880 (D.C. 2019), the DCCA explained, "it suffices that the person depicted in a sexual image can identify himself or herself in the image."

[68] D.C. Code § 22-3531(f)(2).

RCC § 22E-1805. Distribution of an Obscene Image.

Explanatory Note. *This section establishes the distribution of an obscene image offense and penalty for the Revised Criminal Code (RCC). The revised statute replaces subsection (a) of the obscenity statute, D.C. Code § 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception).*

Paragraph (a)(1) specifies that a person must at least knowingly engage in distribution or display of an image. "Knowingly" is a defined term[1] and, applied here, means that the person must be practically certain that they are distributing or displaying an image to another person. The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[2] The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. The person must also be practically certain that the picture or video depicts an actual or simulated[3] sexual act; sadomasochistic abuse; masturbation; sexual or sexualized[4] display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or sexualized[5] display of the breast[6] below the top of the areola, or buttocks, when there is less than a full opaque covering. The terms "sexual act," "sexual contact," and "sadomasochistic abuse" are defined in RCC § 22E-701.

Paragraph (a)(2) requires that the person act without the recipient's effective consent.[7] The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant has not given effective consent to receiving the offensive image.[8]

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[1] RCC § 22E-206.

[2] Consider, for example, a person who brings a computer to a repairman for service, with an agreement or understanding that the repairman will not browse and open his private files.

[3] The term "simulated" is defined in RCC § 22E-701 and means feigned or pretended in a way which realistically duplicates the appearance of actual conduct.

[4] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[5] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[6] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman. It excludes the chest of a transmasculine man.

[7] *See Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1144 (D.C. 2016) (explaining, "[A]lthough courts have been willing to protect the rights of consenting adults to transmit and receive indecent materials, they have also permitted states to regulate the dissemination of some indecent materials to minors and nonconsenting adults.") (citing *Ginsberg v. New York*, 390 U.S. 629, 636, (1968)).

[8] A person does not commit distribution of an obscene image if they subjectively believe—reasonably or unreasonably—that the recipient consents to viewing the material. For example, a man does not commit an offense for sending a photograph of his erect penis by text message to a woman he is dating and, based on a prior conversation, believes the woman has agreed to such conduct. On the other hand, a man who, for example, sends a similar penis picture with intent to annoy, harass, or alarm someone, or with intent to seduce a stranger he knows nothing about (and, therefore, has not given any indication of agreement to such behavior) does commit the offense.

Paragraph (a)(3) specifies that a person must also be reckless as to the image being obscene.[9] The term "obscene" is defined in RCC § 22E-701 and requires proof that the image: appeals to a prurient interest in sex, under contemporary community standards[10] and considered as a whole; is patently offensive; and is lacking serious literary, artistic, political, or scientific value, considered as a whole.[11] "Reckless" is defined in the revised code,[12] and, applied here, means that the person must be aware of a substantial risk that the image is obscene, and the person's conduct must be clearly blameworthy under the circumstances.

Subsection (b) establishes four exclusions from liability for the distribution of an obscene image offense.[13] Paragraph (b)(1) provides that the statute does not apply to any licensee[14] under the Communications Act of 1934, such as a radio, television, or phone service provider.[15] Paragraph (b)(2) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16] Paragraph (b)(3) excludes liability for publishing an image in or on a public forum, unless the image is also distributed or displayed directly to a specific viewer[17] or with the purpose of reaching a specific viewer,[18] without that viewer's effective consent. Paragraph (b)(4) excludes liability when the person reasonably believes they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is.[19]

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[9] The government is not required to prove that the person viewed the image. The person may be practically certain that a film contains pornography based on the title, description, or other indicators. *See Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

[10] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards").

[11] *See Miller v. California*, 413 U.S. 15 (1973).

[12] RCC § 22E-206.

[13] *See* RCC §§ 22E-201(b); 22E-605.

[14] The term "licensee" is defined in paragraph (e)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[15] *See* D.C. Code § 22-2201(d).

[16] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[17] E.g., sending an image to another social media user via direct message.

[18] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *with People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague).

[19] Consider, for example, a parent who discovers an obscene image of their teen engaged in a sexual act with another teen. If the parent sends the image to the other teen and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1805 - 1806.

Paragraph (c)(1) establishes an affirmative defense for an employee of a school, museum, library, movie theater, or other venue, who is acting within the scope of their role.

Paragraph (c)(2) establishes an affirmative defense for the innocent display or distribution of a prohibited image.[20] The actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[21] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. The recipient of the display or distribution must be someone that the actor reasonably believes to be a "law enforcement officer, prosecutor, attorney, school administrator;" or someone with a responsibility for the health, welfare, or supervision of one of the people depicted or involved in the creation of the image or recording.

Subsection (d) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (e) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised distribution of an obscene image offense clearly changes current District law in eight main ways.*

First, the revised statute applies the RCC standardized definitions of "knowingly" and "recklessly." The current obscenity statute in D.C. Code § 22-2201(a)(1) states at the beginning of the offense that, "It shall be unlawful in the District of Columbia for any person knowingly:" then, after the colon, describes all the prohibited conduct. The plain language of the statute thus appears to require a mental state of "knowingly" apply to all elements of the offense. Current D.C. Code § 22-2201(a)(2)(B) broadly defines "knowingly" to mean "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of" the obscene materials.[22] In contrast, the revised offense defines "knowingly" to require practical certainty and defines "recklessness" to require conscious disregard of a substantial risk.[23] The revised statute requires knowledge of the sexual nature of the image but only recklessness as to the image being of the sort that is criminally obscene. Application of the standardized RCC definitions here appears to be largely consistent with District case law interpreting the obscenity statute.[24] Moreover, applying a

[20] Per RCC § 22E-201, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

[21] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

[22] *See also Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) (citing *Morris v. United States*, 259 A.2d 337 (D.C. 1969)).

[23] RCC § 22E-206.

[24] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence[25]and courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[26] This change improves the clarity and consistency of the revised statute.

Second, the revised statute requires a distribution or display of an image. The current obscenity statute in D.C. Code § 22-2201(a)(1) makes it unlawful to participate in,[27] purchase,[28] possess,[29] materials that are obscene, indecent, filthy, or immoral.[30] The current statute also makes it unlawful to promote[31] or possess with intent to disseminate[32] obscene materials. D.C. Code § 22-2201(a)(2)(A) also contains a permissive inference that states, "[T]he creation, purchase, procurement, or possession of a mold, engraved plate, or other embodiment of obscenity specially adapted for reproducing multiple copies or the possession of more than 3 copies, of obscene, indecent, or filthy material shall be prima facie evidence of an intent to disseminate such material in violation of this subsection."

In contrast, the revised offense makes it unlawful to distribute or display obscene materials only if it is unsolicited, unwelcome, and unwanted, and in other situations where effective consent has not been given. Merely creating, possessing, or promoting depictions of sexual activity between consenting adults is not prohibited.[33] Due process

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[25] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[26] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[27] *See* D.C. Code §§ 22-2201(a)(1)(B) ("present, direct, act in, or otherwise participate in the preparation or presentation of…"); 22-2201(a)(1)(C) ("pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale…"); 22-2201(a)(1)(E) ("create").

[28] D.C. Code § 22-2201(a)(1)(E) ("buy, procure").

[29] D.C. Code § 22-2201(a)(1)(E).

[30] Under § 22-2201(a)(1)(C), it is unlawful to "pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale" specified obscene materials. Under § 22-2201(a)(1)(B), it is unlawful to "present, direct, act in, or otherwise participate in the preparation or presentation of" specified obscene materials. Under § 22-2201(a)(1)(E), it is unlawful to "create, buy, procure, or possess…with intent to disseminate" specified obscene materials. Under D.C. Code §§ 22-2201(a)(1)(A) and (D), it is unlawful to "offer or agree to sell" specified obscene materials. Under §§ 22-2201(a)(1)(F) and (G), it is unlawful to "advertise or otherwise promote the sale of" obscene material (or materials represented to be obscene).

[31] D.C. Code §§ 22-2201(a)(1)(A) and (D) ("offer or agree to sell, deliver, distribute, or provide"); 2202291(a)(1)(F) and (G) ("advertise or otherwise promote the sale of").

[32] D.C. Code § 22-2201(a)(1)(E).

[33] Producing adult pornographic films may constitute prostitution in violation of D.C. Code § 22-2701 et seq. "Prostitution" is broadly defined to include "a sexual act or contact with another person in return for giving or receiving anything of value." D.C. Code § 22-2701.01(3).

confers a right to privately create and enjoy erotica, even if it is objectively offensive.[34] The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct.[35] It is not clear that the aspects of the current law that relate to the creation and possession of obscene pornography create a risk of harm to any of the participants or the general public. In addition, elimination of the permissive inference also may reduce the possibility of a constitutional challenge.[36] Moreover, the rationale for criminalizing conduct short of an attempt[37] is less compelling with respect to obscenity than it is for other contraband offenses such as weapons or controlled substances. The offensive material itself—which oftentimes exists in digital format only—does not create a health hazard, pose a risk of physical danger, or invite violence from rival distributors. This change improves the proportionality of the revised offense and may ensure its constitutionality.

Third, the revised statute criminalizes depictions only of specified parts of the body or types of conduct. Subsection (a) of D.C. Code § 22-2201 applies broadly to materials that are obscene, indecent, filthy, or immoral. The terms "obscene," "indecent," "filthy," and "immoral" are not defined in in the statute. However, District case law[38] has interpreted the terms to refer to the three criteria enumerated by the Supreme Court in *Miller v. California*.[39] Namely, to determine whether material is obscene, one must consider: (a) whether 'the average person,[40] applying contemporary

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[34] *See, e.g., Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744, 747 (5th Cir. 2008) (holding Texas criminal statute prohibiting sale of sexual devices violated consumers' rights to engage in private intimate conduct of their choosing); *see also* D.C. Code § 22-2201(a)(1)(D), which makes it unlawful to "sell…any…device which is intended for…immoral use."

[35] *Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

[36] *See Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States*, 395 U.S. 6, 36 (1969)) ("Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases "must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.").

[37] *See* RCC § 22E-301.

[38] D.C. Code § 22-2201 is largely absent from modern District case law, with only one published opinion mentioning it in the past twenty-five years. *See Blackledge v. United States*, 871 A.2d 1193, 1196 (D.C. 2005) (wherein the defendant was found not guilty on the obscenity charge at trial and the issue was not examined on appeal). Otherwise, the statute only appears in the occasional footnote. *See, e.g., Hawkins v. United States*, 119 A.3d 687, 691 n. 7 (D.C. 2015). Indeed, case law involving the statute has not been especially active since the late 1970s, following *Miller v. California*, 413 U.S. 15 (1973), in which the Court established the constitutional baseline, per the First Amendment, for criminal laws prohibiting obscenity.

[39] 413 U.S. 15 (1973); *Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction); *see also Hudson v. United States*, 234 A.2d 903, 905 (D.C. 1967) (explaining that the word "obscene" is intended to have a meaning that varies from time to time as general notions of decency in attire and public entertainment tend to change).

[40] The phrase "average person" distinguishes the broader community from fetishists and persons with paraphilic disorders. *See also* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular

community standards'[41] would find that the work, taken as a whole, appeals to the prurient interest,[42] (b) whether the work depicts or describes, in a patently offensive way,[43] sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Although local and national community standards may be difficult to discern,[44] a person may be held criminally liable if they comprehend the material's content[45] or character,[46] even if they do not know it to be patently offensive. In contrast, the revised statute is more narrowly limited to depictions that are likely to or designed to appeal to the prurient

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segment of the community—the young, the immature or the highly prudish—or, would leave another segment—the scientific or highly educated or so-called worldly wise and sophisticated—indifferent and unmoved.").

[41] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards"); *see also Hermann v. United States*, 304 A.2d 22, n. 3 (D.C. 1973); *see also* Ed Bruske, *Smut Work: Identifying Obscenity*, Washington Post (Feb. 16, 1982), pg. C1.

> More than four years have gone by since the last time prosecutors showed pornographic films to a jury in the city. As a result, prosecutors have no "community standards"—the benchmark established by the U.S. Supreme Court—on which to judge what is obscene.

[42] *See* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("'Prurient interest' is a morbid, degrading, or unhealthy interest in sex.").

[43] In *Parks v. United States*, 294 A.2d 858, 859–60 (D.C. 1972), the court explained:

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces no evidence, then…the Government prevails. However, it the defense introduces some evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

See also United States v. Gower, 316 F. Supp. 1390 (D.D.C. 1970); *but see Fennekohl v. United States*, 354 A.2d 238, 240 (D.C. 1976) (finding the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman).

[44] *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (J. Stewart concurring) (stating, "I know it when I see it.").

[45] *See* D.C. Code § 22-2201(a)(2)(B); *Lakin v. U. S.*, 363 A.2d 990, 998 (D.C. 1976); *Morris v. U. S.*, 259 A.2d 337, 340 (D.C. 1969); *Huffman v. United States*, 259 A.2d 342, 345 (D.C. 1969); *Smith v. People of the State of California*, 361 U.S. 147, 154-55 (1959).

[46] *Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

interest, such as nudity and sexual activity. The revised statute only reaches body parts and conduct that are the subject of other sexual and privacy offenses: an actual or simulated sexual act; sadomasochistic abuse; masturbation; sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering. This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Fourth, the revised statute criminalizes distribution or display of images only. Subsection (a) of current D.C. Code § 22-2201 criminalizes obscene[47] writings, pictures, sound recordings, plays, dances, motion pictures, performances, exhibitions, representations, devices, articles, and things. In contrast, the revised obscenity offense is limited to the defined term "image," which means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format.[48] Other mediums are less vivid, poignant, or memorable than visual representations, and it appears highly unlikely that they may be said to be "patently offensive" under modern community standards per *Miller v. California*.[49] A blanket prohibition of devices, articles, or things that are "intended for…immoral use"[50] also may be especially vulnerable to a substantive due process challenge.[51] This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Fifth, the revised statute excludes liability for any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions. Current D.C. Code § 22-2201(d) provides, "Nothing in this section shall apply to a licensee[52] under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act." In contrast, the revised offense excludes liability for a wider array of commercial information technology providers. Unlike radio stations, television broadcasters, and phone service providers, internet service providers are not licensed under the federal communications act. The

[47] D.C. Code § 22-2201(a)(1)(G) also makes it unlawful to "advertise or otherwise promote the sale of material represented or *held out by such person* to be obscene." (Emphasis added.)
[48] RCC § 22E-701.
[49] 413 U.S. 15 (1973). In particular, many writings and sound recordings, excluded under the revised statute, are of "serious literary, artistic, political, or scientific value."
[50] D.C. Code § 22-2201(a)(1)(D).
[51] *See, e.g., Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744-747 (5th Cir. 2008) (holding Texas criminal statute prohibiting sale of sexual devices violated consumers' rights to engage in private intimate conduct of their choosing).
[52] The term "licensee" is undefined and District case law has not addressed its meaning. 47 U.S.C. § 153(30) defines "licensee" to mean "the holder of a radio station license granted or continued in force under authority of this chapter." 47 U.S.C. § 153(49) defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."

revised statute better aligns itself with the practicalities of the information age by excepting these service providers as well as other remote communications providers.[53] This change improves the proportionality of the revised offense.

Sixth, the revised statute limits liability for online posts of obscene images. Current D.C. Code § 22-2201 does not directly address publishing sexual material to an online public forum. The current statute was enacted in 1967, decades before the invention of smartphones equipped with cameras and internet access. In contrast, the revised statute limits liability for obscene online publication to conduct that targets an online user. Paragraph (b)(4) of the revised statute requires that either the obscene post be sent directly to another user without their effective consent (e.g., via direct message to that user) or purposely sent to the complainant without their effective consent (e.g., posting the image as a comment on that user's page,[54] tagging that user in the image or image caption[55]). A mere knowledge standard for online publication is insufficient because, in most instances a person who publishes pornography online can be said to be practically certain that they are displaying that pornography to every person who reaches that particular web address, whether the person consented to viewing sexual images or not. This change improves the proportionality of the revised offense.

Seventh, the revised statute revises the affirmative defense in current law for "individuals having scientific, educational, or other special justification for possession of such material." Current D.C. Code § 22-2201(c) states that it is an affirmative defense that "the dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material." The term "special justification" is not defined and District case law has not addressed its meaning. In contrast, the revised offense establishes an affirmative defense for employees of schools, museums, libraries, movie theaters, and other venues who are acting within the reasonable scope of their professional duties.[56] Other general defenses in the RCC's general part may also apply to persons with special justification.[57] This change improves the clarity and consistency of the revised offense. Eighth, the revised offense does not codify a special confiscation and disposal provision. Current D.C. Code § 22-2201(a)(3) provides: "When any person is convicted of a violation of this subsection, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation

[53] *See, e.g.*, D.C. Code § 22-3055(b).

[54] For example, if a person posts a comment below a Washington Post article that includes a .gif of an obscene display of bestiality, that person may have committed distribution of an obscene image to the author of the article but has not committed an offense against every viewer of the article.

[55] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *with People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague).

[56] The exclusions do not apply to a rogue employee who is acting *ultra vires*. For example, a projectionist in a movie theater who displays an obscene, X-rated film in lieu of a G-rated cartoon, commits an offense.

[57] RCC § 22E-408 includes defenses for parents, wards, and emergency health professionals. Consider, for example, a parent who gives a teenager a child birth video to warn them of the consequences of unprotected sexual intercourse. Such a parent may be able to avail themselves of the defense in RCC § 22E-408(a)(1).

and disposal of any materials described in paragraph (1) of this subsection, which were named in the charge against such person and which were found in the possession or under the control of such person at the time of such person's arrest." In contrast, the revised offense does not require confiscation of obscene materials. Unlike dangerous articles such as firearms and explosives,[58] obscene images do not present a physical danger to public health or safety. Moreover, under the revised statute, a person is permitted to possess and enjoy obscene material without distributing it inside the District. Accordingly, the revised statute does not authorize a sentencing court to order an offender to relinquish or destroy it. This change improves the consistency and proportionality of the revised offense.

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

First, the revised statute excludes liability for a person who reasonably believes they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is.[59] Current D.C. Code § 22-2201 does not include an exception for this conduct and it is unclear whether common law defenses would apply under these circumstances. The revised statute expressly excludes liability when the image is being distributed to someone who is already familiar with it or is responsible for someone who made it or is depicted in it. This change clarifies and improves the completeness of the revised statute.

Second, the revised statute includes an affirmative defense for a person who demonstrates they distributed the image or audio recording to someone they reasonably believed to be a law enforcement officer, prosecutor, attorney, school administrator, or person with a responsibility for the health, welfare, or supervision of someone depicted in the image or involved in the creation of the image. Current D.C. Code § 22-2201 does not include an exception for this conduct and it is unclear whether common law defenses would apply under these circumstances. The revised statute expressly includes a defense when the person intended only "to report possible illegal conduct or seek legal counsel from an attorney." This change clarifies and improves the completeness of the revised statute.

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

The revised offense clarifies the term "licensee" has the meaning specified in 47 U.S.C. § 153(30). Current D.C. Code § 22-2201(d) provides: "Nothing in this section shall apply to a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act. The term "licensee" is undefined and District case law has not addressed its meaning. However, Title 47 of the United States Code defines "licensee" to mean "the holder of a radio station license

[58] *See* D.C. Code § 22-4517 (providing for the taking and destruction of weapons).

[59] Consider, for example, a parent who discovers an obscene image of their teen engaged in a sexual act with another teen. If the parent sends the image to the other teen and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1805 - 1806.

granted or continued in force under authority of this chapter"[60] and defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."[61] The revised statute adopts this definition to clarify the meaning of the revised offense.

[60] 47 U.S.C. § 153(30).
[61] 47 U.S.C. § 153(49).

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

Explanatory Note. *This section establishes the distribution of an obscene image to a minor offense and penalty for the Revised Criminal Code (RCC). The revised statute replaces subsection (b) of the obscenity statute, D.C. Code § 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception).*

Paragraph (a)(1) specifies that a person must at least knowingly engage in distribution or display of an image. "Knowingly" is a defined term[1] and, applied here, means that the person must be practically certain that they are distributing or displaying an image to another person.[2] The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[3] The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. The person must also be practically certain that the image depicts: a sexual act; sadomasochistic abuse; masturbation; a sexual or sexualized[4] display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or a sexual or sexualized[5] display of the breast[6] below the top of the areola or buttocks, when there is less than a full opaque covering. The terms "sexual act," "sexual contact," and "sadomasochistic abuse" are defined in RCC § 22E-701.

Subparagraph (a)(2)(A) specifies that a person must also be reckless as to image being obscene.[7] The term "obscene" is defined in RCC § 22E-701 and requires proof that the image: appeals to a prurient interest in sex, under contemporary community standards[8] and considered as a whole is patently offensive; and is lacking serious literary, artistic, political, or scientific value, considered as a whole.[9] "Reckless" is defined in the

[1] RCC § 22E-206.

[2] The government is not required to prove that the recipient viewed the picture or video, only that it was received.

[3] Consider, for example, a person who brings a computer to a repairman for service, with an agreement or understanding that the repairman will not browse and open his private files.

[4] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[5] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[6] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman. It excludes the chest of a transmasculine man.

[7] The government is not required to prove that the person viewed the image. The person may be practically certain that a film contains pornography based on the title, description, or other indicators. *See Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

[8] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards").

[9] *See Miller v. California*, 413 U.S. 15 (1973).

revised code,[10] and, applied here, means that the person must be aware of a substantial risk that the image is obscene, and the person's conduct must be clearly blameworthy under the circumstances.

Subparagraph (a)(2)(B) specifies that a person must also be reckless as to the recipient being under 16 years old.[11] The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 16 years of age and the risk is clearly blameworthy under the circumstances.[12]

Paragraph (a)(3) requires that the person is at least 18 years old and at least four years older than the recipient. The term "in fact" indicates that a person is strictly liable as to their age and the relative age of the recipient.[13] It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was less than four years.

Subsection (b) establishes three exclusions from liability for the distribution of an obscene image to a minor offense. Paragraph (b)(1) provides that the statute does not apply to any licensee[14] under the Communications Act of 1934, such as a radio, television, or phone service provider.[15] Paragraph (b)(2) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16] Paragraph (b)(3) excludes liability for publishing an image in or on a public forum, unless the image is also distributed or displayed directly to a specific viewer.[17] Paragraph (b)(4) excludes liability when the person reasonably believes they are distributing the

[10] RCC § 22E-206.

[11] *See Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1144 (D.C. 2016) (explaining, "[A]lthough courts have been willing to protect the rights of consenting adults to transmit and receive indecent materials, they have also permitted states to regulate the dissemination of some indecent materials to minors and nonconsenting adults.") (citing *Ginsberg v. New York*, 390 U.S. 629, 636, (1968)).

[12] *See* RCC § 22E-701. For example, a 20-year-old who *knows* that the recipient of the obscene image attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary. On the other hand, a person may engage in a pattern of unwelcome communication toward an anonymous person online, without having any reason to suspect that it is operated by a child.

[13] RCC § 22E-207.

[14] The term "licensee" is defined in paragraph (e)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[15] *See* D.C. Code § 22-2201(d).

[16] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[17] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *with People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague).

image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is.[18]

Paragraph (c)(1) establishes an affirmative defense for an employee of a school, museum, library, movie theater, or other venue, who is acting within the scope of their role.[19]

Subsection (c) establishes an affirmative defense for the innocent display or distribution of a prohibited image.[20] The actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[21] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. The recipient of the display or distribution must be someone that the actor reasonably believes to be a "law enforcement officer, prosecutor, attorney, school administrator;" or someone with a responsibility for the health, welfare, or supervision of one of the people depicted or involved in the creation of the image or recording.

Paragraph (c)(3) establishes an affirmative defense if the actor and the complainant are, in fact, in a marriage, domestic partnership, or dating relationship. The actor must be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant and be no more than four years older than the complainant. The "romantic, dating, or sexual relationship" language tracks the language in the District's current definition of "intimate partner violence"[22] and is intended to have the same meaning. The actor and the complainant must be the only persons who are depicted in the image. The complainant must give "effective consent" to the prohibited conduct or the actor must reasonably believe that the complainant gave "effective consent" to this conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The term "consent" is also defined in RCC § 22E-701.

