First Draft of Report #23:
Disorderly Conduct and Public Nuisance

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

This Draft Report has two parts: (1) draft statutory text for a new Title 22A of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

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

The deadline for the Advisory Group's written comments on this First Draft of Report No. 23, *Disorderly Conduct and Public Nuisance*, is September 14, 2018 (eight weeks from the date of issue). Oral comments and written comments received after September 14, 2018, will not be reflected in the Second Draft of Report No. 23. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Chapter 40. Disorderly Conduct and Public Nuisance.

Section 4001. Disorderly Conduct.
Section 4002. Public Nuisance.

RCC § 22A-4001. DISORDERLY CONDUCT.

(a) *Offense.* A person commits disorderly conduct when that person:
  (1) Recklessly engages in conduct that:
    (A) Causes another person to reasonably believe that there is likely to be immediate and unlawful:
      (i) Bodily injury to another person;
      (ii) Damage to property; or
      (iii) Taking of property; and
    (B) Is not directed at a law enforcement officer in the course of his or her official duties;
  (2) While that person is in a location that, in fact, is:
    (A) Open to the general public; or
    (B) A communal area of multi-unit housing.

(b) *Penalty.* Disorderly conduct is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:
  (1) The term "recklessly," has the meaning specified in § 22A-206;
  (2) The terms "bodily injury" and "law enforcement officer" have the meanings specified in § 22A-1001;
  (3) The term "property" has the meaning specified in § 22A-2001;
  (4) The phrase "open to the general public" excludes locations that require payment or permission to enter or leave.

(d) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq.

(e) *Prosecutorial Authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.

COMMENTARY

Explanatory Note. *This section establishes the disorderly conduct offense for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct that causes a breach of peace in a public place and is not protected by the First Amendment or District law. The RCC disorderly conduct statute criminalizes conduct that would cause a person reasonably to believe another criminal act is likely, even though the conduct may not constitute a criminal threat, menace, assault, destruction of property, or*

theft. The revised offense replaces DC Code § 22-1301 (Affrays) and subsection (a) of DC Code § 22-1321 (Disorderly Conduct).[1]

Subsection (a)(1) states that the offense applies to any type of conduct that causes one of three specified results. Such conduct may consist of actions, movements, gestures, or speech such as "fighting words" [2] which cause the specified results.

Subsection (a)(1) also specifies the culpable mental state required is recklessness, a term defined in RCC § 22A-206. The accused must be aware that there was a substantial risk that his or her conduct will cause one of the three specified results.[3] The accused must also grossly deviate from the standard of care that a reasonable person would observe in the person's situation. A person does not commit disorderly conduct when he or she exercises reasonable caution or where he or she deviates only slightly from the ordinary standard of care.[4]

Subsection (a)(1)(A) describes the three results that the accused's conduct must cause: unlawful bodily injury, unlawful damage to property, or unlawful taking of property. The accused's conduct must actually cause another person[5] to reasonably believe that one of three dangers is likely to occur immediately, and the accused must be reckless as to another person having such a belief.

Subsection (a)(1)(A)(i) specifies that causing a reasonable belief in the likelihood of immediate and unlawful bodily injury to another is one means of committing disorderly conduct. As defined in RCC § 22A-1001, "bodily injury" means physical pain, illness, or any impairment of physical condition. The apparent danger of bodily injury must be to another person; a person cannot commit disorderly conduct where she poses a risk of harm to only herself.[6] The apparent danger of bodily injury also must be unlawful, such as assaultive conduct.[7] Engaging in legal group activities such as contact sports, rough-housing, or horseplay is not disorderly conduct unless it creates a likelihood of immediate bodily injury to a third party. Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" applies to the fact that the accused's conduct

[1] Other subsections of D.C. Code § 22-1321, concerning nuisance, prowling, and jostling, will be addressed in different sections of the RCC.

[2] Fighting words are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, (1942).

[3] For example, a person who enters an area of a park that, on inspection, appears to be vacant. She then swings a stick wildly near a statue while screaming obscenities. She has not committed disorderly conduct because she was not aware of a substantial risk that any person could see her or hear her.

[4] For example, a person playing kickball in a public park who chases the ball near a group of uninvolved bystanders, alarming them. However agile or clumsy the athlete might be, it is unlikely that her movements will rise to the level of disorderly conduct because a person of ordinary caution would likely chase after the ball in the same manner, under the same circumstances.

[5] The person who reasonably believes the accused's conduct will cause one of the specified three results may be a law enforcement officer, so long as the accused's conduct is not directed at the law enforcement officer while in the course of his or her duties, per subsection (a)(1)(B).

[6] Consider, for example, a person who is performing a dangerous skateboarding stunt, high wire act, or magic trick in a public square. She has not committed disorderly conduct unless it appears likely that her conduct will cause bodily injury to someone other than herself or damage to property.

[7] See generally RCC § 22A-1202. Per RCC § 22A-1202(i), consent is a defense to conduct that causes bodily injury and otherwise would constitute an assault. See also RCC § 22A-1001 which defines "consent" as words or actions that indicate an agreement to particular conduct and "effective consent" as consent obtained by means other than coercion or deception.

causes another reasonably to believe there is likely to be unlawful bodily injury to another.

Subsection (a)(1)(A)(ii) specifies that causing a reasonable belief in the likelihood of immediate and unlawful damage to property is a second means of committing disorderly conduct. As defined in RCC § 22A-2001, "property" means anything of value. The apparent danger of damage to property must be unlawful, such as in criminal damage to property of another[8] or arson.[9] Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" applies to the fact that the accused's conduct causes another to reasonably believe to believe there is likely to be unlawful damage to property of another.

Subsection (a)(1)(A)(iii) specifies that causing a reasonable belief in the likelihood of immediate and unlawful taking of property is a third means of committing disorderly conduct. As defined in RCC § 22A-1001, "property" means anything of value. The apparent danger of taking property must be unlawful, such as in theft or unlawful use of property.[10] A person does not commit disorderly conduct when he or she poses a risk of taking only his or her own property.[11] Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" applies to the fact that the accused's conduct causes another person to reasonably believe there is likely to be an unlawful taking of property of another.

Subsection (a)(1)(B) categorically excludes as a basis for disorderly conduct liability conduct directed at a law enforcement officer in the course of his or her official duties.[12] The culpable mental state of recklessly applies to the fact that the complainant is a "protected person."[13] "Recklessly," a culpable mental state defined in RCC § 22A-206, means the accused must disregard a substantial and unjustifiable risk that the complainant is a law enforcement officer in the course of his or her official duties.[14]

Subsection (a)(2) provides that, in addition to causing one of the results described in subsection (a)(1), the accused's conduct must occur in a place that is either open to the general public or the communal area of multi-unit housing.[15] "In fact," a defined term, is

[8] As defined in RCC § 22A-2001, "property of another" means "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."

[9] *See generally* RCC §§ 22A-2503, 22A-2501.

[10] *See generally* RCC §§ 22A-2101, 22A-2102.

[11] Chapter 21 of the revised code proscribes wrongfully obtaining or using "property of another." As defined in RCC § 22A-1001, and "property of another" means "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."

[12] *See* Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-425 at Page 8 ("[T]he crime of using abusive or offensive language must focus on the likelihood of provoking a violent reaction by persons other than a police officer to whom the words were directed, because a police officer is expected to have a greater tolerance for verbal assaults and is especially trained to resist provocation by verbal abuse that might provoke or offend the ordinary citizen." And, "it seems unlikely at best that the use of bad language toward a police officer will provoke immediate retaliation or violence, not by him, but by someone else.").

[13] *See* RCC § 22A-1001(15)(D).

[14] For example, if the accused directs abusive language toward a person while completely unaware that the person is an undercover officer, the exclusion in subsection (a)(1)(B) would not apply to the accused's conduct.

[15] Pursuant the rules of construction in RCC § 22A-207, the term "in fact" holds actors strictly liable.

used to indicate that there is no culpable mental state requirement as to whether the location is open to the general public or a communal area of multi-unit housing.

Subsection (b) provides the penalty for the offense. [RESERVED.]