Subsection (d) provides the penalty for the revised offense. [*See* Fourth Draft of Report #41.]

Subsection (e) cross-references applicable definitions in the RCC and the federal code.

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[18] Consider, for example, a parent who discovers an obscene image of their teen engaged in a sexual act with another teen. If the parent sends the image to the other teen and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1805 - 1806.

[19] The exclusion does not apply to an employee who is acting *ultra vires*. For example, a cashier who accepts a bribe from a 15-year-old to be admitted into an X-ray screening commits distribution of an obscene image to a minor offense.

[20] Per RCC § 22E-201, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

[21] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

[22] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

Relation to Current District Law. *The revised distribution of obscene materials to a minor offense clearly changes current District law in eight main ways.*

First, the revised statute applies the RCC standardized definitions of "knowingly" and "recklessly." The current obscenity statute in D.C. Code § 22-2201(b) states at the beginning of the offense that, "It shall be unlawful in the District of Columbia for any person knowingly:" then, after the colon, describes all the prohibited conduct. The plain language of the statute thus appears to require a mental state of "knowingly" apply to all elements of the offense. D.C. Code § 22-2201(b)(2)(F) broadly defines "knowingly" to mean "having a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both of: (i) The character and content of any material described in paragraph (1) of this subsection which is reasonably susceptible of examination by the defendant; and (ii) The age of the minor." In contrast, the revised offense defines "knowingly" to require practical certainty and defines "recklessness" to require conscious disregard of a substantial risk.[23] The revised statute requires knowledge of the sexual nature of the image but only recklessness as to the age of the minor and as to image being of the sort that is criminally obscene. The revised statute holds an actor strictly liable with respect to the age difference between the defendant and the complainant. Application of the standardized RCC definitions here appears to be largely consistent with District case law interpreting the obscenity statute.[24] Moreover, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence[25] and courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[26] This change improves the clarity and consistency of the revised statute.

Second, the revised statute criminalizes depictions only of specified parts of the body or types of conduct. Subsection (b) of current D.C. Code § 22-2201 applies broadly to offensive materials that either include "explicit and detailed verbal descriptions or narrative accounts of sexual excitement" or depict "nudity, sexual conduct, or sado-masochistic abuse." The term "nudity" is defined broadly to include the depiction of

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[23] RCC § 22E-206.

[24] *See Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[25] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[26] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

covered male genitals in a discernibly turgid state, a pubic area or buttocks with less than a full opaque covering, and the female breast with less than a full opaque covering of any portion below the top of the nipple.[27] The term "sexual conduct" is defined broadly to include homosexuality[28] and all physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or female breast.[29] And the term "sado-masochistic abuse" is defined broadly to include any flagellation or physical restraint of a person wearing undergarments, a mask, or a bizarre costume.[30] District case law[31] explains that the proscribed materials in the obscenity statute are limited to the three criteria enumerated in *Miller v. California*.[32] Namely, to determine whether material is obscene, one must consider: (a) whether 'the average person,[33] applying contemporary community standards'[34] would find that the work, taken as a whole, appeals to the prurient interest,[35]

[27] D.C. Code § 22-2201(b)(2)(B).

[28] The term "homosexuality" is undefined and District case law has not addressed its meaning. It is not clear whether the term encompasses sexual acts, sexual contact, or any display of affection between members of the same sex.

[29] D.C. Code § 22-2201(b)(2)(C). It is unclear whether the phrase "clothed or unclothed" modifies only "genitals" or "explicit and detailed verbal descriptions or narrative accounts of sexual excitement."

[30] D.C. Code § 22-2201(b)(2)(D).

[31] D.C. Code § 22-2201 is largely absent from modern District case law, with only one published opinion mentioning it in the past twenty-five years. *See Blackledge v. United States*, 871 A.2d 1193, 1196 (D.C. 2005) (wherein the defendant was found not guilty on the obscenity charge at trial and the issue was not examined on appeal). Otherwise, the statute only appears in the occasional footnote. *See, e.g.*, *Hawkins v. United States*, 119 A.3d 687, 691 n. 7 (D.C. 2015). Indeed, case law involving the statute has not been especially active since the late 1970s, following *Miller v. California*, 413 U.S. 15 (1973), in which the Court established the constitutional baseline, per the First Amendment, for criminal laws prohibiting obscenity.

[32] 413 U.S. 15 (1973); *Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction); *see also Hudson v. United States*, 234 A.2d 903, 905 (D.C. 1967) (explaining that the word "obscene" is intended to have a meaning that varies from time to time as general notions of decency in attire and public entertainment tend to change).

[33] The phrase "average person" distinguishes the broader community from fetishists and persons with paraphilic disorders. *See also* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community—the young, the immature or the highly prudish—or, would leave another segment—the scientific or highly educated or so-called worldly wise and sophisticated—indifferent and unmoved.").

[34] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards"); *see also Hermann v. United States*, 304 A.2d 22, n. 3 (D.C. 1973); *see also* Ed Bruske, *Smut Work: Identifying Obscenity*, Washington Post (Feb. 16, 1982), pg. C1.

> More than four years have gone by since the last time prosecutors showed pornographic films to a jury in the city. As a result, prosecutors have no "community standards"—the benchmark established by the U.S. Supreme Court—on which to judge what is obscene.

[35] *See* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("'Prurient interest' is a morbid, degrading, or unhealthy interest in sex.").

(b) whether the work depicts or describes, in a patently offensive way,[36] sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Although local and national community standards may be difficult to discern,[37] a person may be held criminally liable if they comprehend the material's content[38] or character,[39] even if they do not know it to be patently offensive. In contrast, the revised statute is more narrowly limited to depictions that are likely to or designed to appeal to the prurient interest, such as nudity and sexual activity. The revised statute only reaches body parts and conduct that are the subject of other sexual and privacy offenses: an actual or simulated sexual act; sadomasochistic abuse; masturbation; sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering. Since 1967, when this language was adopted, social mores regarding promiscuous and licentious behavior and popular fashion have changed considerably.[40] In modern America, it commonplace for swimwear or evening

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[36] In *Parks v. United States*, 294 A.2d 858, 859–60 (D.C. 1972), the court explained:

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces no evidence, then…the Government prevails. However, it the defense introduces some evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

See also United States v. Gower, 316 F. Supp. 1390 (D.D.C. 1970); *but see Fennekohl v. United States*, 354 A.2d 238, 240 (D.C. 1976) (finding the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman).

[37] *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (J. Stewart concurring) (stating, "I know it when I see it.").

[38] *See* D.C. Code § 22-2201(a)(2)(B); *Lakin v. U. S.*, 363 A.2d 990, 998 (D.C. 1976); *Morris v. U. S.*, 259 A.2d 337, 340 (D.C. 1969); *Huffman v. United States*, 259 A.2d 342, 345 (D.C. 1969); *Smith v. People of the State of California*, 361 U.S. 147, 154-55 (1959).

[39] *Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

[40] For example, in 1957, after vocal objections from audiences in Nashville and St. Louis about his wiggling hips, Elvis Presley was filmed from the waist up for a CBS broadcast of the Ed Sullivan Show. *See* Jordan Runtagh, *Elvis Presley on TV: 10 Unforgettable Broadcasts*, ROLLING STONE (January 28, 2016). In the year 2000, rapper Nelly released a music video on cable network BET for his song "Tip Drill," which depicted an orgy of topless women gyrating while men chewed on the women's thong underwear. In 2013, singer Robin Thicke release a video on YouTube featuring topless supermodels dancing around for men's entertainment.

wear to expose the lower part of the buttocks or breast. This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Third, the revised statute criminalizes distribution or display of images only. Subsection (b) of current D.C. Code § 22-2201 applies to any "picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image,"[41] "book, magazine, or other printed matter however reproduced or sound recording,"[42] "explicit and detailed verbal description[] or narrative account[],"[43] and "motion picture, show, or other presentation."[44] In contrast, the revised obscenity offense is limited to the defined term "image," which means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format.[45] Other mediums are less vivid, poignant, or memorable than visual representations, and it appears highly unlikely that they may be said to be "patently offensive" under modern community standards per *Miller v. California*.[46] This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Fourth, the revised offense applies to adults only. Current D.C. Code § 22-2201(b) makes it unlawful to distribute obscene materials to any person under 17 years old.[47] It makes no exception for one child who gives obscene materials to another child, though a child may not be sophisticated enough to judge whether an item "affronts prevailing standards *in the adult community as a whole* with respect to what is suitable material for minors."[48] In contrast, the revised statute applies only to a person who is over 18 years old who shares obscene materials with a person who is both under 16 years old and four years younger than the accused. This change improves the consistency and proportionality of the revised offenses.

Fifth, the revised statute excludes liability for any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions. Current D.C. Code § 22-2201(d) provides, "Nothing in this section shall apply to a licensee[49] under the Communications Act of 1934 (47 U.S.C. § 151 et seq.)

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[41] D.C. Code § 22-2201(b)(1)(A)(i).
[42] D.C. Code § 22-2201(b)(1)(A)(ii).
[43] *Id*.
[44] D.C. Code § 22-2201(b)(1)(B).
[45] RCC § 22E-701.
[46] 413 U.S. 15 (1973). In particular, many writings and sound recordings, excluded under the revised statute, are of "serious literary, artistic, political, or scientific value."
[47] *See* D.C. Code § 22-2201(b)(2)(A) (defining "minor").
[48] *See* D.C. Code §§ 22-2201(b)(1)(A)(i), (A)(ii), and (B). (Emphasis added.)
[49] The term "licensee" is undefined and District case law has not addressed its meaning. 47 U.S.C. § 153(30) defines "licensee" to mean "the holder of a radio station license granted or continued in force under authority of this chapter." 47 U.S.C. § 153(49) defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."

while engaged in activities regulated pursuant to such Act." In contrast, the revised offense excludes liability for a wider array of commercial information technology providers. Unlike radio stations, television broadcasters, and phone service providers, internet service providers are not licensed under the federal communications act. The revised statute better aligns itself with the practicalities of the information age by excepting these service providers as well as other remote communications providers.[50] This change improves the proportionality of the revised offense.

Sixth, the revised statute limits liability for online posts of obscene images. Current D.C. Code § 22-2201 does not directly address publishing sexual material to an online public forum. In contrast, the revised statute limits liability for obscene online publication to conduct that targets an online user. Paragraph (b)(4) of the revised statute requires that either the obscene post be sent directly to another user without their effective consent (e.g., via direct message to that user) or purposely sent to the complainant without their effective consent (e.g., posting the image as a comment on that user's page,[51] tagging that user in the image or image caption[52]). A mere knowledge standard for online publication is insufficient because, in most instances a person who publishes pornography online can be said to be practically certain that they are displaying that pornography to every person who reaches that particular web address, whether the person consented to viewing sexual images or not. This change improves the proportionality of the revised offense.

Seventh, the revised statute revises the affirmative defense in current law for "individuals having scientific, educational, or other special justification for possession of such material." Current D.C. Code § 22-2201(c) states that it is an affirmative defense that "the dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material." The term "special justification" is not defined and District case law has not addressed its meaning. In contrast, the revised offense establishes an affirmative defense for employees of schools, museums, libraries, movie theaters, and other venues who are acting within the reasonable scope of their professional duties.[53] Other general defenses in the RCC's general part may also apply to persons with special justification.[54] This change improves the clarity and consistency of the revised offense.

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[50] *See, e.g.*, D.C. Code § 22-3055(b).

[51] For example, if a person posts a comment below a Washington Post article that includes a .gif of an obscene display of bestiality, that person may have committed distribution of an obscene image to the author of the article but has not committed an offense against every viewer of the article.

[52] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *with People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague).

[53] The exclusions do not apply to a rogue employee who is acting *ultra vires*. For example, a projectionist in a movie theater who displays an obscene, X-rated film in lieu of a G-rated cartoon, commits an offense.

[54] RCC § 22E-408 includes defenses for parents, wards, and emergency health professionals. Consider, for example, a parent who gives a teenager a child birth video to warn them of the consequences of unprotected sexual intercourse. Such a parent may be able to avail themselves of the defense in RCC § 22E-408(a)(1).

Eighth, the revised statute codifies an affirmative defense for marriage, domestic partnership, and other romantic relationships. The current obscenity statute[55] does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This is inconsistent with several of the current sex offense statutes[56] and the current sexual performance of a minor offense.[57] In contrast, the revised distribution of an obscene image to a minor statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant. This change improves the consistency and proportionality of the revised statute.

Beyond these eight changes to current District law, three other aspects of the revised statute may constitute a substantive change to current District law.

First, the revised statute does not criminalize non-purposefully providing a minor access to an obscene exhibition. Current D.C. Code § 22-2201(b)(1)(B) makes it unlawful to "provide to a minor an admission ticket to, or pass to, or to admit a minor to, premises whereon" patently offensive materials are exhibited. This language is ambiguous in at least three ways. In contrast, consistent with other RCC offenses, the revised statute provides liability for such conduct only when the actor's role meets the standards for accomplice liability under RCC § 22E-210, which requires a more direct causal link between the actor's conduct and the resulting harm. An actor is subject to accomplice liability for purposely encouraging or assisting another person who displays obscene materials to a minor. The revised language eliminates liability for museum workers[58] and other employees who may knowingly, but not purposely, admit a minor to a display of obscene material. This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

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[55] D.C. Code § 22-2201.

[56] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[57] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by…an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[58] For example, in 2018, the Smithsonian's Hirshhorn Museum and Sculpture Garden featured the work of Georg Baselitz, including "The Naked Man," which depicts a cadaverous man with a huge erection lying on his back on a table. The painting was confiscated by a state's attorney in 1963. *See* Sebastian Smee, *Georg Baselitz is an overrated hack. Art collectors fell for him — but you don't have to*, WASHINGTON POST (June 24, 2018).

Second, the revised statute excludes liability for a person who reasonably believes they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is.[59] Current D.C. Code § 22-2201 does not include an exception for this conduct and it is unclear whether common law defenses would apply under these circumstances. The revised statute expressly excludes liability when the image is being distributed to someone who is already familiar with it or is responsible for someone who made it or is depicted in it. This change clarifies and improves the completeness of the revised statute.

Third, the revised statute includes an affirmative defense for a person who demonstrates they distributed the image or audio recording to someone they reasonably believed to be a law enforcement officer, prosecutor, attorney, school administrator, or person with a responsibility for the health, welfare, or supervision of someone depicted in the image or involved in the creation of the image. Current D.C. Code § 22-2201 does not include an exception for this conduct and it is unclear whether common law defenses would apply under these circumstances. The revised statute expressly includes a defense when the person intended only "to report possible illegal conduct or seek legal counsel from an attorney." This change clarifies and improves the completeness of the revised statute.

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

First, the revised offense clarifies the term "licensee" has the meaning specified in 47 U.S.C. § 153(30). Current D.C. Code § 22-2201(d) provides: "Nothing in this section shall apply to a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act." The term "licensee" is undefined and District case law has not addressed its meaning. However, Title 47 of the United States Code defines "licensee" to mean "the holder of a radio station license granted or continued in force under authority of this chapter"[60] and defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."[61] The revised statute adopts this definition to clarify the meaning of the revised offense.

Second, the revised statute defines the term "obscene" consistent with U.S. Supreme Court precedent. D.C. Code § 22-2201(b)(1)(B) makes it unlawful to exhibit to a minor "a motion picture, show, or other presentation which, *in whole or in part*, depicts nudity, sexual conduct, or sado-masochistic abuse and which *taken as a whole* is patently offensive *because* it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors." (Emphasis added.) Current D.C. Code §§ 22-2201(b)(1)(A)(i), (A)(ii) contain similar language. District case law has not

[59] Consider, for example, a parent who discovers an obscene image of their teen engaged in a sexual act with another teen. If the parent sends the image to the other teen and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1805 - 1806.
[60] 47 U.S.C. § 153(30).
[61] 47 U.S.C. § 153(49).

addressed the meaning of these phrases beyond stating generally[62] that the obscenity statute is to be interpreted consistent with the Supreme Court's ruling in *Miller*.[63] The *Miller* articulation of the standards for interpreting what is patently offensive and whether to assess obscenity in terms of the "whole" work varies[64] slightly from the current District statute. The revised statute, through use of the defined term "obscene," adopts the obscenity standard as articulated in the *Miller* opinion. This change clarifies the revised offense and may help ensure its constitutionality.

[62] *Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976)
[63] *Miller v. California*, 413 U.S. 15 (1973).
[64] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.").

RCC § 22E-1807. Creating or Trafficking an Obscene Image of a Minor.

Explanatory Note.[1] *The RCC creating or trafficking an obscene image of a minor offense prohibits creating, displaying, distributing, selling, or advertising images that depict complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The offense also prohibits a person that is responsible under civil law for a complainant under the age of 18 years from giving effective consent for the recording, photographing, or filming of a complainant engaged in specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted, or will be depicted, in the image. The revised trafficking an obscene image of a minor statute has the same penalties as the RCC arranging a live sexual performance of a minor statute,*[2] *the main difference being that the RCC creating or trafficking an obscene image of a minor offense is limited to images. Along with the possession of an obscene image of a minor offense,*[3] *the arranging a live sexual performance of a minor offense,*[4] *and the attending or viewing a live sexual performance of a minor offense,*[5] *the revised creating or trafficking an obscene image of a minor statute replaces the current sexual performance using a minor offense*[6] *in the current D.C. Code, as well as the current definitions,*[7] *penalties,*[8] *and affirmative defenses*[9] *for that offense.*

Subsection (a) specifies the various types of prohibited conduct in first degree creating or trafficking an obscene image of a minor, the highest gradation of the revised offense. The prohibited conduct is specific to an "image." An "image," as defined in RCC § 22E-701, is a visual depiction, other than a depiction rendered by hand, and includes videos and live broadcasts. Paragraph (a)(1) requires a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she will cause the prohibited result, i.e. creating a specified image. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to each type of prohibited conduct in subparagraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), and (a)(1)(E).

For subparagraph (a)(1)(A), the "knowingly" culpable mental state requires that the actor be "practically certain" that he or she creates an image, other than a derivative image, by recording, photographing, or filming the complainant or that he or she "produces" or "directs" the creation of such an image. "Derivative" is intended to have

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[1] Unless otherwise noted, when discussing the current D.C. Code sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

[2] RCC § 22E-1809.

[3] RCC § 22E-1808.

[4] RCC § 22E-1809.

[5] RCC § 22E-1810.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

its common meaning as "having parts that originate from another source."[10] The exclusion of derivative images, in conjunction with the requirements in paragraph (a)(2), requires the defendant to record, photograph, or film the complainant engaged in live sexual conduct. There is no liability in subparagraph (a)(1)(A) for recording, photographing, or filming a pre-existing image of the complainant or creating a composite image of the complainant.[11] However, if the defendant records, photographs, or films a pre-existing image or creates a composite image of the complainant with intent to distribute that image, there may be liability under subparagraph (a)(1)(D).

Subparagraph (a)(1)(B) prohibits a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" from giving "effective consent" for the complainant to engage in or submit to the recording, photographing, or filming of an image, other than a derivative image. The phrase "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" is identical to the language in the special defense in RCC § 22E-408, and has the same meaning as discussed in that commentary. The "knowingly" culpable mental state in paragraph (a)(1) here requires that the actor be "practically certain" that he or she is giving effective consent for the complainant to engage in or submit to the recording, photographing, or filming of an image, other than a derivative image.[12] In conjunction with the requirements in paragraph (a)(2), the exclusion on derivative images requires the defendant to give effective consent for the complainant to engage in or submit to the recording, photographing, or filming of live sexual conduct, as opposed to recording, photographing, or filming a pre-existing image or creating a composite image.[13] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." As is discussed in the commentary to the RCC definition of "consent," there are circumstances in which indirect types of agreement or inaction may be sufficient. There is no requirement for liability in subparagraph (a)(1)(B) that an image actually be created; it is sufficient that the actor give effective consent for the complainant to engage in or submit to the creation of an image.[14]

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[10] Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

[11] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[12] Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state also applies to the fact that the actor is a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant." The actor must be "practically certain" that he or she is such a person.

[13] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[14] This provision is redundant in the case of a responsible individual who has a higher culpable mental state than "knowingly." In those cases, the RCC solicitation (RCC § 22E-302) and RCC accomplice (RCC § 22E-210) provisions would establish liability, as they would for any other defendant. However, the RCC solicitation and accomplice provisions require a culpable mental state of "purposely" and have other more stringent requirements. Subparagraph (a)(1)(B) is intended to provide liability for responsible individuals who are merely "practically certain" that they are giving effective consent to the complainant engaging in

For subparagraph (a)(1)(C), the actor must be "practically certain" that he or she will display, distribute, or manufacture an image. "Display" has its ordinary meaning and is intended to indicate ways of showing an image without distributing it—i.e. showing an image to another person without actually relinquishing it. "Distribute" has its ordinary meaning, involving a transfer of an item, more than a mere display.[15] Additionally, for manufacturing in subparagraph (a)(1)(D), the actor must have the "intent" to distribute the image. Manufacturing images for personal use is characterized as possession and is penalized under the less serious offense of possession of an obscene image of a minor statute (RCC § 22E-1808). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would distribute the image. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant distributed the manufactured image, only that the defendant believed to a practical certainty that he or she would do so. Unlike subparagraphs (a)(1)(A) and (a)(1)(B), subparagraph (a)(1)(C) applies to any image, including images derived from sources other than live conduct, such as a screenshot of a pre-existing video of the complainant, or a composite image of the complainant.[16]

For subparagraph (a)(1)(D), the actor must be "practically certain" that he or she will make an image accessible to another user on an electronic platform. An accidental posting to an electronic platform[17] is insufficient for liability under the trafficking statute. The phrase "accessible to another user on an electronic platform" includes peer-to-peer sharing sites and web sites where it may be difficult to determine site views or membership or whether the image was actually displayed or distributed. It is sufficient that only one other user has access to the image. The term "user" excludes network administrators and others that are not also users of the electronic platform. Unlike subparagraphs (a)(1)(A) and (a)(1)(B), subparagraph (a)(1)(D) applies to any image, including images derived from sources other than live conduct, such as a screenshot of a pre-existing video of the complainant, or a composite image of the complainant.[18]

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or submitting to the creation of an image. The lower culpable mental state is warranted because these responsible individuals are likely violating their duty of care to the complainant by giving effective consent. These responsible individuals may still claim that they are not violating their duty of care under the general special responsibility defenses in RCC § 22E-408.

[15] RCC § 22E-701 defines a "live broadcast" as "a streaming video, or any other electronically transmitted image for simultaneous viewing by one or more people." Thus, transmitting a live broadcast is sufficient for distribution of those images if the other requirements of the revised trafficking offense are met. If the individual that transmits a live broadcast is the same individual that is directing the live sexual conduct being broadcast, the individual could also have liability for directing or creating a live sexual performance under the RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809), which has the same penalties as the revised trafficking offense. However, due to the RCC merger provision in RCC § 22E-214, the actor cannot have liability for both trafficking and arranging the same live performance.

[16] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[17] For example, accidentally uploading the wrong file.

[18] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2)

For subparagraph (a)(1)(E), the actor must be "practically certain" that he or she sells or advertises an image. "Advertise" is not limited to commercial settings and includes promoting or drawing attention to an image without any expectation of financial gain. Unlike subparagraphs (a)(1)(A) and (a)(1)(B), subparagraph (a)(1)(E) applies to any image, including images derived from sources other than live conduct, such as a screenshot of a pre-existing video of the complainant, or a composite image of the complainant.[19]

Paragraph (a)(2) specifies additional requirements for the image. First, the image must depict, or will depict, in part or whole, the body of a real complainant under the age of 18 years. "Body" includes the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body is sufficient. The complainant must be a real minor, but there is no requirement that the government prove the identity of the minor. Second, the image must depict, or will depict, the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area,[20] or anus, when there is less than a full opaque covering.[21] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "reckless." "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the image depicts, or will depict, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state also applies to the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted or will be depicted in the image is one of the types prohibited in subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree creating or trafficking an obscene image of a minor. Paragraph (b)(1), subparagraphs (b)(1)(A), (b)(1)(B), (b)(1)(C), (b)(1)(D), and (b)(1)(E), and paragraph (b)(2) have the same

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images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[19] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[20] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[21] If the genitals, pubic area, or anus of the minor have a full opaque covering, or will have a full opaque covering, there is no liability under first degree trafficking an obscene image. However, if the image depicts, or will depict, a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised trafficking an obscene image statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

requirements as paragraph (a)(1), subparagraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), and (a)(1)(E), and paragraph (a)(2) in first degree creating or trafficking an obscene image of a minor. However, the types of prohibited sexual conduct are different in second degree creating or trafficking an obscene image. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact," and subparagraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.[22] The terms "obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must consciously disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display.