Subsection (c) cross-references applicable definitions located elsewhere in the RCC and defines an additional phrase used in this section. "Open to the general public" excludes locations that require payment or special permission to enter or leave.[16]

Subsection (d) cross-references the District's First Amendment Assemblies Act, codified in Title 5 of the D.C. Code. This reference does not change or alter any person's rights or liabilities under the statute. Instead, it is merely intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense.[17] Not all conduct involved in the offense, of course, will implicate First Amendment rights.[18]

Subsection (e) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Relation to Current District Law. *The revised disorderly conduct statute does not clearly make any substantive changes to existing District law.*[19] *However, three aspects of the revised disorderly conduct statute may be viewed as substantive changes in law.*

First, the revised statute specifies that a culpable mental state of recklessness is required for all offense elements other than the location, which is a matter of strict liability. The current disorderly conduct statute[20] begins with a prefatory clause "In any place open to the general public, and in the communal areas of multi-unit housing," but does not specify a culpable mental state for that circumstance. District case law does not address the matter. Also, in subsection (a)(1), the current statute specifies a mental state of "intentionally or recklessly." However, the current statute does not define "recklessly"

[16] For example, in a Metro train station, a location outside the fare gates normally would be open to the general public during business hours, but a location inside the fare gates would not be open to the general public. Locations for which the general public always needs special permission to enter, such as public schools while in session or the Central Detention Facility (D.C. Jail), are not "open to the general public" for the purposes of this statute.

[17] The RCC disorderly conduct statute does not outlaw "all 'offensive conduct' that disturbs 'any neighborhood or person.'" *See Cohen v. California*, 403 U.S. 15, 22 (1971); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression…[T]o justify prohibition of a particular expression of opinion, [the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.")

[18] For example, the United States Supreme Court has long recognized that "fighting words" are not protected by the First Amendment to the United States Constitution. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, (1942); *see also Cantwell* v. *Connecticut*, 310 U.S. 296, 309-310 (1940). *See also* FIGHTING WORDS IN THE ERA OF TEXTS, IMS, AND E-MAILS: CAN A DISPARAGED DOCTRINE BE RESUSCITATED TO PUNISH CYBER-BULLIES, 21 DePaul J. Art Tech. & Intell. Prop. L. 1, 4-5 (citing *Citizen Publ'g Co. v. Miller*, 115 P.3d 107, 113 (Ariz. 2005) (observing that "the fighting words doctrine has generally been limited to 'face-to-face' interactions") (emphasis added); *Idaho v. Poe*, 88 P.3d 704, 714 (Idaho 2004) (observing that fighting words must be "spoken face-to-face")).

[19] The current disorderly conduct statute, DC Code § 22-1321, was revised in 2011 to significantly change the scope and language. The D.C. Court of Appeals (DCCA) has yet to publish an opinion interpreting this relatively new statute.

[20] DC Code § 22-1321.

and does not make clear whether a person must be reckless as to every result and circumstance in subsection in (a)(1), or the following subsections (a)(2) and (3), which do not contain a culpable mental state of their own. Again, District case law to date does not address the matter. The RCC clearly specifies the culpable mental states for all elements of the revised offense as being either strict liability (through use of the phrase "in fact") as to the location, or recklessly, as to all other offense elements. These culpable mental state terms are defined in RCC § 22A-206 and RCC § 22A-207.[21] Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[22] however, the Supreme Court has left open the possibility that recklessness may suffice[23] for such elements. Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior also is an accepted practice in American jurisprudence.[24] This change improves the clarity and the consistency of the revised offense, and, to the extent it may require a new culpable mental state as to some of the principal elements of the offense, improves its proportionality.[25]

Second, the revised statute specifies that conduct directed at law enforcement officers can never be the basis for a breach of the peace. The current disorderly conduct statute punishes three different types of misconduct in public: putting others in fear a harm will occur (subsection (a)(1)),[26] provoking violence (subsection (a)(2)),[27] provoking violence by offensive language or gestures (subsection (a)(3)).[28] Only the third type of conduct, criminalized by subsection (a)(3) of the statute, explicitly excludes from liability language or gestures directed at a law enforcement officer while acting in his or her official capacity. Conduct criminalized under subsections (a)(1) and (a)(2) of the current statute are silent as to whether they cover conduct directed at law enforcement officers and no District case law addresses the issue. However, legislative history indicates that the Council intended to broadly exclude conduct directed at law enforcement officers on

[21] The revised disorderly conduct statute makes clear that the actor must consciously disregard a substantial risk that her conduct will lead an onlooker to reasonably believe one of three harms is likely to immediately occur. The RCC also makes clear that actor must grossly deviate from the standard of care that a reasonable person would observe in the person's situation. Finally, the RCC makes clear that a person is strictly liable with respect to whether she is located in a place that is open to the general public or is the communal area of multi-unit housing.