Subsection (c) establishes two exclusions from liability for the RCC trafficking an obscene image offense. Paragraph (c)(1) provides that the statute does not apply to any person that is a licensee[23] under the Communications Act of 1934, such as a radio, television, or phone service provider. Paragraph (c)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified licensee. Paragraph (c)(2) provides that the statute does not apply to any person that is an interactive computer service as defined in 47 U.S.C. § 230(f)(2).[24] Paragraph (c)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified interactive computer service.

Subsection (d) establishes several affirmative defenses for the RCC creating or trafficking an obscene image statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC.

Paragraph (d)(1) establishes an affirmative defense to subsection (a) of the revised statute that the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[25] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, is not subject to the First Amendment requirements set out in *Miller v. California*.[26] However, the affirmative defense recognizes that there may be rare situations where images of such conduct warrant First Amendment protection. Paragraph (d)(1) specifies "in fact." "In fact" is a defined term

[22] If the specified part of the breast or the buttocks has a full opaque covering, and the image does not depict or will not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(B), there is no liability under second degree trafficking an obscene image. However, there may be liability for causing the minor to engage in the underlying sexual conduct in the RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304).

[23] The term "licensee" is defined in paragraph (c)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[24] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[25] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[26] *Miller v. California*, 413 U.S. 15, 24 (1973).

in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the image has, or will have, serious literary, artistic, political, or scientific value when considered as a whole.

Paragraph (d)(2) establishes an affirmative defense for an actor that is under the age of 18 years. Per paragraph (d)(2), the affirmative defense applies to subparagraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), (b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D) of the offense— all prohibited conduct in the offense except selling or advertising an image in subparagraphs (a)(1)(E) and (b)(1)(E). Paragraph (d)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in paragraph (d)(2) applies to subparagraphs (d)(2)(A) and (d)(2)(B) and sub-subparagraphs (d)(2)(B)(i) and (d)(2)(B)(ii) and there is no culpable mental state requirement for any of these elements. Subparagraph (d)(2)(A) requires that the actor is under the age of 18 years. There are two alternative requirements for the affirmative defense under subparagraph (d)(2)(B). Sub-subparagraph (d)(2)(B)(i) requires that the actor is the only person under the age of 18 years who is, or who will be, depicted in the image. In the alternative, sub-subparagraph (d)(2)(B)(ii) applies if there are multiple people under the age of 18 years who are, or who will be, depicted in the image. Under sub-subparagraph (d)(2)(B)(ii), the actor must reasonably believe that every person under 18 years of age who is, or who will be, depicted in the image gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The "in fact" specified in paragraph (d)(2) applies to sub-subparagraph (d)(2)(B)(ii) and no culpable mental state, as defined in RCC § 22E-205, applies to sub-subparagraph (d)(2)(B)(ii). However, sub-subparagraph (d)(2)(B)(ii) still requires that the actor subjectively believe that every person under 18 years of age who is, or who will be, depicted in the image gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[27] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Paragraph (d)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Per paragraph (d)(3), the affirmative defense applies to subparagraphs (a)(1)(A), (a)(1)(C), (a)(1)(D), (b)(1)(A), (b)(1)(C), and (b)(1)(D)) of the offense—all prohibited conduct in

[27] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

the offense except a person responsible for the complainant under civil law giving effective consent (subparagraphs (a)(1)(B) and (b)(1)(B)) and selling or advertising an image (subparagraphs (a)(1)(E) and (b)(1)(E)). Paragraph (d)(3) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in paragraph (d)(3) applies to the remaining elements of the defense under subparagraphs (d)(3)(A) through (d)(3)(E) and there is no culpable mental state requirement for any of these elements.

There are several requirements to the affirmative defense under paragraph (d)(3). First, per subparagraph (d)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (d)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs (d)(3)(B)(i) and (d)(3)(B)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant (sub-subparagraph (d)(3)(B)(ii)). "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[28] and is intended to have the same meaning. There are additional requirements if the actor is in a "romantic, dating, or sexual relationship" with the complainant under sub-subparagraph (d)(3)(B)(ii). When the complainant is under 16 years of age, the actor must be less than four years older (sub-subparagraph (d)(3)(B)(ii)(a)), and when the complainant is under 18 years of age and the actor is at least four years older, the actor must not be in a "position of trust with or authority over" the complainant (sub-subparagraph (d)(3)(B)(ii)(b)). "Position of trust with or authority over" is a defined term in RCC § 22E-701. The requirements in sub-subparagraphs (d)(3)(B)(ii)(a) and (d)(3)(B)(ii)(b) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Second, per subparagraph (d)(3)(C), the complainant must be the only person who is depicted, or who will be depicted, in the image, or the actor and the complainant must be the only persons who are depicted, or who will be depicted in the image. The marriage or romantic partner defense is not available when the image shows, or will show, third persons. Third, per subparagraph (d)(3)(D), the actor must "reasonably believe"[29] that the complainant gives "effective consent" to the actor to engage in the

[28] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[29] As was stated earlier, the "in fact" specified in paragraph (d)(3) applies to subparagraph (d)(3)(D) and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (d)(3)(D). However, subparagraph (d)(3)(D) still requires that the actor subjectively believe that the complainant gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an

conduct that constitutes the offense. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Finally, for display, distribution, manufacturing with intent to distribute, or an electronic platform, subparagraph (d)(3)(E) requires that the actor "reasonably believe"[30] that the recipient, the intended recipient, or the user of the electronic platform is the complainant.

Paragraph (d)(4) establishes an affirmative defense for the innocent display or distribution of a prohibited image in certain socially beneficial situations. Per paragraph (d)(4), the defense applies to the display or distribution of an image under subparagraphs (a)(1)(C) and (b)(1)(C) of the offense. Subparagraph (d)(4)(A) requires that the actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[31] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant successfully reported illegal conduct or sought legal counsel, only that the defendant believed to a practical certainty that he or she would do so. Subparagraph (d)(4)(B) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(4)(B) and sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii) and there is no culpable mental state requirement for any of the elements in these subparagraphs and sub-subparagraphs. Subparagraph (d)(4)(B) requires that the actor display or distribute

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objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[30] As was stated earlier, the "in fact" specified in paragraph (d)(3) applies to subparagraph (d)(3)(E) and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (d)(3)(E). However, subparagraph (d)(3)(E) still requires that the actor subjectively believe that the complainant is the recipient, the intended recipient, or user of the electronic platform, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[31] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

the image to a person the actor reasonably believes[32] is a person specified in sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), such as a law enforcement officer or a person responsible under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believes is depicted in the image or involved in the creation of the image.

Paragraph (d)(5) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. The affirmative defense applies to subparagraphs (a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E).[33] Paragraph (d)(5) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(5)(A), (d)(5)(B), and (d)(5)(C) and there is no culpable mental state requirement for any of the elements in these subparagraphs. The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the image. The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

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

Subsection (f) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised creating or trafficking an obscene image of a minor statute clearly changes current District law in twelve main ways.*

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[32] As was stated earlier, the "in fact" specified in subparagraph (d)(4)(B) applies to sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii) and no culpable mental state, as defined in RCC § 22E-205, applies to these sub-subparagraphs. However, the actor must subjectively believe that the person is one of the specified individuals in sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.

[33] This defense does not apply to creating images derived from recording, photographing, or filming live sexual conduct (subparagraphs (a)(1)(A), and (b)(1)(A)) because such actions create child pornography directly from the sexual abuse of minors (as compared to creating a composite image from pre-existing photographs). However, there may be a separate defense for first degree creating or trafficking an obscene image for images that have serious artistic or other value (subsection (d)(1)), or an argument that the images are not "obscene" as required for second degree.

This defense also does not apply to individuals that are responsible for the complainant under civil law and give effective consent for the complainant to engage in the creation of an image derived from live sexual conduct (subparagraphs (a)(1)(B) and (b)(1)(B)) because these individuals are likely violating their duty of care to the complainant. These individuals can still argue that they are not violating their duty of care under the general special responsibility defenses in RCC § 22E-408.

First, the revised creating or trafficking an obscene image statute punishes creating, displaying, distributing, selling, or advertising a prohibited image more severely than possessing a prohibited image. The current D.C. Code sexual performance of a minor statute has the same penalties for creating, displaying, distributing, selling, advertising, and possessing a prohibited image,[34] even though creating and distributing are direct forms of child abuse[35] and selling and advertising are "an integral part" of the market.[36] In contrast, the revised creating or trafficking an obscene image statute penalizes creating,[37] displaying, distributing, selling, or advertising a prohibited image more severely than possessing a prohibited image in the revised possession statute (RCC § 22E-1808). Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other current District offenses.[38] The revised creating or trafficking statute also prohibits in subparagraphs (a)(1)(D) and (b)(1)(D) making an image accessible to another user on an electronic platform because this kind of electronic access can be as harmful as actual distribution. As part of this revision, the revised statute no longer uses the current D.C. Code statute's defined term "promote" and splits the conduct referred to in that definition between the

[34] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting "employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance," "being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance," "produces, directs, or promotes" any sexual performance, and "attend, transmit, or possess" any sexual performance), 22-3104 (punishing a first violation "of this chapter" with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

[35] *See, e.g., New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."); *id.* at 759 ("The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.").

[36] *Ferber*, 458 U.S. at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[37] The revised creating or trafficking an obscene image statute prohibits two ways of creating an image. First, subparagraphs (a)(1)(A) and (b)(1)(A) prohibit creating an image by filming, recording, or photographing the complainant engaging in live sexual conduct. Second, subparagraphs (a)(1)(D) and (b)(1)(D) prohibit manufacturing "with intent to distribute" an image. This is not limited to recording live conduct, and includes taking a screenshot of a pre-existing image or video and making a composite image, whether from "real" images, computer-generated images, or a combination of both, as long as there is the intent to distribute.

[38] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

revised trafficking an obscene image and possession of an obscene image offenses.[39] This change improves the consistency and proportionality of the revised offense.

Second, the revised creating or trafficking an obscene image statute grades penalties based upon the type of sexual conduct depicted in the image. The current D.C. Code sexual performance of a minor statute prohibits images of "sexual conduct,"[40] a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC creating or trafficking an obscene image statute reserves the first degree gradation for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised trafficking an obscene image statute is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in current District sex

[39] The current statute prohibits "promot[ing]" any sexual performance of a minor and defines "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." D.C. Code § 22-3102(a)(2), 22-3101(4). There is no DCCA case law on the scope of this definition. As is discussed in the commentary, the revised trafficking an obscene image statute retains "distribute," "sell," and "advertise." In addition, the revised trafficking statute prohibits "present" and "exhibit" in the prohibitions on display and electronic platforms in subparagraphs (a)(1)(C), (b)(1)(C), (a)(1)(D), (b)(1)(D). However, instead of "manufacture" and "transmute," the revised statute requires manufacturing with intent to distribute (subparagraphs (a)(1)(C) and (b)(1)(C)). Manufacturing or transmuting images, without more, is characterized as possession, and is criminalized by the less serious possession of an obscene image statute (RCC § 22E-1808). The remaining possessory aspect of the current definition, "procure," is criminalized in the less serious RCC possession of an obscene image offense.
"Offer or agree to do the same" is deleted from the current definition of "promote" because inchoate liability, such as attempt and conspiracy, provides more consistent and proportional punishment for this conduct. For example, under the current statute, a defendant that "offers" to "direct" and film a live sexual performance could be charged with attempted sexual performance of a minor, which, for a first offense, would have a maximum term of imprisonment of 180 days. D.C. Code §§ 22-1803; 22-3102(a)(2) (prohibiting "direct[ing]" a sexual performance of a minor); 22-3103(1). However, if this conduct were charged under the current definition of "promote" as offering to "manufacture" a film of a sexual performance, the defendant would face a maximum term of imprisonment of 10 years. D.C. Code §§ 22-3102(a)(2); 22-3103(1). In the RCC, the defendant would be charged with attempted trafficking of an obscene image (RCC § 22E-1807 (offers to "record[], photograph[], or film[]" the complainant).
The remainder of the current definition is deleted as redundant with distribution (issue, give, provide, lend, mail, deliver, transfer, publish, circulate, disseminate).

[40] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting a "sexual performance" or a "performance which includes sexual conduct by a person under 18 years of age."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

offenses.[41] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised creating or trafficking an obscene image statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current D.C. Code sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[42] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." The creation, distribution, or possession of images of minors engaging in "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[43] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[44] with no enhancements for the obscene materials depicting a minor.[45] In contrast, first degree of the revised creating or trafficking an obscene image statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and "sexual contact" are defined in RCC § 22E-701, consistent with other RCC offenses. As defined, such sexual conduct may be as graphic[46] as other conduct penalized by the current D.C. Code statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a

[41] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

[42] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[43] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the creation, distribution, and possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[44] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[45] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[46] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised trafficking an obscene image of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

"lewd exhibition of the genitals."[47] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[48] This change improves the consistency and proportionality of the revised statute.

Fourth, the revised creating or trafficking an obscene image statute expands the prohibited sexual conduct to include a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current D.C. Code sexual performance of a minor statute is limited to a "lewd exhibition of the genitals." However, the creation, distribution, or possession of images of minors engaging in a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering" may be criminalized in the current D.C. Code obscenity statute.[49] The current D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[50] with no enhancements for the obscene materials depicting a minor.[51] In contrast, the RCC revised creating or trafficking an obscene image of a minor statute criminalizes the creation and distribution of certain depictions of the pubic area[52] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[53] As defined, display of the pubic

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[47] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[48] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[49] The current obscenity statute, D.C. Code § 22-2201 generally criminalizes the creation, distribution, and possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[50] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[51] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[52] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[53] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v.*

area or anus is as graphic as other conduct penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised creating or trafficking an obscene image statute expands the current exception to liability for conduct by persons under 18 years of age and makes it an affirmative defense. In the current D.C. Code sexual performance of a minor statute, minors that are depicted in prohibited images are not liable for possessing or distributing those images if the minor is the only minor depicted,[54] or, if there are multiple minors depicted, all of the minors consent.[55] A minor that is not depicted,[56] or an adult that is not more than four years older than the minor or minors depicted,[57] is not liable for

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Ferber, 458 U.S. 747, 764-66 (1982). The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams*, the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC trafficking an obscene statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC trafficking an obscene image statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised trafficking an obscene image statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.")

[54] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[55] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[56] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[57] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (c) If the sexual performance consists solely of a still or motion picture, then this section: .

possessing an image that he or she receives from a depicted minor, unless he or she knows that at least one of the depicted minors did not consent. The current exclusion does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent,[58] and minors are still liable under the current statute for creating images of themselves or other minors[59] or engaging in sexual conduct.[60] There is no DCCA case law interpreting the current exclusion. In contrast, the revised trafficking an obscene image statute excludes from liability all persons under the age of 18 years,[61] applies to all images,[62] and applies to all prohibited conduct, except selling or advertising images (subparagraphs (a)(1)(E) and (b)(1)(E)). Legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.[63] The only requirements of the

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. (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[58] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[59] A minor that creates a prohibited image of himself or herself or of other minors has "produce[d], direct[ed], or promote[d]" a "performance which includes sexual conduct by a person under 18 years of age." D.C. Code §§ 22-3102(a)(2); 22-3101(4) (defining "promote," in part, as "to manufacture . . . transmute.").

[60] The current definition of "performance" extends to live conduct. D.C. Code § 22-3101(3) ("'Performance' means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."). Thus, under a plain language reading, when a minor engages in "sexual conduct" with themselves, another minor, or an adult, they are "produc[ing], direct[ing], or promot[ing]" a "performance that includes sexual conduct by a person under 18 years of age" or "attend[ing]" a sexual performance by a minor. D.C. Code §§ 22-3102(a)(2), (b); 22-3101(4) (defining "promote," in part, as "to present [or] exhibit.").

[61] The revised creating or trafficking statute excludes from liability minors that have a responsibility under civil law for the health, welfare, or supervision of the complainant. These minors would otherwise have liability under subparagraphs (a)(1)(B) and (b)(1)(B) for giving effective consent for another minor to engage in or submit to the recording, photographing, or filming of a non-derivative image. This exclusion ensures that the revised creating or trafficking an obscene image statute is reserved for predatory adults. However, such a minor may still have liability under the RCC criminal abuse and criminal neglect of a minor statutes (RCC §§ 22E-1501 and 22E-1502) and the RCC sex offenses. In addition, the revised exclusion only applies if the minor that is under the care of the responsible minor gives effective consent to the actions of the responsible minor.

[62] The current exclusion applies only to a "still or motion picture," but there is no substantive difference between the definition of "still or motion picture" and the RCC definition of "image." *Compare* D.C. Code § 22-3102(d)(2) (defining "still or motion picture" as "includ[ing] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced.") *with* RCC § 22E-701 (defining "image" as a "a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format."). The revised trafficking an obscene image statute deletes the current definition of "still or motion picture."

[63] *See, e.g.,* Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography

revised exclusion are either: 1) The minor is the only person under the age of 18 years who is depicted, or who will be depicted, in the image;[64] or 2) The actor reasonably believes that the actor has the effective consent of every person under 18 years of age who is, or who will be, depicted in the image.[65] The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Per the revised statute, a minor still may be liable for selling or advertising images, even of himself or herself,[66] or for distribution or display of an image without the recipient's effective consent.[67] This change improves the clarity, consistency, and proportionality of the revised offense.

Sixth, the revised trafficking an obscene image statute expands the current affirmative defense for a librarian or motion picture theater employee to include similarly positioned museum, school, and other venue employees. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]" any sexual performance of a minor[68] for a "librarian engaged in the normal course of his or her

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frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

[64] If a minor is the only person under the age of 18 years that is depicted, or will be depicted, in the image, it is irrelevant under the exclusion if the image depicts, or will depict, an adult. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1802), electronic stalking (RCC § 22E-1803), unlawful disclosure of sexual recordings (RCC § 22E-1804), distribution of an obscene image (RCC § 22E-1805), or sexual assault (RCC § 22E-1301).

[65] If both minors and adults are depicted, or will be depicted, in the image, it is irrelevant under the defense if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803), electronic stalking (RCC § 22E-1802), unlawful disclosure of sexual recordings (RCC § 22E-1804), distribution of an obscene image (RCC § 22E-1805), or sexual assault (RCC § 22E-1301).

[66] For example, a sixteen year old who sells images of himself or herself masturbating to an online buyer may be liable under the revised statute. Even if the minor's conduct in such situations appears to be consensual, when a minor sells or advertises sexual images such conduct supports the market for prohibited sexual images.

[67] The RCC distribution of an obscene image statute (RCC § 22E-1805) and RCC distribution of an obscene image to a minor statute (RCC § 22E-1806) prohibit the distribution or display of an image without the recipient's effective consent. The RCC distribution of an obscene image to a minor statute (RCC § 22E-1806) requires that the defendant be at least 18 years of age, but the general distribution of an obscene image statute does not, and applies if the recipient is a minor.

[68] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-

employment"[69] and certain movie theater employees[70] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[71] There is no DCCA case law interpreting this defense. In contrast, the revised trafficking an obscene image statute expands this affirmative defense to include employees at museums, schools, and other venues who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the image.[72] For reasons discussed the in explanatory note to this offense, the affirmative defense is limited to the conduct prohibited in subparagraphs (a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E). Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's affirmative defense in paragraph (d)(1) to first degree for images with serious artistic or other value, or, in second degree, the argument that the images are not "obscene." This change improves the clarity and consistency of the revised statute.

Seventh, the revised trafficking an obscene image statute expands the "innocent possession" affirmative defense in the current D.C. Code sexual performance of a minor statute to include conduct involving more images and display or distribution to authorities other than law enforcement, so long as the actor has a socially beneficial intent. The current D.C. Code sexual performance of a minor statute has an affirmative defense for possessing five or fewer images or one motion picture and requires either that the defendant take reasonable steps to destroy the material or report the material to a law enforcement agency and afford that agency access.[73] There is no DCCA case law interpreting the current defense. In contrast, the RCC affirmative defense is available for the distribution or display of any number of images to any number of recipients,

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3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[69] D.C. Code § 22-3104(b)(1)(A).

[70] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[71] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

[72] For example, the defense would not apply to the curator of an art museum who selects prohibited images for an exhibition and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum usher who escorts patrons to the exhibition or sells prints of the prohibited images at the museum gift shop. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the images had serious artistic value under the affirmative defense in paragraph (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

[73] D.C. Code § 22-3104(c) ("It shall be an affirmative defense to a charge under § 22-3102 that the defendant: (1) Possessed or accessed less than 6 still photographs or one motion picture, however produced or reproduced, of a sexual performance by a minor; and (2) Promptly and in good faith, and without retaining, copying, or allowing any person, other than a law enforcement agency, to access any photograph or motion picture: (A) Took reasonable steps to destroy each such photograph or motion picture; or (B) Reported the matter to a law enforcement agency and afforded that agency access to each such photograph or motion picture.").

including a law enforcement officer or person with a responsibility under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image or involved in the depiction when the actor has the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney." The current affirmative defense unnecessarily restricts the number of images or motion pictures and excludes well-intentioned individuals who seek legal advice or report images to authorities other than law enforcement. The expanded defense recognizes that parents, schools, and others have a vital interest in addressing wrongful creation, distribution, and sale of prohibited images, and good faith sharing of information such authorities should not be a crime.[74] The number of images or motion pictures an individual displays or distributes is not limited, but may be relevant to a fact finders' determination of the actor's intent. This change improves the consistency and proportionality of the revised statute.

Eighth, the revised trafficking an obscene image statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[75] The current D.C. Code sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference.[76] There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised trafficking an obscene image statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant, with several additional requirements

[74] For example, if a parent discovers multiple video clips on their child's phone of what appear to be another minor engaging in sexual conduct at the child's school, the parent should be able to send the video to school administrators, the parents of the minor, and/or possibly an attorney for further investigation and resolution without having committed a crime.

[75] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[76] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

The defense only applies to creating an image by recording, photographing, or filming the complainant (subparagraphs (a)(1)(A) and (b)(1)(A)), displaying, distributing, or manufacturing with intent to distribute (subparagraphs (a)(1)(C) and (b)(1)(C)), and placing an image on an electronic platform (subparagraphs (a)(1)(D) and (b)(1)(D)). The prohibited conduct must be limited to the actor and the complainant or just the complainant, and the actor must reasonably believe that the actor has the complainant's effective consent. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Without this defense, the revised trafficking statute would criminalize consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes. This change improves the consistency and proportionality of the revised statute.

Ninth, the revised trafficking an obscene image statute has an affirmative defense for subsection (a) that the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. The current sexual performance of a minor statute does not have any defense if the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current D.C. Code statute appears to criminalize the creation, sale, promotion, or possession of materials like medical textbooks, pictures or videos of newsworthy events, or artistic films that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to images with serious literary, artistic, political, or scientific value, when considered as a whole.[77] In contrast, first degree of the revised creating or trafficking an obscene image statute has an affirmative defense that the image has, or will have serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[78] Despite this defense, however, there may still be liability under the RCC sex offenses for

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[77] In *Ferber*, the Court acknowledged that some applications of the statute at issue would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n 28.

[78] *Miller v. California*, 413 U.S. 14, 24 (1973).

causing or attempting to cause a minor to engage in the prohibited sexual conduct.[79] This change improves the constitutionality of the revised statute.

Tenth, through the RCC definition of "image," the revised trafficking an obscene image statute excludes hand-rendered depictions. The current D.C. Code sexual performance of a minor statute defines "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."[80] There is no DCCA case law on the precise scope of "any visual presentation or exhibition," but the legislative history for the current D.C. Code statute seems to indicate that paintings, sculptures, and other hand rendered depictions would be included.[81] The Supreme Court struck down as unconstitutionally overbroad a federal statute on sexual images of minors in part because it applied to "any visual depiction" without regard to whether it was obscene, however, the ruling did not turn on the medium or method visual representation.[82] In contrast, through the definition of "image" in RCC § 22E-701, the revised creating or trafficking an obscene image statute is limited to images that are not hand-rendered. Limiting the revised statute to images that are not hand-rendered helps ensure that the images feature "real" minors,[83] and, for second

[79] For example, a defendant that causes minors to engage in sexual intercourse for an artistic film may have a successful affirmative defense under subsection (d)(1) of the RCC creating or trafficking offense. However, depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force involved, there may be liability for sexual assault (RCC § 22E-1301). If the sexual activity doesn't actually occur, there may still be liability under enticing a minor into sexual conduct (RCC § 22E-1305) or arranging for sexual conduct with a minor or person incapable of consenting (RCC § 22E-1306).

[80] D.C. Code § 22-3101(3).

[81] *See* Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8 (stating that the definition of "performance" is mean to "to include any visual presentation or exhibition without regard to the medium.").

[82] In *Aschcroft v. Free Speech Coalition*, the Supreme Court held that a provision in a federal statute that extended to "any visual depiction" that "is, or appears to be a minor engaging in sexually explicit conduct" was unconstitutionally overbroad. *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 241, 256 (2002). However, most of the Court's analysis focused on the "appears to be language," and it was in this context that the Court also discussed the problematic scope of "any visual depiction," noting that "the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology" because it is a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." *Free Speech Coalition*, 535 U.S. at 241. The Court in *Free Speech Coalition* also noted that these images "do not involve . . . let alone harm any children in the production process," *id.* at 241, and, accordingly found the Government's arguments for the restriction unpersuasive, *id.* at 246-56, 256. Although not squarely addressed in the opinion, it seems clear that the medium of a visual depiction is not dispositive in the constitutional analysis. A watercolor painting that is derived from painting live conduct is still a product of child sexual abuse and may be prohibited. *Id.* at 249 ("Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. . . . The fact that a work contained serious literary, artistic, or other value did not excuse the harm to its child participants.").

[83] As is discussed elsewhere in this commentary, in *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. However, for many hand-rendered depictions, such as paintings, it may be difficult to determine if the depiction was of a "real" minor or just an individual's artistic rendering. For example, a defendant that sells or shares a realistic painting of female genitalia falls within the scope of the current statute, but without additional information, it is impossible to know if the painting is of a "real"

degree, that the images are "patently offensive" under modern community standards per *Miller v. California*.[84] This change improves the clarity, consistency, and constitutionality of the revised statute.

Eleventh, the revised creating or trafficking an obscene image statute no longer separately prohibits "employ[ing]," "authoriz[ing]," or "induc[ing]" a minor to engage in a sexual performance, instead penalizing such conduct under the RCC solicitation statute at half the penalty of the completed offense. The current D.C. Code sexual performance of a minor statute specifically states that a person commits the offense if he "employs, authorizes, or induces" a minor to engage in a sexual performance.[85] The precise scope of conduct intended by these verbs, and whether such verbs are intended to equate with solicitation of a crime under common law, is unclear. There is no DCCA case law interpreting this provision. Regardless, although such conduct may be far-removed from an actual image, employing, authorizing, or inducing a minor to engage in a sexual performance has the same 10 year penalty as actually filming or directing a sexual performance.[86] In contrast, the revised creating or trafficking an obscene image statute removes employing, authorizing, and inducing as a discrete means of liability. Conduct that facilitates the minor engaging in the creation of an image instead is covered by the RCC solicitation offense (RCC § 22E-302),[87] defined in a manner consistent with other serious offenses against persons, and subject to a penalty one-half of the completed offense. "Employing" a minor to engage in a sexual performance may also make the actor subject to attempt liability[88] depending on the facts of the case. This change improves the clarity, consistency, and proportionality of the revised statute.

Twelfth, the revised statute excludes liability for commercial telecommunications service providers. The current D.C. Code sexual performance of a minor statute makes it unlawful to "transmit" a still or motion picture depicting a sexual performance by a minor "by any means, including electronically."[89] The crime makes no exception for a company or employee who merely facilitates the transmission of an image or sound at a user's request.[90] District case law has not addressed the issue. In contrast, the revised trafficking an obscene image offense excludes liability for any licensee under the Communications Act of 1934,[91] such as a radio station, television broadcaster, or phone service provider, consistent with the current and revised obscenity offenses.[92] The revised offense also excludes liability for any interactive computer service, as defined in

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minor. If the painting is not of a "real" minor, and is not otherwise obscene, it is unconstitutional to prohibit its creation, distribution, etc.

[84] 413 U.S. 15 (1973).

[85] D.C. Code § 22-3102(a)(1).

[86] D.C. Code § 22-3102(1).

[87] Depending on the facts of the case, there may also be accomplice liability under RCC § 22E-210 or conspiracy liability under § 22E-301 for one who "employs, authorizes, or induces" in concert with others.

[88] RCC § 22E-301.

[89] D.C. Code § 22-3102(d)(3).

[90] Consider, for example, a social media platform that "transmits" the obscene image one user posts to other users of the platform. Consider also a television station that "transmits" a live broadcast of local news coverage, during which two minors begin engaging in a sexual act in the background.

[91] 47 U.S.C. § 151 et seq.

[92] *See* D.C. Code § 22-2201(d); RCC §§ 22E-1805 and 1806.

section 230(e)(2) of the Communications Act of 1934,[93] for content provided by another person, consistent with the current and revised nonconsensual pornography offenses.[94] This change improves the consistency and proportionality of the revised offense.

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

First, the revised creating or trafficking an obscene image statute requires a "knowingly" culpable mental state for the prohibited conduct—creating an image, giving consent for a minor to create an image, displaying, distributing, or manufacturing an image, making an image accessible on an electronic platform, and selling or advertising an image. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance.[95] The statute does not specify whether this culpable mental state extends to the prohibited conduct, such as creating the image, and the definition of "knowingly"[96] in the current statute is unclear. There is no DCCA case law on these issues. The current obscenity statute has a substantively identical definition of "knowingly,"[97] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[98] Resolving this ambiguity, the revised creating or trafficking an obscene image statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the prohibited

[93] 7 U.S.C. § 230(f)(2).

[94] *See* D.C. Code § 22-3055(b); RCC § 22E-1804.

[95] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[96] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[97] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[98] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

conduct—creating an image, giving consent for a minor to create an image, displaying, distributing, or manufacturing an image, making an image accessible on an electronic platform, and selling or advertising an image. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[99] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised creating or trafficking an obscene image statute requires recklessness as to the content of the image and, in second degree, as to whether the content is obscene. The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[100] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[101] There is no DCCA case law interpreting the definition of "knowingly"[102] or how it applies to the current statute. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[103] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[104] Resolving this ambiguity, the revised

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

[100] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[101] D.C. Code § 22-3101(1).

[102] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[103] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[104] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the

creating or trafficking an obscene image statute requires recklessness as to the content of the image,[105] and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[106] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[107] This change improves the clarity and consistency of the revised statute

Third, the revised creating or trafficking an obscene image statute requires that the image depicts, or will depict, at least part of a real complainant under the age of 18 years, and excludes purely computer-generated or other fictitious minors. The current D.C. Code sexual performance of a minor statute does not specify whether the complainant that is depicted, or will be depicted, in an image must be a "real," i.e. not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[108] which arguably suggests that the complainant must be a "real," i.e. not fictitious, person. There is no DCCA case law on this issue. Resolving this ambiguity, the revised creating or trafficking an obscene image statute specifies that at least part[109] of a "real," i.e. not fictitious, complainant under the age of 18 years must be depicted or will be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[110] Distribution of obscene images of purely computer-generated or other

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accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[105] While the revised creating or trafficking an obscene image statute requires "recklessness" as to the content of the image (whether it depicts or will depict part or all of a real complainant under the age of 18 years engaging in the prohibited sexual conduct), the closely-related distribution of an obscene image statute (RCC § 22E-1805) and distribution of an obscene image to a minor statute (RCC § 22E-1806) require a higher "knowingly" culpable mental state for the equivalent element (whether an image depicts any person, real or fictitious, of any age, engaging in the prohibited sexual conduct). The higher culpable mental state in these offenses is warranted because they prohibit a much broader array of images.

[106] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[107] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[108] D.C. Code § 22-3101(2).

[109] The revised creating or trafficking an obscene image statute includes composite images of minors if at least part of the composite is of a real minor, such as a real minor's head on an adult body, or an adult's head on a real minor's body. There is no requirement that the government prove the identity of a real minor.

[110] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to meet the *Miller* standard for obscenity. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Crucial to the Court's decision was its acceptance of several arguments and legislative findings,

fictitious minors[111] may be prohibited under the RCC distribution of an obscene image statute (RCC § 22E-1805) or distribution of an obscene image to a minor statute (RCC § 22E-1806). This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, through use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for images of sexual conduct that is apparently fake. The current D.C. Code sexual performance of a minor statute prohibits "simulated" sexual intercourse,[112] but does not define the term. It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way which realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised statute,[113] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[114] and is supported by Supreme Court case law.[115] Distribution

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including that "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child," *id.* at 758, and that "the materials are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," *id*. at 759. *Ferber* was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further. The RCC requirement that the image is at least partially comprised of a real minor ensures the revised trafficking offenses is constitutional.

[111] Under Supreme Court case law, images of computer-generated minors and other fake minors retain First Amendment protection and can only be prohibited if they are also obscene. *Ferber*, 458 U.S. at 764-65 ("We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."). In *Ashcroft v. Free Speech Coalition*, the Court held that a federal statute that prohibited "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct," without any obscenity requirement, was overbroad and unconstitutional. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 249, 256 (2002). The Court noted that unlike *Ferber*, where the images were "the record of sexual abuse, [the federal statute at issue] prohibits speech that records no crime and creates no victims by its production." *Ashcroft*, 535 U.S. at 250. The Court found unpersuasive the Government's arguments about the need for the statute and held that it was overbroad and unconstitutional. *Id.* 250-51, 252-56. In *United States v. Williams*, the Court stated that a federal statute that prohibited "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008).

[112] D.C. Code § 22-3101(5)(A).

[113] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[114] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

of obscene images that do not satisfy the definition of "simulated" may be prohibited under the RCC distribution of an obscene image statute (RCC § 22E-1805) or distribution of an obscene image to a minor statute (RCC § 22E-1806). This change improves the clarity, consistency, and constitutionality of the revised statute.

Fifth, the revised creating or trafficking an obscene image statute provides liability for a person responsible for the complainant under civil law giving "effective consent" to the complainant's participation in the recording, photographing, or filming, and requires a "knowingly" culpable mental state for this element.[116] The current D.C. Code sexual performance using a minor statute prohibits a "parent, legal guardian, or custodian" of a minor from "consent[ing] to the participation by a minor in a sexual performance."[117] The statute does not define "consent" or specify a culpable mental state for this element and there is no DCCA case law on this issue. Resolving this ambiguity, the revised creating or trafficking statute requires that the individual responsible under civil law for the health, welfare, or supervision of the complainant give "effective consent," as defined in RCC § 22E-701, and requires a "knowing" culpable mental state for this element. The term "under civil law for the health, welfare, or supervision of the complainant" includes parents, legal guardians, and custodians who at the time have a legal duty of care for the complainant. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception" and is used consistently throughout the RCC. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[118] This change improves the clarity and consistency of the revised statute.

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[115] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[116] Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) and paragraph (b)(1) also applies to the fact that the defendant is a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant."

[117] D.C. Code § 22-3102(a)(1).

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

Sixth, the revised creating or trafficking an obscene image statute requires recklessness as to the age of the complainant and deletes the current affirmative defense for reasonable mistake of age. The current D.C. Code sexual performance of a minor statute requires that the defendant "know[] the character and content" of the sexual performance[119] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[120] It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence,[121] and it is also unclear whether the mental state applies to the age of the complainant.[122] There is no DCCA case law on these issues. However, the current statute has an affirmative defense for a reasonable mistake of age,[123] which suggests that negligence is not sufficient for liability and that "recklessly" or "knowingly" applies to the age of the complainant. Resolving this ambiguity, the revised creating or trafficking an obscene image statute requires recklessness as to the age of the complainant. A reckless culpable mental state preserves the substance of the affirmative defense[124] and

[119] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[120] D.C. Code § 22-3101(1).

[121] The legislative history notes that the definition of "knowingly" was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[122] The legislative history for the prohibition in the current statute against attending, transmitting or possessing a sexual performance by a minor (D.C. Code § 22-3102(b)), states that the defendant "must know that the performance will depict a minor." Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary on Bill 18-70, The "Prohibition Against Human Trafficking Amendment Act of 2010" at 10. This prohibition was added to the current statute in 2010 and there is no discussion of how the "knowing" culpable mental state in pre-existing parts of the statute applies to the age of the complainant. Regardless, it is persuasive authority that the defendant must "know" the age of the complainant in the other parts of the statute, although the meaning of that definition remains unclear.

[123] D.C. Code § 22-3104(a) ("Under this chapter it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over.").

[124] The current affirmative defense is that "the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over." D.C. Code § 22-3104(a). In the revised creating or trafficking an obscene image statute, it must be proven that an actor was reckless that the complainant was under the age of 18 years. As defined in RCC § 22E-206, "recklessness" requires that the actor must consciously disregard a substantial risk that the complainant was under the age of 18 years; and the risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the person, the actor's conscious disregard of it is clearly blameworthy. A

clarifies that the defendant must have some subjective knowledge as to the age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[125] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[126] Throughout the RCC, recklessness as to age is a consistent basis for penalty enhancement.[127] This change improves the clarity and consistency of the revised statute.

Seventh, the revised creating or trafficking an obscene image statute does not criminalize a person with specified responsibility under civil law for the complainant giving effective consent for the complainant to aid the creation of derivative images. The definition of "performance"[128] in the current D.C. Code sexual performance of a minor statute includes live conduct as well as images (e.g., photographs) of live conduct, and appears to include derivative images (e.g., photographs of photographs). The current statute prohibits a parent, guardian, or custodian from giving consent for "participation by a minor in a sexual performance,"[129] but it is unclear what "participation" means and if this provision extends to giving consent for the minor to create an image derived from a source other than live conduct. There is no DCCA case law on these issues. Resolving this ambiguity, subparagraphs (a)(1)(B) and (b)(1)(B) of the revised statute exclude a "derivative image." Read in conjunction with the requirements in subsections (a)(2) and (b)(2), these subparagraphs require the defendant to give effective consent for the minor to engage in or submit to the recording, photographing, or filming of live sexual conduct. This change improves the clarity and consistency of the revised statute.

Eighth, the revised creating or trafficking an obscene image statute no longer separately prohibits producing or directing a derivative image. The current D.C. Code sexual performance of a minor statute prohibits "produc[ing]" or "direct[ing]" a sexual performance of a minor.[130] The definition of "performance"[131] in the current sexual performance of a minor statute includes live conduct, as well as still images (e.g., photographs). There is no DCCA case law on the intended scope or meaning of "directing" or "producing," and whether the current statute criminalizes producing or

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reasonable mistake as to the complainant's age would negate the recklessness required. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[125] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[126] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.).

[127] RCC § 22E-701 defines "protected person" to include certain individuals under the age of 18 years or over the age of 65 years and several RCC offenses, like assault (RCC § 22E-1202), require a "reckless" culpable mental state for the fact that the complainant is a "protected person." In addition, several of the penalty enhancements for the RCC sexual assault offense (RCC § 22E-1301) require a "reckless" culpable mental state for the age of the complainant.

[128] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[129] D.C. Code § 22-3102(a)(1).

[130] D.C. Code § 22-3102(a)(2).

[131] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

directing the creation of a derivative image.[132] The legislative history notes that "producing a performance [includes] giving financial backing, making background arrangements for a performance such as buying or leasing equipment for a sexual performance or purchasing equipment to film or exhibit a sexual performance."[133] Resolving this ambiguity, the revised creating or trafficking an obscene image statute eliminates separate liability for producing or directing a derivative image as a discrete means of liability. The revised trafficking an obscene image statute continues to criminalize knowingly producing or directing the creation of an image that involves recording, photographing, or filming the complainant.[134] "Produc[ing]" includes actions that facilitate the creation, sales, or advertising of a live performance, such as "giving financial backing" and "making background arrangements for a performance such as buying or leasing equipment for a sexual performance."[135] However, a person who produces or directs the creation of a derivative image is not criminally liable under the revised trafficking statute unless they satisfy the requirements under the RCC accomplice liability statute (RCC § 22E-210).[136] This change improves the clarity and consistency of the revised statute.

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

First, the revised statute deletes subsection (a) of the current D.C. Code statute: "It shall be unlawful in the District of Columbia for a person knowingly to use a minor in a sexual performance or to promote a sexual performance by a minor."[137] It is unclear whether this is a general statement or part of the actual offense for which a person can be charged and convicted.[138] The revised creating or trafficking an obscene image statute

[132] For example, knowingly providing a computer or internet services to a person who creates a compilation of sexualized images of minors copied from the internet.

[133] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[134] For example, an actor that gives money to another individual, knowing that the individual is buying video equipment and filming prohibited images would have liability for "producing" the creation of an image derived from recording, photographing, or filming live conduct. Producing or directing a live performance under the RCC arranging a live sexual performance of a minor statute RCC § 22E-1809 may also provide similar liability.

[135] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[136] For example, if an actor knows that a person creates derivative images of minors engaging in sex acts on their computer, and *purposely* buys that person sophisticated software or pays the rent at their location to facilitate that conduct or to aid the distribution or sale of derivative, there may be accomplice liability for trafficking an obscene image under RCC § 22E-210.

[137] D.C. Code § 22-3102(a).

[138] The current statute substantively encompasses the "use" and "promot[ion] of a minor in a sexual performance, regardless of the meaning of subsection (a). D.C. Code §§ 22-3102(a)(1), (a)(2) ("(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance. (2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age."); 22-3101(4) (defining "promote" as "to

substantively encompasses the "use" of a minor in a sexual performance and "promot[ing]" a sexual performance by a minor, rendering current subsection (a) superfluous. This improves the clarity of the revised offense without changing the law.

Second, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current D.C. Code definitions of "performance" and "sexual performance," the current sexual performance of a minor statute includes both still images and live performances.[139] However, it is counterintuitive to construe a "performance" as including a still image (e.g., a photograph). To clarify that both images and live performances fall within the revised statutes, the RCC creating or trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and attending a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties— creating or trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

Third, the revised creating or trafficking an obscene image statute no longer uses the defined term "minor."[140] Instead, consistent with the current statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[141] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Fourth, the revised creating or trafficking an obscene image statute replaces "parent, legal guardian, or custodian of a minor" with a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant." The current D.C. Code sexual performance of a minor statute prohibits a "parent, legal guardian, or custodian of a minor" from "consent[ing] to the participation by a minor in a sexual performance."[142] There is no DCCA case law on the scope of "parent, legal guardian, or custodian" in the current statute. However, the legislative history for the current statute indicates a broad scope: "[A] parent, whether natural, or adoptive, or a foster parent, a legal guardian defined in D.C. Code, sec. 21-101 to 103 or custodian . . . [c]ustodian means any person who has responsibility for the care of a child without regard to whether

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procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.").

[139] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

[140] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[141] *See, e.g.,* D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

[142] D.C. Code § 22-3102(a)(1).

a formal legal arrangement exists."[143] The revised statute similarly uses a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant," which is used elsewhere in the RCC, such as the special defenses in RCC § 22E-408. This change improves the clarity and consistency of the revised statute without changing current District law.

Fifth, the revised creating or trafficking an obscene image statute requires that the complainant "engage in or submit to" the prohibited sexual conduct. The current D.C. Code sexual performance of a minor statute prohibits inducing a minor to "engage in" a sexual performance,[144] but otherwise refers generally to the complainant's sexual conduct.[145] The revised creating or trafficking statute consistently refers to the complainant "engag[ing] in or submit[ing] to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply in situations where the complainant is an active participant or a completely passive (e.g., unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

Sixth, the revised creating or trafficking an obscene image statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the various forms of sexual penetration the current D.C. Code sexual performance of a minor statute prohibits, including bestiality.[146] This change clarifies the revised statute.

Seventh, instead of prohibiting a "lewd" exhibition,[147] the revised creating or trafficking an obscene image statute prohibits a "sexual or sexualized display" when there is less than a full opaque covering. The current D.C. Code sexual performance of a minor statute does not define "lewd," but the DCCA has approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the

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[143] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[144] D.C. Code § 22-3102(a)(1).

[145] D.C. Code § 22-3102(a)(1) ("participation by a minor in a sexual performance."), (a)(2) ("any performance which includes sexual conduct by a person under 18 years."), (b) ("a sexual performance by a minor."). In addition to the variable statutory language, the definition of "sexual performance" merely requires that the performance "includes sexual conduct" by a minor. D.C. Code § 22-3101(6). The current definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant.

[146] The current sexual performance of a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i) of the current statutory language. Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[147] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[148] The revised creating or trafficking an obscene image statute's reference to "sexual or sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

Eighth, the revised creating or trafficking an obscene image statute deletes the definitions of "transmit" and "transmission" in the current D.C. Code statute[149] because they are redundant with distribution. Deleting them clarifies the revised statute without changing current law.

Ninth, the revised creating or trafficking an obscene image statute clarifies that filming live conduct is a discrete means of liability. The current D.C. Code sexual performance of a minor statute extends to filming live conduct, but it is not explicitly stated in the statute.[150] To better communicate in plain language the scope of the offense, the revised statute specifies that recording, photographing, or filming live conduct are all means of liability. This revision improves the clarity of the revised statute without changing current District law.

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[148] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.

The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

[149] D.C. Code § 22-3102(d)(3) ("For the purposes of subsections (b) and (c) of this section, the term: . . . . 'Transmit' or 'transmission' includes distribution, and can occur by any means, including electronically.". [sic].").

[150] The current definitions of "performance" and "sexual performance" include both still images and live performances. D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age."). Thus, each provision of the current statute extends to using a minor or giving consent for a minor to engage in or participate in live conduct. D.C. Code § 22-3102(a)(1), (a)(2) ("(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance. (2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

Explanatory Note. [1] *The RCC possession of an obscene image of a minor offense prohibits possessing images that depict complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted in the image. The revised possession of an obscene image of a minor statute has the same penalties as the RCC attending or viewing a live sexual performance of a minor statute,*[2] *the main difference being that the RCC possession of an obscene image of a minor offense is limited to images. Along with the creating or trafficking of an obscene image of a minor offense,*[3] *the arranging a live sexual performance of a minor offense,*[4] *and the attending or viewing a live sexual performance of a minor offense,*[5] *the revised possession of an obscene image of a minor statute replaces the current sexual performance using a minor offense*[6] *in the current D.C. Code, as well as the current definitions,*[7] *penalties,*[8] *and affirmative defenses*[9] *for that offense.*

Paragraph (a)(1) specifies the prohibited conduct in first degree possession of an obscene image of a minor, the highest gradation of the revised possession offense—"possesses" an "image." An "image," as defined in RCC § 22E-701, is a visual depiction, other than a depiction rendered by hand, and includes videos and live broadcasts.[10] "Possesses" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over."[11] The RCC definition of "knowingly" in RCC § 22E-206 here means the actor must be "practically certain" that he or she will either hold or carry an image on his or her person or have the ability and desire to exercise control over an image.

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[1] Unless otherwise noted, when discussing the current sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current D.C. Code statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

[2] RCC § 22E-1810.

[3] RCC § 22E-1807.

[4] RCC § 22E-1809.

[5] RCC § 22E-1810.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

[10] Depending on the facts of a given situation, there may also be liability for viewing a live broadcast under the RCC viewing a live performance of a minor statute (RCC § 22E-1810). However, due to the RCC merger provision in RCC § 22E-214, an individual may not be convicted of both possessing and viewing the same live broadcast on the same occasion.

[11] Read in conjunction with the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807), the RCC possession of an obscene image characterizes as possession: 1) manufacturing an image without an intent to distribute that image; and 2) uploading or making available an image on an electronic platform that is available only to the actor and no other user, i.e. an actor e-mailing himself or herself a prohibited image.

Paragraph (a)(2) specifies additional requirements for the image. First, the image must depict, in part or whole, the body of a real complainant under the age of 18 years. "Body" includes the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body is sufficient. The complainant must be a real minor but there is no requirement that the government prove the identity of the minor. Second, the image must depict the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area,[12] or anus, when there is less than a full opaque covering.[13] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "reckless." "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the image depicts, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state also applies to the prohibited sexual conduct in sub-paragraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted in the image is one of the types prohibited in subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree possession of an obscene image of a minor. Paragraph (b)(1) and paragraph (b)(2) have the same requirements as paragraph (a)(1) and paragraph (a)(2) in first degree. However, the types of prohibited sexual conduct are different for second degree possession of an obscene image. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact" and subparagraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.[14] RCC § 22E-701 defines "obscene" and "sexual contact." Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (b)(2) applies to the prohibited sexual conduct and the actor must consciously disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display.

Subsection (c) establishes two exclusions from liability for the RCC possession of an obscene image offense. Paragraph (c)(1) provides that the statute does not apply to

[12] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[13] If the genitals, pubic area, or anus of the minor have a full opaque covering, there is no liability under first degree of the revised possession statute. However, if the image depicts a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised possession of an obscene image statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

[14] If the specified part of the breast or the buttocks has a full opaque covering, and the image does not depict or will not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(B), there is no liability under second degree possession of an obscene image.

any person that is a licensee[15] under the Communications Act of 1934, such as a radio, television, or phone service provider. Paragraph (c)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified licensee. Paragraph (c)(2) provides that the statute does not apply to any person that is an interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16] Paragraph (c)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified interactive computer service.

Subsection (d) establishes several affirmative defenses for the RCC possession of an obscene image statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC.

Paragraph (d)(1) establishes an affirmative defense to subsection (a) of the revised statute that the image has serious literary, artistic, political, or scientific value when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[17] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, are not subject to the First Amendment requirements set out in *Miller v. California*.[18] However, the affirmative defense recognizes that there may be rare situations where images of such conduct warrant First Amendment protection. Paragraph (d)(1) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the image has serious literary, artistic, political, or scientific value when considered as a whole.

Paragraph (d)(2) establishes an affirmative defense for an actor that is under the age of 18 years. Paragraph (d)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in paragraph (d)(2) applies to subparagraphs (d)(2)(A) and (d)(2)(B) and sub-subparagraphs (d)(2)(B)(i) and (d)(2)(B)(ii) and there is no culpable mental state requirement for any of these elements. Subparagraph (d)(2)(A) requires that the actor is under the age of 18 years. There are two alternative requirements for the affirmative defense under subparagraph (d)(2)(B). Sub-subparagraph (d)(2)(B)(i) requires that the actor is the only person under the age of 18 years who is depicted in the image. In the alternative, sub-subparagraph (d)(2)(B)(ii) applies if there are multiple people under the age of 18 years who are depicted in the image. Under sub-subparagraph (d)(2)(B)(ii), the actor must reasonably believe that every person under 18 years of age who is depicted in

[15] The term "licensee" is defined in paragraph (c)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[16] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[17] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[18] *Miller v. California*, 413 U.S. 15, 24 (1973).

the image gives "effective consent" to the actor to engage in the conduct that constitutes the offense. Under sub-subparagraph (d)(2)(B)(ii), the actor must reasonably believe that every person under 18 years of age who is depicted in the image gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The "in fact" specified in paragraph (d)(2) applies to sub-subparagraph (d)(2)(B)(ii) and no culpable mental state, as defined in RCC § 22E-205, applies to sub-subparagraph (d)(2)(B)(ii). However, sub-subparagraph (d)(2)(B)(ii) still requires that the actor subjectively believe that every person under 18 years of age who is depicted in the image gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[19] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Paragraph (d)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Paragraph (d)(3) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in paragraph (d)(3) applies to the remaining elements of the defense under subparagraphs (d)(3)(A) through (d)(3)(D) and there is no culpable mental state requirement for any of these elements.

There are several requirements to the affirmative defense under paragraph (d)(3). First, per subparagraph (d)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (d)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs (d)(3)(B)(i) and (d)(3)(B)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant (sub-subparagraph (d)(3)(B)(ii)). "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[20] and is intended to have the same meaning. There are additional requirements if the actor is in a "romantic, dating, or sexual relationship" with the

[19] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[20] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

complainant under sub-subparagraph (d)(3)(B)(ii). When the complainant is under 16 years of age, the actor must be less than four years older (sub-subparagraph (d)(3)(B)(ii)(a)), and when the complainant is under 18 years of age and the actor is at least four years older, the actor must not be in a "position of trust with or authority over" the complainant (sub-subparagraph (d)(3)(B)(ii)(b)). "Position of trust with or authority over" is a defined term in RCC § 22E-701. The requirements in sub-subparagraphs (d)(3)(B)(ii)(a) and (d)(3)(B)(ii)(b) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Second, per subparagraph (d)(3)(C), the complainant must be the only person who is depicted in the image, or the actor and the complainant must be the only persons who are depicted in the image. The marriage or romantic partner defense is not available when the image shows third persons. Third, per subparagraph (d)(3)(D), the actor must "reasonably believe"[21] that the complainant gives "effective consent" to the actor to engage in the conduct that constitutes the offense. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Paragraph (d)(4) establishes an affirmative defense for the innocent display or distribution of a prohibited image in certain socially beneficial situations. Subparagraph (d)(4)A) requires that the actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[22] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant successfully reported illegal conduct or sought legal counsel, only that the defendant believed to a practical certainty that he or she would do so. Subparagraph (d)(4)(B) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(4)(B), sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), and sub-subparagraphs (d)(4)(C)(i) and (d)(4)(C)(ii) and there is no culpable mental state requirement for any of the elements in these

[21] As was stated earlier, the "in fact" specified in paragraph (d)(3) applies to subparagraph (d)(3)(D) and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (d)(3)(D). However, subparagraph (d)(3)(D) still requires that the actor subjectively believe that the complainant gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[22] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

subparagraphs or sub-subparagraphs. Subparagraph (d)(4)(B) requires that the actor promptly contact a person the actor reasonably believes is a person specified in sub-subparagraphs (d)(4)(C)(i) and (d)(4)(C)(ii), such as a "law enforcement officer" or a person responsible under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believes[23] is depicted in the image or involved in the creation of the image. "Law enforcement officer" is a defined term in RCC § 22E-701. Per sub-subparagraph (d)(4)(C)(i) and sub-subparagraph (d)(4)(C)(ii), the actor must also promptly distribute the image to one of the specified individuals or authorities, without making or retaining a copy, or allow a law enforcement agency access to the image.

Paragraph (d)(5) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. Paragraph (d)(5) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(5)(A), (d)(5)(B), and (d)(5)(C) and there is no culpable mental state requirement for any of the elements in these subparagraphs. The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the image. The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

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

Subsection (f) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised possession of an obscene image of a minor statute clearly changes current District law in eleven main ways.*

First, the revised possession of an obscene image statute punishes possessing a prohibited image less severely than creating, displaying, distributing, selling, or advertising a prohibited image. The current D.C. Code sexual performance of a minor statute has the same penalties for creating, displaying, distributing, selling, advertising,

[23] As was stated earlier, the "in fact" specified in subparagraph (d)(4)(B) applies to sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), and no culpable mental state, as defined in RCC § 22E-205, applies to these sub-subparagraphs. However, the actor must subjectively believe that the person is one of the specified individuals in sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

and possessing an image,[24] even though creating and distributing are direct forms of child abuse[25] and selling and advertising are "an integral part" of the market.[26] In contrast, the revised possession of a prohibited image statute punishes possessing a prohibited image less severely than creating, displaying, distributing, selling, or advertising an image in the RCC creating or trafficking an obscene image offense (RCC § 22E-1807). Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other current District offenses.[27] As part of this revision, the revised statute no longer uses the term "promote" or its definition in the current statute and splits the conduct referred to in that definition between the revised creating or trafficking an obscene image and possession of an obscene image offenses.[28] This change improves the consistency and proportionality of the revised offense.

Second, the revised possession of an obscene image statute grades penalties based upon the sexual conduct depicted in the image. The current D.C. Code sexual performance of a minor statute prohibits images of "sexual conduct,"[29] a defined term

[24] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting "employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance," "being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance," "produces, directs, or promotes" any sexual performance, and "attend, transmit, or possess" any sexual performance), 22-3104 (punishing a first violation "of this chapter" with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

[25] *See, e.g., New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."); *id.* at 759 ("The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.").

[26] *Ferber*, 458 U.S. at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[27] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

[28] The current statute prohibits "promot[ing]" any sexual performance of a minor and defines "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." D.C. Code §§ 22-3102(a)(2), 22-3101(4). There is no DCCA case law on the scope of this definition. The revised possession of an obscene image statute criminalizes as possession, with a lower penalty, certain aspects of the current definition of "promote": 1) "manufacture[s]" or "transmute[s]" an image; and 2) "procure"; and The commentary to the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807) discusses the remainder of the current definition of "promote."

[29] D.C. Code §§ 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attending, transmit, or possess a sexual performance by a minor."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or

including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC possession of an obscene image statute reserves first degree for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised possession of an obscene image statute is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in current District sex offenses.[30] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised possession of an obscene image statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current D.C. Code sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[31] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." The possession of images of minors engaging in "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[32] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[33] with no enhancements for the obscene materials depicting a minor.[34] In contrast, first degree of the revised possession of an obscene image statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and

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anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[30] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

[31] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[32] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[33] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[34] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

"sexual contact" are defined in RCC § 22E-701, consistent with other RCC offenses. As defined, such sexual conduct may be as graphic[35] as other conduct penalized by the current statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[36] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[37] This change improves the consistency and proportionality of the revised statute.

Fourth, the revised possession of an obscene image statute expands the prohibited sexual conduct to include a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current D.C. Code sexual performance of a minor statute is limited to a "lewd exhibition of the genitals."[38] However, the possession of images of minors engaging in a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering" may be criminalized in the current D.C. Code obscenity statute.[39] The current D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[40] with no enhancements for the obscene materials depicting a minor.[41] In contrast, the RCC revised possession of an obscene image statute criminalizes possessing certain depictions

[35] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised possession of an obscene image of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

[36] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[37] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[38] D.C. Code § 22-3101(5)(E).

[39] The current obscenity statute, D.C. Code § 22-2201 generally criminalizes the possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[40] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[41] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

of the pubic area[42] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[43] As defined, display of the pubic area or anus is as graphic as other conduct penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised possession of an obscene image statute expands the "innocent possession" affirmative defense in the current sexual performance of a minor statute to include conduct involving more images and display or distribution to authorities other than law enforcement, so long as the actor has a socially beneficial intent. The current D.C. Code sexual performance of a minor statute has an affirmative defense for

[42] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[43] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment, even when the defendant only possesses these images. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). Although *Ferber* was specific to the creation and distribution of visual sexual depictions of minors, the Court later held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography" due, in part, to the same rationales the Court accepted in *Ferber*. *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams*, the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC possession of an obscene image statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC possession of an obscene image statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised possession of an obscene image statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

possessing five or fewer images or one motion picture and requires either that the defendant take reasonable steps to destroy the material or report the material to a law enforcement agency and afford that agency access.[44] There is no DCCA case law interpreting the current defense. In contrast, the RCC affirmative defense is available for possessing any number of images, if the actor also promptly contacts a specified individual, such as a law enforcement officer or person with a responsibility under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image or involved in the depiction when the actor has the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney." The actor must also distribute the image to one of the specified authorities or afford a law enforcement agency access. The current affirmative defense unnecessarily restricts the number of images or motion pictures and excludes well-intentioned individuals who seek legal advice or report images to authorities other than law enforcement. The expanded defense recognizes that parents, schools, and others have a vital interest in addressing wrongful creation, distribution, and sale of prohibited images, and good faith sharing of information such authorities should not be a crime.[45] The number of images or motion pictures an individual possesses is not limited, but may be relevant to a fact finders' determination of the actor's intent. This change improves the consistency and proportionality of the revised statute.

Sixth, the revised possession of an obscene image statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current D.C. Code sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[46] The current D.C. Code

[44] D.C. Code § 22-3104(c) ("It shall be an affirmative defense to a charge under § 22-3102 that the defendant: (1) Possessed or accessed less than 6 still photographs or one motion picture, however produced or reproduced, of a sexual performance by a minor; and (2) Promptly and in good faith, and without retaining, copying, or allowing any person, other than a law enforcement agency, to access any photograph or motion picture: (A) Took reasonable steps to destroy each such photograph or motion picture; or (B) Reported the matter to a law enforcement agency and afforded that agency access to each such photograph or motion picture.").

[45] For example, if a parent discovers multiple video clips on their child's phone of what appear to be another minor engaging in sexual conduct at the child's school, the parent should be able to send the video to school administrators, the parents of the minor, and/or possibly an attorney for further investigation and resolution without having committed a crime.

[46] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are

sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image[47] and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference. There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised possession of an obscene image statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant, with several additional requirements. The prohibited conduct must be limited to the actor and the complainant or just the complainant, and the actor must reasonably believe that the actor has the complainant's effective consent. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Without this defense, the revised possession statute would criminalize possessing images of consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes. This change improves the consistency and proportionality of the revised statute.

Seventh, the revised statute applies the current affirmative defense for a librarian or motion picture theater employee to possessing an image and expands the defense to include similarly positioned employees of museums, schools, and other venues. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]"[48] any sexual performance of a minor[49] for a "librarian engaged in the normal course of his or her employment"[50] and certain movie theater employees[51] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[52] There is no DCCA case law interpreting this defense. In contrast, the

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based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[47] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[48] As is discussed elsewhere in this commentary, the current definition of "promote" appears to include purely possessory conduct, such as "procures." D.C. Code § 22-3101(4). Thus, it is possible that the current affirmative defense could be construed to include mere possession of prohibited images.

[49] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[50] D.C. Code § 22-3104(b)(1)(A).

[51] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[52] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

revised possession of an obscene image statute applies this defense to possessing a prohibited image and expands the defense to include employees at museums, schools, and other venues who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the image.[53] Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's defense in paragraph (d)(1) to first degree for images with serious artistic or other value, or, in second degree, the argument that the images are not "obscene." This change improves the clarity and consistency of the revised statute.

Eighth, the revised possession of an obscene image statute has an affirmative defense for subsection (a) that the image has serious literary, artistic, political, or scientific value, when considered as a whole. The current D.C. Code sexual performance of a minor statute does not have any defense if the image has serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current statute appears to criminalize the possession of materials like medical textbooks, pictures or videos of newsworthy events, or artistic films that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to images with serious literary, artistic, political, or scientific value, when considered as a whole.[54] In

[53] For example, the defense would not apply to the curator of an art museum who selects prohibited images for an exhibition and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum usher who possesses the images while constructing the exhibition or arranging for-sale prints of the image in the gallery gift shop. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the images had serious artistic value under the affirmative defense in subsection (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

[54] In *Ferber*, the Court acknowledged that some applications of the statute at issue would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n 28.
The statute in *Ferber* prohibited the production and distribution of prohibited images, but the Court in *Osborne v. Ohio* recognized that overbreadth is also an issue in statutes that ban the possession of child pornography. *Osborne v. Ohio*, 495 U.S. 103, 112, 113, 114 (1990) (stating that "in light of the statute's exemptions and 'proper purposes' provisions, the statute [at issue] may not be substantially overbroad in our cases" and that the appellant's "overbreadth challenge, in any event, fails" because the Ohio Supreme

contrast, first degree of the revised possession of an obscene image statute has an affirmative defense that the image has serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[55] This change improves the constitutionality of the revised statute.

Ninth, through the RCC definition of "image," the revised possession of an obscene image statute excludes hand-rendered depictions. The current D.C. Code sexual performance of a minor statute defines "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."[56] There is no DCCA case law on the precise scope of "any visual presentation or exhibition," but the legislative history for the current statute seems to indicate that paintings, sculptures, and other hand rendered depictions would be included.[57] The Supreme Court struck down as unconstitutionally overbroad a federal statute on sexual images of minors in part because it applied to "any visual depiction" without regard to whether it was obscene, however, the ruling did not turn on the medium or method visual representation.[58] In contrast, through the definition of "image" in RCC § 22E-701, the revised trafficking an obscene image statute is limited to images that are not hand-rendered. Limiting the revised statute to images that are not hand-rendered helps ensure that the images feature "real" minors,[59] and, for second degree, that the

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Court had construed the statute to "avoid[] penalizing persons for viewing or possessing innocuous photographs of naked children.").

[55] *Miller v. California*, 413 U.S. 14, 24 (1973).

[56] D.C. Code § 22-3101(3).

[57] *See* Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8 (stating that the definition of "performance" is mean to "to include any visual presentation or exhibition without regard to the medium.").

[58] In *Aschcroft v. Free Speech Coalition*, the Supreme Court held that a provision in a federal statute that extended to "any visual depiction" that "is, or appears to be a minor engaging in sexually explicit conduct" was unconstitutionally overbroad. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 256 (2002). However, most of the Court's analysis focused on the "appears to be language," and it was in this context that the Court also discussed the problematic scope of "any visual depiction," noting that "the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology" because it is a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." *Free Speech Coalition*, 535 U.S. at 241. The Court in *Free Speech Coalition* also noted that these images "do not involve . . . let alone harm any children in the production process," *id.* at 241, and, accordingly found the Government's arguments for the restriction unpersuasive, *id.* at 246-56, 256. Although not squarely addressed in the opinion, it seems clear that the medium of a visual depiction is not dispositive in the constitutional analysis. A watercolor painting that is derived from painting live conduct is still a product of child sexual abuse and may be prohibited. *Id.* at 249 ("Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. . . . The fact that a work contained serious literary, artistic, or other value did not excuse the harm to its child participants.").

[59] The Supreme Court held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography." *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). *Osborne* did not explicitly state that the children must be "real" children, but in *Ashcroft v. Free Speech Coalition*, the Court held that a federal statute that banned possession of images of what "is, or appears to be" minors engaged in prohibited sexual conduct was overbroad, in part because it could extend to "virtual child pornography" that does not use or harm real children. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239, 241, 256

images are "patently offensive" under modern community standards per *Miller v. California*.[60] This change improves the clarity, consistency, and constitutionality of the revised statute.

Tenth, the revised statute excludes liability for commercial telecommunications service providers. The current D.C. Code sexual performance of a minor statute makes it unlawful to "transmit" a still or motion picture depicting a sexual performance by a minor "by any means, including electronically."[61] The statutes make no exception for a company or employee who merely facilitates the transmission of an image or sound at a user's request, and in doing so, possesses it. District case law has not addressed the issue. In contrast, the revised possession of an obscene image offense excludes liability for any licensee under the Communications Act of 1934,[62] such as a radio station, television broadcaster, or phone service provider, consistent with the current and revised obscenity offenses.[63] The revised offense also excludes liability for any interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934,[64] for content provided by another person, consistent with the current and revised nonconsensual pornography offenses.[65] This change improves the consistency and proportionality of the revised offense.

Eleventh, the revised possession of an obscene image statute extends liability to the knowing possession of an "electronically received or accessible" image the same as to any other prohibited image of a minor. The current D.C. Code sexual performance of a minor statute states that possession "requires accessing the sexual performance if electronically received or available."[66] There is no DCCA case law on this language limiting possession liability. The definition does not impose any limitations on possession of any other type of image (i.e. not "electronically received or available"). In contrast, through use of the RCC definition of "possession,"[67] the revised offense includes liability for constructive possession of an "electronically received or accessible" image the same as other images. The plain language of the current statute appears to categorically exclude liability for a person who, "knowing the character and content thereof," retains possession of prohibited images without actually accessing them,

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(2002). However, for many hand-rendered depictions, such as paintings, it may be difficult to determine if the depiction was of a "real" minor or just an individual's artistic rendering. For example, a defendant that owns a realistic painting of female genitalia falls within the scope of the current statute, but without additional information, it is impossible to know if the painting is of a "real" minor. If the painting is not of a "real" minor, and is not otherwise obscene, it is unconstitutional to prohibit its creation, distribution, etc.

[60] 413 U.S. 15 (1973).

[61] D.C. Code § 22-3102(d)(3)

[62] 47 U.S.C. § 151 et seq.

[63] *See* D.C. Code § 22-2201(d); RCC §§ 22E-1805 and 1806.

[64] 7 U.S.C. § 230(f)(2).

[65] *See* D.C. Code § 22-3055(b); RCC § 22E-1804.

[66] D.C. Code § 22-3102(d)(1) ("For the purposes of subsections (b) and (c) of this section, the term 'possess,' 'possession,' or 'possessing requires accessing the sexual performance if electronically received or available.").

[67] The definition of "possession" in RCC § 22E-701 requires a person to "hold or carry on one's person" or to "have the ability and desire to exercise control over."

regardless of the method of delivery.[68] Use of the standard RCC definition of "possession" and its constructive possession requirements to have "the ability and desire to exercise control over" the image assigns criminal liability consistent with other RCC and current D.C. law concerning contraband. This change improves the clarity and consistency of the revised offense, and closes a gap in liability.

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

First, the revised possession of an obscene image statute clarifies the requirements for "possession" and requires a "knowingly" culpable mental state for this element. Additionally, although the current D.C. Code statute requires the defendant to "know[] the character and content" of the sexual performance,[69] it does not specify whether this culpable mental state extends to possession, and the definition of "knowingly"[70] in the current statute is unclear. There is no DCCA case law on these issues. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[71] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[72] Resolving this ambiguity, the revised possession of an obscene image statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for possessing an image. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established

[68] It is unclear why a person who knowingly receives a package containing prohibited images, and without opening the package, stores them for future viewing should be liable for possession, but a person who knowingly receives electronic files or a password to an online vault containing prohibited images and stores the file or password for future viewing is not.

[69] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attend, transmit, or possess a sexual performance by a minor.").

[70] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[71] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[72] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

practice in American jurisprudence[73] and is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised possession of an obscene image statute requires recklessness as to the content of the image and, in second degree, as to whether the content is obscene. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[74] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[75] There is no DCCA case law interpreting the definition of "knowingly"[76] or how it applies to the current statute. The current obscenity statute has a substantively identical definition of "knowingly,"[77] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[78] Resolving this ambiguity, the revised possession of an obscene image statute requires recklessness as to the content of the image,[79] and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge

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

[74] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to . . . possess a sexual performance by a minor.")

[75] D.C. Code § 22-3101(1).

[76] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[77] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[78] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[79] While the revised possession of an obscene image statute requires "recklessness" as to the content of the image (whether it depicts part or all of a real complainant under the age of 18 years engaging in the prohibited sexual conduct), the closely-related distribution of an obscene image statute (RCC § 22E-1805) and distribution of an obscene image to a minor statute (RCC § 22E-1806) require a higher "knowingly" culpable mental state for the equivalent element (whether an image depicts any person, real or fictitious, of any age, engaging in the prohibited sexual conduct). The higher culpable mental state in these offenses is warranted because they prohibit a much broader array of images.

culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[80] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[81] This change improves the clarity and consistency of the revised statute.

Third, the revised possession of an obscene image statute requires that the image depicts at least part of a real complainant under the age of 18 years, and excludes purely computer-generated or other fictitious minors. The current D.C. Code sexual performance of a minor statute does not specify whether the complainant that is depicted in an image must be a "real," i.e. not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[82] which arguably suggests that the complainant must be a "real," i.e. not fictitious, person. There is no DCCA case law on this issue. Resolving this ambiguity, the revised possession of an obscene image statute specifies that at least part[83] of a "real," i.e. not fictitious, complainant under the age of 18 years must be depicted or will be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[84] The RCC does not ban possession of obscene images that depict entirely computer-generated or other fictitious minors, although there is liability for the distribution of these images under the RCC distribution of an obscene image to a minor statute (RCC § 22E-1805) or distribution of an obscene image to a minor statute (RCC § 22E-1806). This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, through use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for images of sexual conduct that is apparently fake. The current D.C. Code sexual performance of a minor statute prohibits "simulated"

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[80] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[81] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[82] D.C. Code § 22-3101(2).

[83] The revised possession statute includes composite images of minors if at least part of the composite is of a real minor, such as a real minor's head on an adult body, or an adult's head on a real minor's body. There is no requirement that the government prove the identity of a real minor.

[84] The Supreme Court held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography." *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). *Osborne* was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further. The RCC requirement that the image is at least partially comprised of a real minor ensures the revised possession offense is constitutional.

sexual intercourse,[85] but does not define the term. It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way which realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised statute,[86] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[87] and is supported by Supreme Court case law.[88] Possession of suggestive or obscene images that do not satisfy the definition of "simulated" is not prohibited in the RCC. This change improves the clarity, consistency, and constitutionality of the revised statute.

Fifth, the revised possession of an obscene image statute requires recklessness as to the age of the complainant and deletes the current affirmative defense for reasonable mistake of age. The current D.C. Code sexual performance of a minor statute requires that the defendant "know[] the character and content" of the sexual performance[89] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[90] The legislative

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[85] D.C. Code § 22-3101(5)(A).

[86] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[87] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[88] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[89] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to . . . possess a sexual performance by a minor.")

[90] D.C. Code § 22-3101(1).

history states that the defendant must "know that the performance will depict a minor,"[91] but it is unclear whether the current definition of "knowingly" requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence.[92] There is no DCCA case law on this issue. However, the current statute has an affirmative defense for a reasonable mistake of age,[93] which suggests that negligence is not sufficient for liability. Resolving this ambiguity, the revised possession of an obscene image statute requires recklessness as to the age of the complainant. A reckless culpable mental state preserves the substance of the affirmative defense[94] and clarifies that the defendant must have some subjective knowledge as to the age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[95] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[96] Throughout the RCC, recklessness as to age is a consistent basis for penalty enhancement.[97] This change improves the clarity and consistency of the revised statute.

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[91] Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary on Bill 18-70, The "Prohibition Against Human Trafficking Amendment Act of 2010" at 10. This provision was added to the current sexual performance of a minor statute in 2010.

[92] The legislative history notes that the definition of "knowingly" was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[93] D.C. Code § 22-3104(a) ("Under this chapter it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over.").

[94] The current affirmative defense is that "the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over." D.C. Code § 22-3104(a). In the revised possession of an obscene image statute, it must be proven that an actor was reckless that the complainant was under the age of 18 years. As defined in RCC § 22E-206, "recklessness" requires that the actor must consciously disregard a substantial risk that the complainant was under the age of 18 years; and the risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the person, the actor's conscious disregard of it is clearly blameworthy. A reasonable mistake as to the complainant's age would negate the recklessness required. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[95] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[96] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.).

[97] RCC § 22E-701 defines "protected person" to include certain individuals under the age of 18 years or over the age of 65 years and several RCC offenses, like assault (RCC § 22E-1202), require a "reckless" culpable mental state for the fact that the complainant is a "protected person." In addition, several of the penalty enhancements for the RCC sexual assault offense (RCC § 22E-1301) require a "reckless" culpable mental state for the age of the complainant.

Sixth, the revised possession of an obscene image statute clarifies the current exception to liability for conduct by persons under 18 years of age and makes it an affirmative defense. Under the current D.C. Code sexual performance of a minor statute, minors are exempt from liability for possessing prohibited still images or motion pictures when the minor is the only person under 18 years of age that is depicted,[98] or when all the minors depicted in the still or motion picture consent.[99] The current exclusion does not define "consent" and does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent.[100] There is no DCCA case law on the current exclusion. Resolving these ambiguities, the revised statute consistently requires that the minor reasonably believed that every person under the age of 18 years[101] depicted in the image[102] gave effective consent to the minor. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. This change improves the clarity, consistency, and proportionality of the revised offense.

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

First, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current D.C. Code definitions of "performance" and "sexual performance," the current sexual performance of a minor statute includes both still images and live performances.[103] However, it is counterintuitive to construe a "performance" as including a still image (e.g., a photograph). To clarify that both images

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[98] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[99] D.C. Code § 22-3102(c)(1), (c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission; . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[100] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[101] If both minors and adults are depicted in the image it is irrelevant under the defense if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803), electronic stalking (RCC § 22E-1802), or unlawful disclosure of sexual recordings (RCC § 22E-1804).

[102] The current "sexting" exclusion applies only to a "still or motion picture," but there is no substantive difference between the definition of "still or motion picture" and the RCC definition of "image." *Compare* D.C. Code § 22-3102(d)(2) (defining "still or motion picture" as "includ[ing] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced.") *with* RCC § 22E-701 (defining "image" as a "a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format.").

[103] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

and live performances fall within the revised statutes, the RCC trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and attending a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

Second, the revised possession of an obscene image statute no longer uses the defined term "minor."[104] Instead, consistent with the current D.C. Code statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[105] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Third, the revised possession of an obscene image statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the various forms of sexual penetration the current D.C. Code sexual performance of a minor statute prohibits, including bestiality.[106] This change clarifies the revised statute.

Fourth, instead of prohibiting a "lewd" exhibition,[107] first degree of the revised possession of an obscene image statute prohibits a "sexual or sexualized display" when there is less than a full opaque covering. The current D.C. Code sexual performance of a minor statute does not define "lewd," but the DCCA approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[108] The revised possession of an obscene image statute's reference to "sexual or

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[104] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[105] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

[106] The current sexual performance of a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i) of the current statutory language. Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[107] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[108] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA

sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

Fifth, the revised possession of an obscene image statute requires that the image depict the complainant "engaging in or submitting to" the prohibited sexual conduct. The current D.C. Code sexual performance of a minor statute prohibits possessing a "sexual performance by a minor,"[109] and refers generally to the complainant's sexual conduct."[110] The revised possession statute prohibits images that depict the complainant "engaging in or submitting to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply to depictions of a complainant that is an active participant or a completely passive (e.g., unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

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noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.

The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

[109] D.C. Code § 22-3102(b).

[110] "Sexual performance" is defined as "any performance or part thereof which includes sexual conduct by a person under 18 years of age" and the definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant. D.C. Code §" 22-3101(5), (6).

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

Explanatory Note. [1] *The RCC arranging a live performance of a minor offense prohibits creating, selling admission to, and advertising a live performance that depicts complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The offense also prohibits a person that is responsible under civil law for a complainant under the age of 18 years from giving effective consent for the complainant to engage in a live performance the depicts the specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted, or will be depicted in the live performance. The revised arranging a live performance of a minor statute has the same penalties as the RCC creating or trafficking an obscene image of a minor statute,*[2] *the main difference being that the RCC arranging a live performance of a minor offense is limited to live performances. Along with the trafficking of an obscene image of a minor offense,*[3] *the possession of an obscene image of a minor offense,*[4] *and the attending a live performance of a minor offense,*[5] *the revised arranging a live performance of a minor statute replaces the current sexual performance using a minor offense*[6] *in the current D.C. Code, as well as the current definitions,*[7] *penalties,*[8] *and affirmative defenses*[9] *for that offense.*

Subsection (a) specifies the various types of prohibited conduct in first degree arranging a live performance of a minor statute, the highest gradation of the revised offense. The prohibited conduct is specific to a "live performance." "Live performance" is defined in RCC § 22E-701 as a "play, dance, or other visual presentation or exhibition for an audience, including an audience of one person." Paragraph (a)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she will cause the prohibited result, i.e. creating a live performance. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to each type of prohibited conduct in subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C).

For subparagraph (a)(1)(A), the "knowingly" culpable mental state requires, in part, that the actor be "practically certain" the he or she is "creat[ing], produc[ing], or direct[ing]" a "live performance." The "knowingly" culpable mental state applies to the RCC definition of "live performance" and requires that the actor is "practically certain" that the visual presentation is "for an audience, including an audience of one person." An

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[1] Unless otherwise noted, when discussing the current sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

[2] RCC § 22E-1807.

[3] RCC § 22E-1807.

[4] RCC § 22E-1808.

[5] RCC § 22E-1810.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

actor that "creates" or directs" a visual presentation will nearly always be sufficient for the audience requirement, even if the actor does not watch the presentation.[10] There may also be liability if the audience is not physically present for the presentation.[11] "Produc[ing]" a live performance in subparagraph (a)(1)(A) includes actions that facilitate the creation, sales, or advertising of a live performance, such as "giving financial backing" and "making background arrangements for a performance such as buying or leasing equipment for a sexual performance."[12]

Subparagraph (a)(1)(B) prohibits a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" from giving "effective consent" for the complainant to engage in or submit to the creation of a live performance. "Person with a responsibility under civil law for the health, welfare, or supervision of the complainant" is identical to the language in the special defense in RCC § 22E-408, and has the same meaning as discussed in that commentary. The "knowingly" culpable mental state in paragraph (a)(1) here requires that the actor be "practically certain" that he or she will give "effective consent" for the complainant to engage in or submit to the creation of a live performance.[13] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." As is discussed in the commentary to the RCC definition of "consent," there are circumstances in which indirect types of agreement or inaction may be sufficient. There is no requirement for liability in subparagraph (a)(1)(B) that a live performance actually occur; it is sufficient that the actor give effective consent for the complainant to engage in or submit to the creation of a live performance.[14]

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[10] When the actor creates or directs a visual presentation and also watches the visual presentation, the actor is clearly the audience. However, an actor cannot avoid liability for creating or directing a visual presentation simply because the actor does not also watch the visual presentation. For example, an actor that directs the complainant to perform a striptease or sexual dance, but does not watch it, still has liability because the striptease or dance is "for" the actor. If an actor creates or directs a visual presentation in an area where other individuals are present and can watch, such as a bar or a park, there is liability if the actor is "practically certain" that those other individuals might watch the performance because the performance is "for" them (and likely also the actor).

[11] An actor is liable if he or she creates or directs a visual presentation and is "practically certain" that a third party could watch from a physically distant location. For example, an actor that directs a play, knowing that a third party may be able to watch or is watching from across the street or several blocks away through a telescope is liable because the actor is "practically certain" that the presentation is "for" an audience. In addition, as previously noted, the actor is likely sufficient for "an audience."

[12] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[13] Per the rule of construction, the "knowingly" culpable mental state also applies to the fact that the actor is a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant." The actor must be "practically certain" that he or she is such a person.

[14] This provision is redundant in the case of a responsible individual who has a higher culpable mental state than "knowingly." In those cases, the RCC solicitation (RCC § 22E-302) and RCC accomplice (RCC § 22E-210) provisions would establish liability, as they would for any other defendant. However, the RCC solicitation and accomplice provisions require a culpable mental state of "purposely" and have other more stringent requirements. Subparagraph (a)(1)(B) is intended to provide liability for responsible individuals who are merely "practically certain" that they are giving effective consent to the complainant engaging in or submitting to the creation of a live performance. The lower culpable mental state is warranted because these responsible individuals are likely violating their duty of care to the complainant by giving effective

For subparagraph (a)(1)(C), the actor must be "practically certain" that he or she will sell admission to[15] or advertise a live performance. "Advertise" is not limited to commercial settings and includes promoting or drawing attention to a live performance without any expectation of financial gain.

Paragraph (a)(2) specifies additional requirements for the live performance. First, the live performance must depict, or will depict, in part or whole, the body of a real complainant under the age of 18 years. "Body" includes the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body is sufficient. The complainant must be a real minor but there is no requirement that the government prove the identity of the minor. Second, the live performance must depict, or will depict, the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.[16] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "recklessly." "Recklessly" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the live performance depicts, or will depict, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state also applies to the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted or will be depicted in the live performance is one of the types prohibited in subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree arranging a live performance of a minor. Paragraph (b)(1), subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C), and paragraph (b)(2) have the same requirements as paragraph (a)(1), subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C), and paragraph (a)(2) in first degree. However, the types of prohibited sexual conduct are different. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact," and subparagraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the

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consent. These responsible individuals may still claim that they are not violating their duty of care under the general special responsibility defenses in RCC § 22E-408.

[15] If a live performance is filmed, recorded, or photographed, and the resulting film or photograph is sold or distributed, there may be liability for distributing an "image" under the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807).

[16] If the genitals, pubic area, or anus of the minor have a full opaque covering, or will have a full opaque covering, there is no liability under first degree arranging a live performance. However, if the live performance depicts, or will depict, a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised arranging a live performance statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

buttocks, when there is less than a full opaque covering.[17] The terms "obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must consciously disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display.

Subsection (c) establishes several affirmative defenses for the RCC arranging a live performance statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC.

Paragraph (c)(1) establishes an affirmative defense to subsection (a) of the revised statute that the live performance has, or will have, serious literary, artistic, political, or scientific value when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[18] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, is not subject to the First Amendment requirements set out in *Miller v. California*.[19] However, the affirmative defense recognizes that there may be rare situations where live performances of such conduct warrant First Amendment protection. Paragraph (c)(1) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the live performance has, or will have, serious literary, artistic, political, or scientific value when considered as a whole.

Paragraph (c)(2) establishes an affirmative defense for an actor that is under the age of 18 years. Per paragraph (c)(2), the affirmative defense applies to subparagraphs (a)(1)(A), (a)(1)(B), (b)(1)(A), and (b)(1)(B) of the offense—all prohibited conduct except selling admission to or advertising a live performance in subparagraphs (a)(1)(C) and (b)(1)(C). Paragraph (c)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in paragraph (c)(2) applies to subparagraphs (c)(2)(A) and (c)(2)(B) and sub-subparagraphs (c)(2)(B)(i) and (c)(2)(B)(ii) and there is no culpable mental state requirement for any of the elements in these subparagraphs or sub-subparagraphs. Subparagraph (c)(2)(A) requires that the actor is under the age of 18 years. There are two alternative requirements for the affirmative defense under subparagraph (c)(2)(B). Sub-subparagraph (c)(2)(B)(i) requires that the actor is the only person under the age of 18 years who is, or who will be, depicted in the live performance. In the alternative, sub-subparagraph (c)(2)(B)(ii) applies if there are multiple people under the age of 18 years who are, or who will be, depicted in the live performance. Under sub-subparagraph (c)(2)(B)(ii), the actor must reasonably believe that every person under 18 years of age

[17] If the specified part of the breast or the buttocks has a full opaque covering, and the live performance does not depict or will not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(B), there is no liability under second degree arranging a live performance. However, there may be liability for causing the minor to engage in the underlying sexual conduct in the RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304).

[18] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[19] *Miller v. California*, 413 U.S. 15, 24 (1973).

who is, or who will be, depicted in the live performance gives "effective consent" to the actor. Under sub-subparagraph (c)(2)(B)(ii), the actor must reasonably believe that every person under 18 years of age who is, or who will be, depicted in the live performance gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The "in fact" specified in paragraph (c)(2) applies to sub-subparagraph (c)(2)(B)(ii) and no culpable mental state, as defined in RCC § 22E-205, applies to sub-subparagraph (c)(2)(B)(ii). However, sub-subparagraph (c)(2)(B)(ii) still requires that the actor subjectively believe that every person under 18 years of age who is, or who will be, depicted in the live performance gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[20] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Paragraph (c)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Per paragraph (c)(3), the affirmative defense applies to subparagraphs (a)(1)(A) and (b)(1)(A) of the offense. Paragraph (c)(3) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to every element under subparagraph (c)(3)(A) through subparagraph (c)(3)(E) and there is no culpable mental state required for any of these elements.

There are several requirements to the affirmative defense under paragraph (c)(3). First, per subparagraph (c)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (c)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs c)(3)(B)(i) and (c)(3)(B)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant. "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[21] and is intended to have the same meaning. There are additional requirements if the actor in a "romantic, dating,

[20] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[21] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

or sexual relationship" with the complainant under sub-subparagraph (c)(3)(B)(ii). When the complainant is under 16 years of age, the actor must be less than four years older (sub-subparagraph (c)(3)(B)(ii)(a)), and when the complainant is under 18 years of age and the actor is at least four years older, the actor must not be in a "position of trust with or authority over" the complainant (sub-subparagraph (c)(3)(B)(ii)(b)). "Position of trust with or authority over" is a defined term in RCC § 22E-701. The requirements in sub-subparagraphs (c)(3)(A)(ii)(a) and (c)(3)(A)(ii)(b) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Second, per subparagraph (c)(3)(C), the complainant must be the only person who is depicted, or who will be depicted, in the live performance, or the actor and the complainant must be the only persons who are depicted, or who will be depicted in the live performance. The marriage or romantic partner defense is not available when the live performance shows, or will show, third persons. Third, per subparagraph (c)(3)(D), the actor must reasonably believe[22] that the actor has the complainant's "effective consent" to the prohibited conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Fourth, per subparagraph (c)(3)(E), the actor must reasonably believe[23] that the actor is the only audience for the live performance, other than the complainant.[24]

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[22] As was stated earlier, the "in fact" specified in subparagraph (c)(3) applies to subparagraph (c)(3)(D) and no culpable mental state, as defined in RCC § 22E-205, applies to this subparagraph. However, the actor must subjectively believe that the complainant gives the actor "effective consent" to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.*, Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[23] As was stated earlier, the "in fact" specified in subparagraph (c)(3) applies to subparagraph (c)(3)(E) and no culpable mental state, as defined in RCC § 22E-205, applies to this subparagraph. However, the actor must subjectively believe that the actor is the only audience for the live performance other than the complainant, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.*, Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[24] The "reasonably believes" requirement parallels the requirements of subparagraphs (a)(1)(A) and (b)(1)(A) of the offense. As is discussed earlier in the explanatory note, those subparagraphs apply a "knowingly" culpable mental state to the "live performance" element and require that the actor be

Paragraph (c)(4) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. The affirmative defense applies to subparagraphs (a)(1)(C) and (b)(1)(C).[25] Paragraph (c)(4) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (c)(4)(A), (c)(4)(B), and (c)(4)(C) and there is no culpable mental state requirement for any of the elements in these subparagraphs. The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the image. The actor must not record, photograph, or film the live performance.[26] The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

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

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

Relation to Current District Law. *The revised arranging a live sexual performance of a minor statute clearly changes current District law in nine main ways.*

First, the revised arranging a live performance statute punishes creating, selling, or advertising a live performance more severely than attending or viewing a live performance.[27] The current D.C. Code sexual performance of a minor statute has the same penalties for creating, selling, advertising, attending, and viewing a live performance,[28] even though creating a live performance is a direct form of child abuse[29]

"practically certain" that the visual presentation is "for an audience." The "audience" can extend beyond the actor or the complainant to include other people that are watching or may watch the performance as long as the actor is "practically certain" of this fact. For the defense, if an actor reasonably believes that the actor, the complainant, or both of them, are the only audience for the performance, it is irrelevant that there may be other people watching.

[25] This defense does not apply to creating, producing, or directing a live performance (subparagraphs (a)(1)(A) and (b)(1)(A)) because such actions create child pornography directly from the sexual abuse of minors. However, there may be a separate defense for first degree arranging a live sexual performance of a minor image for live performances that have serious artistic or other value (paragraph (d)(1)), or an argument that the images are not "obscene" as required for second degree.

This defense also does not apply to individuals that are responsible for the complainant under civil law and give effective consent for the complainant to engage in the creation of an image derived from live sexual conduct (subparagraphs (a)(1)(B) and (b)(1)(B)) because these individuals are likely violating their duty of care to the complainant. These individuals can still argue that they are not violating their duty of care under the general special responsibility defenses in RCC § 22E-408.

[26] If an actor records, photographs, or films the live performance, he or she is creating a prohibited image of a minor and there may be liability under the RCC trafficking an obscene image offense (RCC § 22E-1807).

[27] The RCC attending a live performance of a minor statute (D.C. Code § 22E-1810) prohibits attending or viewing a live performance, as well as viewing a live broadcast. However, for simplicity, this discussion will refer to attending or viewing a "live performance" only.

[28] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting "employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance," "being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance," "produces, directs, or promotes" any sexual performance, and "attend, transmit, or possess" any sexual performance), 22-3104 (punishing a first violation "of this chapter" with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

and selling and advertising are "an integral part" of the market.[30] In contrast, the revised arranging a live performance of a minor statute penalizes the creating, selling, or advertising of a live performance more severely than viewing or attending a live performance in RCC § 22E-1810. The different penalties recognize that this conduct harms children and supports the market and are consistent with the penalty scheme in other current and RCC offenses. Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other District offenses.[31] As part of this revision, the revised statute no longer uses the current statute's defined term "promote" and instead codifies directly in the revised statute the relevant conduct in that definition.[32] This change improves the consistency and proportionality of the revised offense.

Second, the revised arranging a live performance statute grades punishments based upon the sexual conduct depicted in the live performance. The current D.C. Code sexual performance of a minor statute prohibits live performances of "sexual conduct,"[33]

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[29] *See, e.g., New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

[30] *Id.* at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[31] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

[32] The current statute prohibits "promot[ing]" any sexual performance of a minor and defines "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." D.C. Code § 22-3102(a)(2), 22-3101(4). There is no DCCA case law on the scope of this definition. As is discussed in the commentary, the revised trafficking an obscene image statute retains "sell" and "advertise." The revised arranging a live performance statute also prohibits creating, producing, or directing a live performance, which covers "present" and "exhibit" in the current definition. "Offer or agree to do the same" is deleted from the current definition of "promote" because inchoate liability, such as attempt and conspiracy, provides more consistent and proportional punishment for this conduct. For example, under the current statute, a defendant that "offers" to "direct" a live sexual performance could be charged with attempted sexual performance of a minor, which, for a first offense, would have a maximum term of imprisonment of 180 days. D.C. Code §§ 22-1803; 22-3102(a)(2) (prohibiting "direct[ing]" a sexual performance of a minor); 22-3103(1). However, if this conduct were charged under the current definition of "promote" as offering to "manufacture," "present," or "exhibit" a live performance, the defendant would face a maximum term of imprisonment of 10 years. D.C. Code §§ 22-3102(a)(2); 22-3103(1). In the RCC, the defendant would be charged with attempted arranging a live sexual performance of a minor (offers to "create[], produce[], or direct[]" a live performance).
The remainder of the current definition of "promote" is inapplicable to a live performance. The commentaries to the revised trafficking an obscene image of a minor statute (RCC § 22E-1807) and revised possession of an obscene image of a minor statute (RCC § 22E-1808) discuss this prohibited conduct.

[33] D.C. Code §§ 22-3102(a)(1), (a)(2), (a)(3) (prohibiting a "sexual performance" or a "performance which includes sexual conduct by a person under 18 years of age."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial

a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC arranging a live performance statute reserves first degree for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised arranging a live performance of a minor statute is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in current District sex offenses.[34] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised arranging a live performance statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current D.C. Code sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[35] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." However, creating, producing, or directing live performances that feature "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[36] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[37] with no enhancements for the obscene materials depicting a minor.[38] In contrast, first degree of the revised arranging a live performance statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene,"

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sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[34] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

[35] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[36] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the creation, production, or direction of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[37] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[38] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

and "sexual contact" are defined in RCC § 22E-701. As defined, such sexual conduct may be as graphic[39] as other conduct penalized by the current statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[40] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[41] This change improves the consistency and proportionality of the revised statute.

Fourth, the revised arranging a live performance statute expands the prohibited conduct to include a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current D.C. Code sexual performance of a minor statute is limited to a "lewd exhibition of the genitals." However, creating, producing, or directing live performances that feature minors engaging in a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering" may be criminalized in the current D.C. Code obscenity statute.[42] The current D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[43] with no enhancements for the obscene materials depicting a minor.[44] In contrast, the RCC criminalizes creating, producing, and directing live performances featuring certain

[39] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised arranging a live performance of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

[40] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[41] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[42] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the creation, production, or direction of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[43] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[44] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

depictions of the pubic area[45] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[46] As defined, display of the pubic area or anus is as graphic as other conduct penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised arranging a live performance statute expands the current exceptions to liability for conduct by persons under 18 years of age and makes it an affirmative defense. In the current D.C. Code sexual performance of a minor statute, minors that are depicted in prohibited images are not liable for possessing or distributing those images if the minor is the only minor depicted,[47] or, if there are multiple minors

[45] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[46] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams*, the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC arranging a live performance statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC arranging a live performance statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised arranging a live performance statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.")

[47] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or

depicted, all of the minors consent.[48] A minor that is not depicted,[49] or an adult that is not more than four years older than the minor or minors depicted,[50] is not liable for possessing an image that he or she receives from a depicted minor, unless he or she knows that at least one of the depicted minors did not consent. The current exclusion does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent,[51] and minors are still liable under the current statute for creating live performances with themselves or other minors[52] or engaging in sexual conduct.[53] There is no DCCA case law interpreting the current exclusion. In contrast, the revised arranging a live performance statute excludes from liability all persons under the age of 18 years,[54] and applies to all prohibited conduct, except selling admission to or advertising live performance (subparagraphs (a)(1)(C) and (b)(1)(C)). Legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize

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transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[48] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section:(1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[49] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[50] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (c) If the sexual performance consists solely of a still or motion picture, then this section: . . (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[51] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[52] A minor that creates a prohibited live performance involving himself or herself or other minors has "produce[d], direct[ed], or promote[d]" a "performance which includes sexual conduct by a person under 18 years of age." D.C. Code §§ 22-3102(a)(2); 22-3101(4) (defining "promote," in part, as "to manufacture . . . transmute.").

[53] The current definition of "performance" extends to live conduct. D.C. Code § 22-3101(3) ("'Performance' means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."). Thus, under a plain language reading, when a minor engages in "sexual conduct" with themselves, another minor, or an adult, they are "produc[ing], direct[ing], or promot[ing]" a "performance that includes sexual conduct by a person under 18 years of age" or "attend[ing]" a sexual performance by a minor. D.C. Code §§ 22-3102(a)(2), (b); 22-3101(4) (defining "promote," in part, as "to present [or] exhibit.").

[54] The revised arranging a live performance statute excludes from liability minors that have a responsibility under civil law for the health, welfare, or supervision of the complainant. These minors would otherwise have liability under subparagraphs (a)(1)(B) and (b)(1)(B) for giving effective consent for another minor to engage in or submit to the creation of a live performance. This exclusion ensures that the revised arranging a live performance statute is reserved for predatory adults. However, such a minor may still have liability under the RCC criminal abuse and criminal neglect of a minor statutes (RCC §§ 22E-1501 and 22E-1502) and the RCC sex offenses. In addition, the revised exclusion only applies if the minor that is under the care of the responsible minor gives effective consent to the actions of the responsible minor.

minors producing images of otherwise legal sexual encounters.[55] The only requirements of the revised exclusion are either: 1) The minor is the only person under the age of 18 years who is depicted, or who will be depicted, in the live performance;[56] or 2) The actor reasonably believes that the actor has the effective consent of every person under 18 years of age who is, or who will be, depicted in the live performance.[57] The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. A minor may still be liable for selling admission to or advertising a live performance under the revised statute, even if the live performance is of himself or herself,[58] and there may be liability under the RCC indecent exposure statute (RCC § 22E-4206) for a live performance done without the effective consent of those that may view it. This change improves the clarity, consistency, and proportionality of the revised offense.

Sixth, the revised arranging a live performance statute expands the current affirmative defense for a librarian or motion picture theater employee to include similarly positioned museum, school, and other venue employees. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]" any sexual performance of a minor[59] for a "librarian engaged in the normal course of his or her

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[55] *See, e.g.*, Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

[56] If a minor is the only person under the age of 18 years that is depicted, or will be depicted, in the live performance, it is irrelevant under the exclusion if the live performance depicts, or will depict, an adult. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[57] If both minors and adults are depicted, or will be depicted, in the live performance, it is irrelevant under the exclusion if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[58] For example, a sixteen year old who sells admission to an exhibition of himself or herself masturbating may be liable under the revised statute. Even if the minor's conduct in such situations appears to be consensual, when a minor sells or advertises sexual performance such conduct supports the market for prohibited sexual performances.

[59] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a

employment"[60] and certain movie theater employees[61] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[62] There is no DCCA case law interpreting this defense. In contrast, the revised arranging a live performance statute expands this affirmative defense to include employees at museums, schools, and other venues who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the image.[63] For reasons discussed the in explanatory note to this offense, the affirmative defense is limited to the conduct prohibited in subparagraphs (a)(1)(C) and (b)(1)(C) provided that the actor does not record, film, or photograph the live performance. Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's defense in paragraph (c)(1) to first degree for images with serious artistic or other value, or, in second degree, the argument that the images are not "obscene." This change improves the clarity and consistency of the revised statute.

Seventh, the revised arranging a live performance statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current D.C. Code sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[64] The current D.C. Code

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minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[60] D.C. Code § 22-3104(b)(1)(A).

[61] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[62] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

[63] For example, the defense would not apply to the curator of an art museum who decides to feature an exhibition of prohibited sexual conduct and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum usher who escorts patrons to the exhibition. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the images had serious artistic value under the affirmative defense in subsection (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

[64] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and

sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image[65] and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference.[66] There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised arranging a live performance statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant, with several additional requirements. The defense only applies to creating, producing, or directing a live performance (sub-paragraphs (a)(1)(A) and (b)(1)(B)). The live performance must be limited to the actor and the complainant or just the complainant, and the actor must reasonably believe that the actor has the complainant's effective consent. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Finally, the actor must reasonably believe that he or she is the only audience for the live performance, other than the complainant. Without this defense, the revised arranging a live performance statute would criminalize consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes. This change improves the consistency and proportionality of the revised statute.

Eighth, the revised arranging a live performance statute has an affirmative defense for subsection (a) that the live performance has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. The current D.C. Code sexual performance of a minor statute does not have any defense if the performance has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current statute appears to criminalize the creation, sale, or promotion, of artistic films, or newsworthy events that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to live performances with serious literary, artistic, political, or scientific value, when considered as a whole.[67]

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misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[65] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[66] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[67] In *Ferber*, the Court acknowledged that some applications of the statute, which extended to live performances, at issue would be unconstitutional:

> While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from

In contrast, the revised arranging a live performance statute has an affirmative defense that the live performance has, or will have serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[68] Despite this defense, however, there may still be liability under the RCC sex offenses for causing or attempting to cause a minor to engage in the prohibited sexual conduct.[69] This change improves the constitutionality of the revised statute.

Ninth, the revised arranging a live performance statute no longer separately prohibits "employ[ing]," "authoriz[ing]," or "induc[ing]" a minor to engage in a sexual performance, instead penalizing such conduct under the RCC solicitation statute at half the penalty of the completed offense. The current D.C. Code sexual performance of a minor statute specifically states that a person commits the offense if he "employs, authorizes, or induces" a minor to engage in a sexual performance.[70] The precise scope of conduct intended by these verbs, and whether such verbs are intended to equate with solicitation of a crime under common law, is unclear. There is no DCCA case law interpreting this provision. Regardless, although such conduct may be far-removed from an actual live performance, employing, authorizing, or inducing a minor to engage in a live performance has the same 10 year penalty as actually creating or directing a live performance.[71] In contrast, the revised arranging a live performance statute removes employing, authorizing, and inducing as a discrete means of liability. Conduct that facilitates the minor engaging in the creation of a live performance instead is covered by the RCC solicitation offense (RCC § 22E-302),[72] defined in a manner consistent with other serious offenses against persons, and subject to a penalty one-half of the completed offense. "Employing" a minor to engage in a live performance may also make the actor

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> medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n. 28.

[68] *Miller v. California*, 413 U.S. 14, 24 (1973).

[69] For example, a defendant that causes minors to engage in sexual intercourse for a live play may have a successful affirmative defense under the RCC arranging a live performance offense or RCC attending a live performance offense. However, depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force involved, there may be liability for sexual assault (RCC § 22E-1301), as either a principal or an accomplice (RCC § 2E-210).

[70] D.C. Code § 22-3102(a)(1).

[71] D.C. Code § 22-3102(1).

[72] Depending on the facts of the case, there may also be accomplice liability under RCC § 22E-210 or conspiracy liability under § 22E-301 for one who "employs, authorizes, or induces" in concert with others.

subject to attempt liability[73] depending on the facts of the case. This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, the revised arranging a live performance statute requires a "knowingly" culpable mental state for the prohibited conduct—creating a live performance, giving consent for a minor to engage in a live performance, or selling or advertising a live performance. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance.[74] The statute does not specify whether this culpable mental state extends to the prohibited conduct, such as creating the live performance, and the definition of "knowingly"[75] in the current statute is unclear. There is no DCCA case law on these issues. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[76] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[77] Resolving this ambiguity, the revised arranging a live performance statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the prohibited conduct—creating a live performance, giving consent for a minor to engage in a live performance, or selling or advertising a live performance. Applying a knowledge culpable mental state requirement to statutory elements that distinguish

[73] RCC § 22E-301.

[74] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[75] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[76] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[77] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

innocent from criminal behavior is a well-established practice in American jurisprudence.[78] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised arranging a live performance statute requires a "knowingly" culpable mental state for the fact that a visual presentation is "for an audience," as required by the RCC definition of "live performance." The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance,[79] but neither the statute nor the current definition of "sexual performance"[80] specifies whether the visual presentation must be for an audience.[81] In addition, the definition of "knowingly"[82] in the current statute is unclear. There is no DCCA case law on these issues. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[83] which the DCCA has interpreted as

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

[79] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[80] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[81] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[82] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber,* 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[83] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

requiring subjective knowledge of the sexual nature of the material at issue.[84] Resolving these ambiguities, the revised arranging a live performance statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the fact that the visual presentation is a "live performance" as defined in RCC § 22E-701.[85] The RCC definition of "live performance" requires that the visual presentation be "for an audience," and read in conjunction with the RCC definition of "knowingly," requires that the defendant be "practically certain" that the presentation is "for an audience."[86] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[87] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Third, the revised arranging a live performance statute requires recklessness as to the content of the live performance and, in second degree, as to whether the content is obscene. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[88] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[89] There is no DCCA case law interpreting the definition of "knowingly" or how it applies to the current statute.[90] However, the current obscenity statute has a substantively identical definition

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[84] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

[85] The RCC definition of "live performance" is substantively identical to the current definition of "performance" as it pertains to live conduct, differing only in the explicit requirement that the presentation be "for an audience, including an audience of one person." *Compare* D.C. Code § 22-3101(3) (defining "performance" as "any play . . . electronic representation, dance, or any other visual presentation or exhibition.") *with* RCC § 22E-701 (defining "live performance" as a "play, dance, or other visual presentation or exhibition for an audience.").

[86] This requirement is discussed further in the explanatory note for the revised offense.

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

[88] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[89] D.C. Code § 22-3101(1).

[90] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the

of "knowingly,"[91] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[92] Resolving this ambiguity, the revised arranging a live performance statute requires recklessness as to the content of the live performance, and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[93] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[94] This change improves the clarity and consistency of the revised statute

Fourth, the revised arranging a live performance statute requires recklessness as to the age of the complainant and deletes the current affirmative defense for reasonable mistake of age. The current D.C. Code sexual performance of a minor statute requires that the defendant "know[] the character and content" of the sexual performance[95] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[96] It is unclear

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scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[91] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[92] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

[93] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019)* (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[94] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[95] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[96] D.C. Code § 22-3101(1).

whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence,[97] and it is also unclear whether the mental state applies to the age of the complainant.[98] There is no DCCA case law on these issues. However, the current statute has an affirmative defense for a reasonable mistake of age,[99] which suggests that negligence is not sufficient for liability and that "recklessly" or "knowingly" applies to the age of the complainant. Resolving this ambiguity, the revised arranging a live performance statute requires recklessness as to the age of the complainant. A reckless culpable mental state preserves the substance of the affirmative defense[100] and clarifies that the defendant must have some subjective knowledge as to the age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[101] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[102] This change improves the clarity and consistency of the revised statute.

Fifth, the revised arranging a live performance statute requires that the live performance depicts, or will depict, at least part of a real complainant under the age of 18

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[97] The legislative history notes that the definition of "knowingly" was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber,* however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[98] The legislative history for the prohibition in the current statute against attending, transmitting or possessing a sexual performance by a minor (D.C. Code § 22-3102(b)), states that the defendant "must know that the performance will depict a minor." Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary on Bill 18-70, The "Prohibition Against Human Trafficking Amendment Act of 2010" at 10. This prohibition was added to the current statute in 2010 and there is no discussion of how the "knowing" culpable mental state in pre-existing parts of the statute applies to the age of the complainant. Regardless, it is persuasive authority that the defendant must "know" the age of the complainant in the other parts of the statute, although the meaning of that definition remains unclear.

[99] D.C. Code § 22-3104(a) ("Under this chapter it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over.").

[100] The current affirmative defense is that "the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over." D.C. Code § 22-3104(a). In the revised arranging a live performance statute, it must be proven that an actor was reckless that the complainant was under the age of 18 years. As defined in RCC § 22E-206, "recklessness" requires that the actor must disregard a substantial risk that the complainant was under the age of 18 years; and the risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the person, the actor's conscious disregard of it is clearly blameworthy. A reasonable mistake as to the complainant's age would negate the recklessness required. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[101] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[102] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.).

years and excludes purely computer-generated or other fictitious minors. The current D.C. Code sexual performance of a minor statute does not specify whether the complainant that is depicted, or will be depicted, in a live performance must be a "real," i.e. not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[103] which arguably suggests that the complainant must be a "real," i.e. not fictitious, person. There is no DCCA case law on this issue. Resolving this ambiguity, the revised arranging a live performance statute specifies that at least part[104] of a "real," i.e. not fictitious, complainant under the age of 18 years must be depicted or will be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[105] The RCC does not criminalize an obscene live performance with computer-generated minors or other "fake" minors, such as youthful looking adults, although there may be liability under the RCC indecent exposure statute (RCC § 22E-4206).[106] This change improves the clarity, consistency, and proportionality of the revised statute.

Sixth, through the use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for live performances of sexual conduct that is apparently fake. The current D.C. Code sexual performance of a minor statute prohibits "simulated" sexual intercourse,[107] but does not define the term. It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way which realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised

[103] D.C. Code § 22-3101(2).

[104] The revised arranging a live performance statute includes performances that show at least part of a real minor, such as a real minor's head that seems to be attached to an adult body, or an adult's head that seems to be attached to a real minor's body. There is no requirement that the government prove the identity of a real minor.

[105] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to meet the *Miller* standard for obscenity. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Crucial to the Court's decision was its acceptance of several arguments and legislative findings, including that "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child," *id.* at 758, and that "the materials are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," *id*. at 759. The opinion was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "morphed images may fall within the definition of virtual child pornography, [but] they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further.

[106] The actor would have to meet the requirements of the RCC indecent exposure statute, as well an RCC inchoate offense, such as solicitation (RCC § 22E-302) or accomplice liability (RCC § 22E-210), unless the actor was also directly involved in the performance.

[107] D.C. Code § 22-3101(5)(A).

statute,[108] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[109] and is supported by Supreme Court case law.[110] This change improves the clarity, consistency, and constitutionality of the revised statute.

Seventh, the revised arranging a live performance statute provides liability for a person responsible for the complainant under civil law giving "effective consent" to the complainant's participation in the live performance, and requires a "knowingly" culpable mental state for this element.[111] The current D.C. Code sexual performance using a minor statute prohibits a "parent, legal guardian, or custodian" of a minor from "consent[ing] to the participation by a minor in a sexual performance."[112] The statute does not define "consent" or specify a culpable mental state for this element and there is no DCCA case law on this issue. Resolving this ambiguity, the revised arranging a live performance statute requires that the individual responsible under civil law for the health, welfare, or supervision of the complainant give "effective consent," as defined in RCC § 22E-701, and requires a "knowing" culpable mental state for this element. The term "under civil law for the health, welfare, or supervision of the complainant" includes parents, legal guardians, and custodians who at the time have a legal duty of care for the complainant. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception" and is used consistently throughout the RCC. Applying a knowledge culpable mental state requirement to statutory elements that distinguish

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[108] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[109] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[110] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[111] Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) and paragraph (b)(1) also applies to the fact that the defendant is a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant."

[112] D.C. Code § 22-3102(a)(1).

innocent from criminal behavior is a well-established practice in American jurisprudence.[113] This change improves the clarity and consistency of the revised statute.

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

First, the revised statute deletes subsection (a) of the current D.C. Code statute: "It shall be unlawful in the District of Columbia for a person knowingly to use a minor in a sexual performance or to promote a sexual performance by a minor."[114] It is unclear whether this is a general statement or part of the actual offense for which a person can be charged and convicted.[115] The revised arranging a live performance statute substantively encompasses the "use" of a minor in a sexual performance and "promot[ing]" a sexual performance by a minor, rendering current subsection (a) superfluous. This improves the clarity of the revised offense without changing the law.

Second, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current D.C. Code definitions of "performance" and "sexual performance," the current sexual performance of a minor statute includes both still images and live performances.[116] However, it is counterintuitive to construe a "performance" as including a still image (e.g., photograph). To clarify that both images and live performances fall within the revised statutes, the RCC creating or trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and viewing a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

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

[114] D.C. Code § 22-3102(a).

[115] The current statute substantively encompasses the "use" and "promot[ion] of a minor in a sexual performance, regardless of the meaning of subsection (a). D.C. Code §§ 22-3102(a)(1), (a)(2) ("(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance. (2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age."); 22-3101(4) (defining "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.").

[116] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

Third, the revised arranging a live performance statute no longer uses the defined term "minor."[117] Instead, consistent with the current D.C. Code statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[118] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Fourth, the revised arranging a live performance statute replaces "parent, legal guardian, or custodian of a minor" with a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant." The current D.C. Code sexual performance of a minor statute prohibits a "parent, legal guardian, or custodian of a minor" from "consent[ing] to the participation by a minor in a sexual performance."[119] There is no DCCA case law on the scope of "parent, legal guardian, or custodian" in the current statute. However, the legislative history for the current statute indicates a broad scope: "[A] parent, whether natural, or adoptive, or a foster parent, a legal guardian defined in D.C. Code, sec. 21-101 to 103 or custodian . . . [c]ustodian means any person who has responsibility for the care of a child without regard to whether a formal legal arrangement exists."[120] The revised statute uses a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant," which is used elsewhere in the RCC, such as the special defenses in RCC § 22E-408. This change improves the clarity and consistency of the revised statute without changing current District law.

Fifth, the revised arranging a live performance statute requires that the complainant "engage in or submit to" the prohibited sexual conduct. The current D.C. Code sexual performance of a minor statute prohibits inducing a minor to "engage in" a sexual performance,[121] but otherwise refers generally to the complainant's actions.[122] The revised arranging a live performance statute consistently refers to the complainant "engag[ing] in or submit[ing] to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply in situations where the complainant is an active participant or a completely passive (e.g., unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

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[117] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[118] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

[119] D.C. Code § 22-3102(a)(1).

[120] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[121] D.C. Code § 22-3102(a)(1).

[122] D.C. Code § 22-3102(a)(1) ("participation by a minor in a sexual performance."), (a)(2) ("any performance which includes sexual conduct by a person under 18 years."), (b) ("a sexual performance by a minor."). In addition to the variable statutory language, the definition of "sexual performance" merely requires that the performance "includes sexual conduct" by a minor. D.C. Code § 22-3101(6). The current definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant.

Sixth, the revised arranging a live performance statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the various forms of sexual penetration the current sexual performance of a minor statute prohibits and includes bestiality.[123] This change clarifies the revised statute.

Seventh, instead of prohibiting a "lewd" exhibition,[124] the revised arranging a live performance statute prohibits a "sexual or sexualized display" of certain body parts when there is less than a full opaque covering. The current D.C. Code sexual performance of a minor statute does not define "lewd," but the DCCA approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[125] The revised arranging a live performance statute's reference to "sexual or sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

Eighth, the revised arranging a live performance statute prohibits selling "admission to" a live performance. The current sexual performance of a minor statute

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[123] The current sexual performance using a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i). Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[124] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[125] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.
The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

prohibits "sell[ing]" a live performance,[126] but in the context of a live sexual performance, it is more accurate to say selling "admission to."[127] This change improves the clarity of the revised statute without changing current District law.

[126] D.C. Code §§ 22-3102(a)(2) (prohibiting "promotes" any sexual performance with a minor); 22-3101(4) (defining "promote" to include "sell.").

[127] If a live performance is filmed, photographed, etc., and the resulting image is sold, there is liability under the RCC creating or trafficking an obscene image statute (RCC § 22E-1807).

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

Explanatory Note.[1] *The RCC attending or viewing a live sexual performance of a minor offense prohibits attending or viewing a live performance or live broadcast that depicts complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted in the live performance or live broadcast. The revised attending or viewing a live sexual performance of a minor statute has the same penalties as the RCC possession of an obscene image of a minor statute,[2] the main difference being that the RCC possession of an obscene image of a minor offense is limited to images. Along with the creating or trafficking of an obscene image of a minor offense,[3] the possession of an obscene image of a minor offense,[4] and the arranging a live sexual performance of a minor offense,[5] the revised attending or viewing a live sexual performance of a minor statute replaces the current sexual performance using a minor offense[6] in the current D.C. Code, as well as the current definitions,[7] penalties,[8] and affirmative defenses[9] for that offense.*

Subsection (a) specifies the various types of prohibited conduct in first degree attending or viewing a live sexual performance of a minor statute, the highest gradation of the revised offense. Paragraph (a)(1) specifies the prohibited conduct—attending or viewing a "live performance" or "live broadcast."[10] "Live performance" is defined in RCC § 22E-701 as a "play, dance, or other visual presentation or exhibition for an audience, including an audience of one person." "Live broadcast" is defined in RCC § 22E-701 as "a streaming video, or any other electronically transmitted image for viewing by an audience, including an audience of one person." Paragraph (a)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she attends or views a "live performance" or "live broadcast."[11] As applied to the elements "live performance" and

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[1] Unless otherwise noted, when discussing the current sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current D.C. Code statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

[2] RCC § 22E-1808.

[3] RCC § 22E-1807.

[4] RCC § 22E-1808.

[5] RCC § 22E-1809.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

[10] It is arguably redundant to prohibit attending or viewing a "live broadcast" because an actor that attends or views a "live broadcast" has likely also attended or viewed a "live performance." As defined in the RCC § 22E-701, a "live broadcast" is essentially a "live performance" that is streamed or electronically transmitted. However, the revised statute includes both live performances and live broadcasts for clarity.

[11] The revised statute prohibits both attending and viewing a live performance or live broadcast because it is possible to attend such a visual presentation without viewing it. An actor that is "practically certain" that he or she is attending a live performance or live broadcast cannot avoid liability by not watching the

"live broadcast," the "knowingly" culpable mental state requires that the actor be "practically certain" that the visual presentation is for an audience or one or more people."[12]

Paragraph (a)(2) specifies additional requirements for the live performance or live broadcast. First, the live performance or live broadcast must depict the body of a real complainant under the age of 18 years. "Body" includes the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body is sufficient. The complainant must be a real minor but there is no requirement that the government prove the identity of the minor. Second, the live performance or live broadcast must depict the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.[13] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "recklessly." "Recklessly" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the live performance or live broadcast depicts, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state also applies to the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted in the live performance or live broadcast is one of the types prohibited in

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performance, i.e. closing his or her eyes, or leaving the room, but staying in reasonably close physical proximity to the performance or broadcast. In addition, an actor cannot avoid liability for being in reasonably close physical proximity to the live performance or live broadcast, but in another part of the facility, venue, or area if the other requirements of the offense are met.

[12] The actor must be "practically certain" that the live performance or live broadcast is "for" an audience, including an audience of one person, and the visual presentation must, in fact, be "for" an audience. It is a fact-specific inquiry as to whether a live performance or live broadcast is "for" an audience. For example, a couple having sex in the privacy of their bedroom, or the relative privacy of a car or their backyard, is likely not having sexual activity "for" an audience. An actor that spies on the couple may be liable for voyeurism under RCC § 22E-1803, but there is no liability for attending or viewing a live performance. In contrast, if the actor views a live performance that is happening openly in a public park, or if he or she has to pay for admission or seek permission to enter a venue or area where the performance occurs, the presentation likely is "for" an audience and likely satisfies the RCC definition of "live performance." It should be noted that in many instances, the actor is the only "audience" and is the same individual that creates, produces, or directs the live performance or live broadcast. Due to the RCC merger provision in RCC § 22E-214, the actor cannot have liability for creating, producing, directing, and attending the same live performance.

[13] If the genitals, pubic area, or anus of the minor have a full opaque covering, there is no liability under first degree of the revised attending a live performance statute. However, if the live performance depicts a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised attending a live performance statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree attending or viewing a live sexual performance of a minor. Paragraph (b)(1) and paragraph (b)(2) have the same requirements as paragraph (a)(1) and paragraph (a)(2) in first degree. However, the types of prohibited sexual conduct are different in second degree. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact," and subparagraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.[14] "Obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must consciously disregard a substantial risk that the conduct is an "obscene" "sexual contact" or a specified "obscene" sexual display. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must consciously disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display.

Subsection (c) establishes several affirmative defenses for the RCC attending or viewing a live performance statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC.

Paragraph (c)(1) establishes an affirmative defense to subsection (a) of the revised statute that the live performance or live broadcast has serious literary, artistic, political, or scientific value when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[15] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, is not subject to the First Amendment requirements set out in *Miller v. California*.[16] However, the affirmative defense recognizes that there may be rare situations where live performances or live broadcasts of such conduct warrant First Amendment protection. Paragraph (c)(1) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the live performance or live broadcast has serious literary, artistic, political, or scientific value when considered as a whole.

Paragraph (c)(2) establishes an affirmative defense for an actor that is under the age of 18 years. Paragraph (c)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact"

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[14] If the specified part of the breast or the buttocks has a full opaque covering, and the live performance does not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(A), there is no liability under second degree attending a live performance. However, there may be liability if the actor caused the minor to engage in the underlying sexual conduct in the RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304).

[15] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[16] *Miller v. California*, 413 U.S. 15, 24 (1973).

specified in paragraph (c)(2) applies to subparagraphs (c)(2)(A) and (c)(2)(B) and sub-subparagraphs (c)(2)(B)(i) and (c)(2)(B)(ii) and there is no culpable mental state requirement for any of the elements in these subparagraphs or sub-subparagraphs. Subparagraph (c)(2)(A) requires that the actor is under the age of 18 years. There are two alternative requirements for the affirmative defense under subparagraph (c)(2)(B). Sub-subparagraph (c)(2)(B)(i) requires that the actor is the only person under the age of 18 years who is depicted in the live performance or live broadcast. In the alternative, sub-subparagraph (c)(2)(B)(ii) applies if there are multiple people under the age of 18 years who are depicted in the live performance or live broadcast. Under sub-subparagraph (c)(2)(B)(ii), the actor must reasonably believe that every person under 18 years of age who is depicted in the live performance or live broadcast gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The "in fact" specified in paragraph (c)(2) applies to sub-subparagraph (c)(2)(B)(ii) and no culpable mental state, as defined in RCC § 22E-205, applies to sub-subparagraph (c)(2)(B)(ii). However, sub-subparagraph (c)(2)(B)(ii) still requires that the actor subjectively believe that every person under 18 years of age who is depicted in the live performance or live broadcast gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[17] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception.

Paragraph (c)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Paragraph (c)(3) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to every element under subparagraph (c)(3)(A) through subparagraph (c)(3)(E) and there is no culpable mental state required for any of these elements.

There are several requirements to the affirmative defense under paragraph (c)(3). First, per subparagraph (c)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (c)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs c)(3)(B)(i) and (c)(3)(B)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant. "Domestic partnership" is a defined term in RCC § 22E-701 and

[17] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[18] and is intended to have the same meaning. There are additional requirements if the actor in a "romantic, dating, or sexual relationship" with the complainant under sub-subparagraph (c)(3)(B)(ii). When the complainant is under 16 years of age, the actor must be less than four years older (sub-subparagraph (c)(3)(B)(ii)(a)), and when the complainant is under 18 years of age and the actor is at least four years older, the actor must not be in a "position of trust with or authority over" the complainant (sub-subparagraph (c)(3)(B)(ii)(b)). "Position of trust with or authority over" is a defined term in RCC § 22E-701. The requirements in sub-subparagraphs (c)(3)(A)(ii)(a) and (c)(3)(A)(ii)(b) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Second, per subparagraph (c)(3)(C), the complainant must be the only person who is depicted in the live performance or live broadcast, or the actor and the complainant must be the only persons who are depicted in the live performance or live broadcast. The marriage or romantic partner defense is not available when the live performance or live broadcast shows third persons. Third, per subparagraph (c)(3)(D), the actor must reasonably believe[19] that the actor has the complainant's "effective consent" to the prohibited conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Fourth, per subparagraph (c)(3)(E), the actor must reasonably believe[20] that the actor is the only audience for the live performance or live broadcast, other than the complainant.[21]

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[18] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[19] As was stated earlier, the "in fact" specified in subparagraph (c)(3) applies to subparagraph (c)(3)(D) and no culpable mental state, as defined in RCC § 22E-205, applies to this subparagraph. However, the actor must subjectively believe that the complainant gives the actor "effective consent" to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.*, Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[20] As was stated earlier, the "in fact" specified in subparagraph (c)(3) applies to subparagraph (c)(3)(E) and no culpable mental state, as defined in RCC § 22E-205, applies to this subparagraph. However, the actor must subjectively believe that the actor is the only audience for the live performance or live broadcast other than the complainant, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.*, Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had

Paragraph (c)(4) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. Paragraph (c)(4) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (c)(4)(A), (c)(4)(B), (c)(4)(C), and (c)(4)(D) and there is no culpable mental state requirement for any of the elements in these subparagraphs. The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the live performance or live broadcast. The actor must not record, photograph, or film the live performance or live broadcast.[22] The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

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

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

Relation to Current District Law. *The revised attending or viewing a live sexual performance of a minor statute clearly changes current District law in eight main ways.*

First, the revised attending a live performance statute punishes attending or viewing a live performance or live broadcast less severely than the creating, selling, or advertising a live performance. The current D.C. Code sexual performance of a minor statute has the same penalties for creating, selling, advertising, attending, and viewing a live performance,[23] even though creation of a live performance is a direct form of child abuse[24] and selling and advertising are "an integral part" of the market.[25] In contrast, the

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just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[21] The "reasonably believes" requirement parallels the requirements of paragraphs (a)(1) and (b)(1) of the offense. As is discussed earlier in the explanatory note, those subparagraphs apply a "knowingly" culpable mental state to the "live performance" and "live broadcast" elements and require that the actor be "practically certain" that the visual presentation is "for" an audience. The "audience" can extend beyond the actor or the complainant to include other people that are watching or may watch the performance as long as the actor is "practically certain" of this fact. For the defense, if an actor reasonably believes that the actor, the complainant, or both of them, are the only audience for the performance, it is irrelevant that there may be other people watching.

[22] If an actor records, photographs, or films the live performance, he or she is creating a prohibited image of a minor and there may be liability under the RCC creating or trafficking an obscene image offense (RCC § 22E-1807).

[23] D.C. Code § 22-3102(a)(1), (a)(2), (b) (prohibiting "employ[ing], authoriz[ing], or induc[ing] a person under 18 years of age to engage in a sexual performance, the parent, legal guardian, or custodian giving such consent, "produc[ing], direct[ing], or promot[ing]" any sexual performance, and "attend[ing], direct[ing], or promot[ing] any sexual performance"), 22-3104 (punishing a first violation with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

[24] *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

revised attending a live performance statute penalizes attending or viewing a live performance or a live broadcast less severely than creating, selling or advertising a live performance or a live broadcast in the revised arranging a live performance statute (RCC § 22E-1809) or revised creating or trafficking an obscene image statute (RCC § 22E-1807). The different penalties recognize that creating, selling, or advertising a live performance directly harms children and supports the market. Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other District offenses.[26] This change improves the consistency and proportionality of the revised offense.

Second, the revised attending a live performance statute grades punishments based upon the sexual conduct depicted in the live performance or live broadcast. The current D.C. Code sexual performance of a minor statute prohibits attending live performances of "sexual conduct,"[27] a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC attending a live performance statute reserves first degree for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised attending a live performance is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in other District offenses.[28] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised attending a live performance statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current D.C. Code sexual performance of a minor

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[25] *Id.* at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[26] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

[27] D.C. Code §§ 22-3102(b) (prohibiting a attending a "sexual performance by a minor."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[28] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

statute prohibits actual masturbation and sadomasochistic abuse,[29] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." However, attending or viewing a live performance or live broadcast that features "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[30] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[31] with no enhancements for the obscene materials depicting a minor.[32] In contrast, first degree of the revised attending a live performance statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and "sexual contact" are defined in RCC § 22E-701. As defined, such sexual conduct may be as graphic[33] as other conduct penalized by the current statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[34] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[35] This change improves the consistency and proportionality of the revised statute.

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[29] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[30] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes "participat[ing] in the preparation or presentation" of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[31] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[32] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[33] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised arranging a live performance of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

[34] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[35] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

Fourth, the revised attending a live performance statute includes a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current D.C. Code sexual performance of a minor statute is limited to a "lewd exhibition of the genitals," and does not include a lewd exhibition of the pubic area, anus, breast, or buttocks. However, attending or viewing a live performance or live broadcast that features "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[36] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[37] with no enhancements for the obscene materials depicting a minor.[38] In contrast, the RCC criminalizes attending or viewing live performances or live broadcasts that feature certain depictions of the pubic area[39] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[40] As defined, display of the pubic area or anus is as graphic as other conduct

[36] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes "participat[ing] in the preparation or presentation" of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[37] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[38] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[39] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[40] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). Although *Ferber* was specific to the creation and distribution of visual sexual depictions of minors, the Court later held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography" due, in part, to the same rationales the Court accepted in *Ferber*. *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). It is unclear if the Court intended "viewing" to include viewing a live performance. At the time *Osborne* was decided, the relevant Ohio statute prohibited possessing or viewing "any material or performance," but it is unclear whether the statute then defined "performance" to include live conduct, like it does now. Ohio Rev. Code Ann. § 2907.01(K) ("'Performance' means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience."). Regardless, it seems unlikely that the Court would strike down a state law that prohibits viewing a live sexual performance of minors after upholding Ohio's ban on possessing images of that conduct.

penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised attending a live performance statute expands the current exceptions to liability for conduct by persons under 18 years of age. In the current D.C. Coode sexual performance of a minor statute, minors that are depicted in prohibited images are not liable for possessing or distributing those images if the minor is the only minor depicted,[41] or, if there are multiple minors depicted, all of the minors consent.[42] A minor that is not depicted,[43] or an adult that is not more than four years older than the minor or minors depicted,[44] is not liable for possessing an image that he or she receives

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The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams*, the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC arranging a live performance statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC attending a live performance statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised arranging a live performance statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.")

[41] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[42] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[43] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[44] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (c) If the sexual performance consists solely of a still or motion picture, then this section: . . (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older

from a depicted minor, unless he or she knows that at least one of the depicted minors did not consent. The current exclusion does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent,[45] and minors are still liable under the current statute for creating or viewing live performances or live broadcasts with themselves or other minors[46] or engaging in sexual conduct.[47] There is no DCCA case law interpreting the current exclusion. In contrast, the revised attending a live performance statute excludes from liability all persons under the age of 18 years from attending or viewing a live performance or a live broadcast. Legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.[48] The minor must be the only person under the age of 18 years who is depicted in the live performance or live broadcast,[49] or the minor must reasonably believe that he or she has the effective consent

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than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[45] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[46] A minor that creates a live performance of himself or herself or of other minors has "produce[d], direct[ed], or promote[d]" a "performance which includes sexual conduct by a person under 18 years of age." D.C. Code §§ 22-3102(a)(2); 22-3101(4) (defining "promote," in part, as "to manufacture . . . transmute.").

[47] The current definition of "performance" extends to live conduct. D.C. Code § 22-3101(3) ("'Performance' means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."). Thus, under a plain language reading, when a minor engages in "sexual conduct" with themselves, another minor, or an adult, they are "produc[ing], direct[ing], or promot[ing]" a "performance that includes sexual conduct by a person under 18 years of age" or "attend[ing]" a sexual performance by a minor. D.C. Code §§ 22-3102(a)(2), (b); 22-3101(4) (defining "promote," in part, as "to present [or] exhibit.").

[48] *See, e.g.,* Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

[49] If a minor is the only person under the age of 18 years that is depicted in the live performance or live broadcast, it is irrelevant under the exclusion if the live performance or live broadcast depicts an adult.

of every person under 18 years who is depicted in the live performance or live broadcast.[50] The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. This change improves the clarity, consistency, and proportionality of the revised offense.

Sixth, the revised attending a live performance statute applies the current affirmative defense for a librarian or motion picture theater employee to attending or viewing a live performance or live broadcast and expands it to include similarly positioned museum, school, and other venue employees. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]" any sexual performance of a minor[51] for a "librarian engaged in the normal course of his or her employment"[52] and certain movie theater employees[53] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[54] There is no DCCA case law interpreting this defense. In contrast, the revised attending a live performance statute applies this defense to attending or viewing a live performance or a live broadcast and expands this affirmative defense to include employees at museums, schools, and other venues who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the live performance or live broadcast.[55] Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's defense in subsection (c)(1) to first degree for live performances or live broadcasts with serious

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However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[50] If both minors and adults are depicted in the live performance or live broadcast, it is irrelevant under the exclusion if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[51] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[52] D.C. Code § 22-3104(b)(1)(A).

[53] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[54] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

[55] For example, the defense would not apply to the curator of an art museum who decides to feature an exhibition of prohibited sexual conduct and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum employee who attends the live performance as an usher. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the live performance or live broadcast had serious artistic value under the affirmative defense in subsection (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

artistic or other value, or, in second degree, the argument that the live performances or live broadcasts are not "obscene." This change improves the clarity and consistency of the revised statute.

Seventh, the revised attending a live performance statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current D.C. Code sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[56] The current D.C. Code sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image[57] and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference. There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised attending a live performance statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant, with several additional requirements. The live performance or live broadcast must be limited to the actor and the complainant or just the complainant, and the actor must reasonably believe that the complainant gave effective consent to the conduct. The actor must reasonably believe that the actor is the only person that attended or viewed the live performance or live broadcast, other than the complainant. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Without this defense, the revised attending a live performance statute would criminalize consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes. This change improves the consistency and proportionality of the revised statute.

Eighth, the revised attending a live performance statute has an affirmative defense for subsection (a) that the live performance or live broadcast has serious literary, artistic,

[56] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[57] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

political, or scientific value, when considered as a whole. The current D.C. Code sexual performance of a minor statute does not have any defense if the performance has serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current statute appears to criminalize attending or viewing artistic films or newsworthy events that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to live performances or live broadcasts with serious literary, artistic, political, or scientific value, when considered as a whole.[58] In contrast, the revised attending a live performance statute has an affirmative defense that the live performance or live broadcast has serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[59] Despite this defense, however, there may still be liability under the RCC sex offenses for causing or attempting to cause a minor to engage in the prohibited sexual conduct.[60] This change improves the constitutionality of the revised statute.

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

First, the revised attending a live performance statute requires a "knowingly" culpable mental state for the prohibited conduct—attending or viewing a live performance or live broadcast. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual

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[58] In *Ferber*, the Court acknowledged that some applications of the statute at issue, which extended to live performances would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n. 28.

[59] *Miller v. California*, 413 U.S. 14, 24 (1973).

[60] For example, a defendant that causes minors to engage in sexual intercourse for a live play may have a successful affirmative defense under the RCC arranging a live performance offense or RCC attending a live performance offense. However, depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force involved, there may be liability for sexual assault (RCC § 22E-1301), as either a principal or an accomplice (RCC § 2E-210).

performance.[61] The statute does not specify whether this culpable mental state extends to attending or viewing a live performance or live broadcast, and the definition of "knowingly"[62] in the current statute is unclear. There is no DCCA case law on these issues. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[63] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[64] Resolving this ambiguity, the revised attending a live performance statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the prohibited conduct—attending or viewing a live performance or live broadcast. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[65] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised attending a live performance statute requires a "knowingly" culpable mental state for the fact that a visual presentation is "for" an audience, as required by the RCC definitions of "live performance" and "live broadcast." The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance,[66] but neither the statute nor the current definition of

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[61] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attend, transmit, or possess a sexual performance by a minor.").

[62] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[63] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[64] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

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

[66] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting

"sexual performance"[67] specifies whether the visual presentation must be for an audience.[68] In addition, the definition of "knowingly"[69] in the current statute is unclear. There is no DCCA case law on these issues. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[70] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[71] Resolving these ambiguities, the revised attending a live performance statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the fact that the visual presentation is a "live performance"[72] or "live broadcast" as defined in RCC § 22E-701. The RCC definitions of "live performance" and "live broadcast" require that the visual presentation be "for" an audience and read in conjunction with the RCC definition of "knowingly," requires that the defendant be "practically certain" that the live performance is "for" an audience or the live broadcast is "for" one or more people.[73]

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a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[67] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[68] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[69] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[70] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[71] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

[72] The RCC definition of "live performance" is substantively identical to the current definition of "performance" as it pertains to live conduct, differing only in the explicit requirement that the presentation be "for an audience, including an audience of one person." *Compare* D.C. Code § 22-3101(3) (defining "performance" as "any play . . . electronic representation, dance, or any other visual presentation or exhibition.") *with* RCC § 22E-701 (defining "live performance" as a "play, dance, or other visual presentation or exhibition for an audience.").

[73] This requirement is discussed further in the explanatory note for the revised offense.

Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[74] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Third, the revised attending a live performance statute requires recklessness as to the content of the live performance or live broadcast and, in second degree, as to whether the content is obscene. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[75] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[76] There is no DCCA case law interpreting the definition of "knowingly" or how it applies to the current statute.[77] However, the current obscenity statute has a substantively identical definition of "knowingly,"[78] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[79] Resolving this ambiguity, the revised attending a live performance statute requires recklessness as to the content of the live performance or live broadcast, and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a

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

[75] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attend, transmit, or possess a sexual performance by a minor.").

[76] D.C. Code § 22-3101(1).

[77] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[78] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[79] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

well-established practice in American jurisprudence,[80] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[81] This change improves the clarity and consistency of the revised statute.

Fourth, the revised attending a live performance statute requires that the live performance or live broadcast depicts at least part of a real complainant under the age of 18 years and excludes purely computer-generated or other fictitious minors. The current D.C. Code sexual performance of a minor statute does not specify whether the complainant that is depicted in a live performance must be a "real," i.e. not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[82] which arguably suggests that the complainant must be a "real," i.e. not fictitious, person. There is no DCCA case law on this issue. Resolving this ambiguity, the revised attending a live performance statute specifies that at least part[83] of a "real," i.e. not fictitious, complainant under the age of 18 years must be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[84] The RCC does not criminalize attending or viewing an obscene live performance or live broadcast with computer-generated minors or other "fake" minors, such as youthful looking adults. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, through the use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for live performances of sexual conduct that is apparently fake. The current D.C. Code sexual performance of a minor statute prohibits

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[80] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[81] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[82] D.C. Code § 22-3101(2).

[83] The revised attending a live performance statute includes performances that show at least part of a real minor, such as a real minor's head that seems to be attached to an adult body, or an adult's head that seems to be attached to a real minor's body. There is no requirement that the government prove the identity of a real minor.

[84] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to meet the *Miller* standard for obscenity. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Crucial to the Court's decision was its acceptance of several arguments and legislative findings, including that "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child," *id.* at 758, and that "the materials are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," *id*. at 759. The opinion was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "morphed images may fall within the definition of virtual child pornography, [but] they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further.

"simulated" sexual intercourse, but does not define the term.[85] It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way which realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised statute,[86] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[87] and is supported by Supreme Court case law.[88] This change improves the clarity, consistency, and constitutionality of the revised statute.

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

First, the revised attending a live performance statute clarifies that viewing a "live performance" is a discrete form of liability.[89] The current D.C. Code sexual performance of a minor statute prohibits "attend[ing]" or "possess[ing]" a sexual "performance."[90] There is no DCCA case law or legislative history interpreting the scope of "attending." However, limiting "attending" to being physically in the immediate vicinity of a live

[85] D.C. Code § 22-3101(5)(A).

[86] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[87] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[88] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[89] For example, an actor that views from across the street a live sexual performance that is taking place in a park could be said to have "viewed" the performance without also attending it. Similarly, an actor several blocks away that views a live sexual performance in a park through a telescope has also "viewed" the performance without attending it.

[90] D.C. Code § 22-3102(b).

performance would lead to counterintuitive results and disproportionate penalties for similar conduct.[91] This change clarifies current law without changing it.

Second, the revised attending a live performance statute clarifies that attending or viewing a "live broadcast" is a discrete form of liability. The current D.C. Code sexual performance of a minor statute prohibits "attend[ing]" or "possess[ing]" a sexual "performance."[92] The current definition of "performance" includes any "visual representation or exhibition,"[93] which would appear to include live broadcasts. This change clarifies current law without changing it.

Third, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current D.C. Code definitions of "performance" and "sexual performance," the current D.C. Code sexual performance of a minor statute includes both still images and live performances.[94] However, it is counterintuitive to construe a "performance" as including a still image (e.g., photograph). To clarify that both images and live performances fall within the revised statutes, the RCC creating or trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and viewing a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—creating or trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

Fourth, the revised attending a live performance statute no longer uses the defined term "minor."[95] Instead, consistent with the current D.C. Code statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the

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[91] For the purposes of the possession offense, the current sexual performance of a minor statute defines "still or motion picture" to "include[] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced." D.C. Code § 22-3102(d)(2). In addition, for possession of an "electronically received or available" still image or motion picture, the current statute requires that the defendant "access" the still image or motion picture. D.C. Code § 22-3102(b), (d)(3). Thus, a defendant that views a live sexual performance that is being streamed over the Internet would be liable for possessing the resulting images or the motion picture. However, if the defendant were watching the live sexual performance through means other than electronic transmission, such as from across the street or several blocks away through a telescope, it is arguable that the defendant has not "attended" that performance and there would be no liability under the current statute.

[92] D.C. Code § 22-3102(b).

[93] D.C. Code § 22-3101(3). In addition to the general definition of "performance," the current sexual performance of a minor statute, for the possession and attendance prongs, defines a "still or motion picture" to "include[] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced." D.C. Code § 22-3102(d)(2).

[94] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

[95] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

D.C. Code refer to a person under 18 years of age as a "child,"[96] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Fifth, the revised attending a live performance statute requires that the complainant "engage in or submit to" the prohibited sexual conduct. The current D.C. Code sexual performance of a minor statute prohibits inducing a minor to "engage in" a sexual performance,[97] but otherwise refers generally to the complainant's actions.[98] The revised attending a live performance statute consistently refers to the complainant "engag[ing] in or submit[ing] to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply in situations where the complainant is an active participant or a completely passive (e.g., unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

Sixth, the revised attending a live performance statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the various forms of sexual penetration the current D.C. Code sexual performance of a minor statute prohibits and includes bestiality.[99] This change clarifies the revised statute.

Seventh, instead of prohibiting a "lewd" exhibition,[100] the revised attending a live performance statute prohibits a "sexual or sexualized display" of certain body parts when there is less than a full opaque covering. The current D.C. Code sexual performance of a minor statute does not define "lewd," but the DCCA approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually

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[96] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

[97] D.C. Code § 22-3102(a)(1).

[98] D.C. Code § 22-3102(a)(1) ("participation by a minor in a sexual performance."), (a)(2) ("any performance which includes sexual conduct by a person under 18 years."), (b) ("a sexual performance by a minor."). In addition to the variable statutory language, the definition of "sexual performance" merely requires that the performance "includes sexual conduct" by a minor. D.C. Code § 22-3101(6). The current definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant.

[99] The current sexual performance using a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i). Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[100] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

aroused."[101] The revised attending a live performance statute's reference to "sexual or sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

[101] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.
The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.