[22] *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.)).

[23] *See Elonis v. United States*, 135 S. Ct. 2001, 2013 (2015).

[24] *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).").

[25] Were a person strictly liable for conduct that causes a breach of peace per DC Code § 22-1321(a)(2) and (a)(3), even mistakes or accidents by a defendant could be the basis of criminal liability for disorderly conduct. For example, a person who reasonably believes themselves to be alone in a park and recites provocative song lyrics containing "fighting words" may be guilty of disorderly conduct.

[26] DC Code §22-1321(a)(1).

[27] DC Code §22-1321(a)(2).

[28] DC Code §22-1321(a)(3).

duty as a means of committing disorderly conduct.[29] The RCC disorderly conduct statute codifies the Council's intent to preclude disorderly conduct liability for conduct directed at a law enforcement officer. This change improves the clarity and consistency[30] of the offense.

Third, the revised statute eliminates incitement of violence as a distinct basis for disorderly conduct liability. Subsection (a)(2) of the current disorderly conduct statute explicitly provides that it is unlawful to, "Incite or provoke violence where there is a likelihood that such violence will ensue."[31] The term "incite" is not defined by in the statute, and case law has not interpreted the term. Legislative history provides no indication of the term's intended meaning.[32] "Incites," is also predicate conduct in the current D.C. Code rioting statute.[33] The revised statute eliminates incitement as a distinct basis for liability because the term is potentially confusing or misleading. The ordinary meaning of "incite" may simply be a synonym with provoke, but is often used in the context of rioting or being an accessory to a crime.[34] As the revised rioting statute eliminates separate liability for incitement of a riot in favor of reliance on traditional accessory liability theories,[35] continued use of the term may be confusing. Ending use of "incites' in the revised disorderly conduct statute improves the clarity and consistency of the revised offense.

Fourth, the revised statute defines the phrase "open to the general public." The current disorderly conduct statute uses this phrase but does not define it, and there are no DCCA published opinions construing the phrase. The legislative intent is unclear.[36] The

[29] *See* Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-425 at Page 8 (stating that the legislation provides "a bright line: that offensive language directed at police officers is not disorderly conduct.").

[30] Arguably, the current subsections (a)(1) and (a)(2) of the disorderly conduct statute, which do not explicitly exclude behavior directed at a law enforcement officer, are in conflict with subsection (a)(3) which does contain such an exclusion.

[31] DC Code §22-1321(a)(2).

[32] Legislative adoption of the "incite" language in subsection (a)(2) of the current disorderly statute occurred as part of the Council's 2011 amendments that were in significant part based on recommendations by the Council for Court Excellence (CCE) and included language identical to the current subsection (a)(2). *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence ("CCE Report"), October 14, 2010, at Page 16. The CCE recommendations did not provide an explanation for the meaning or significance of the "incite" language in their recommendation beyond a general statement that that and other language was a reformulation of the "catchall" provision in the disorderly conduct statute prior to 2011, which referred to "acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others." CCE Report at 9.

[33] DC Code § 22-1322(c).

[34] *See* Merriam-Webster Online Dictionary at https://www.merriam-webster.com/dictionary/incite (defining incite as "to move to action, stir up, urge on" and listing synonyms as "incite, instigate, abet, foment mean to spur to action. incite stresses a stirring up and urging on, and may or may not imply initiating. ⟨inciting a riot⟩ instigate definitely implies responsibility for initiating another's action and often connotes underhandedness or evil intention. ⟨instigated a conspiracy⟩ abet implies both assisting and encouraging. ⟨aiding and abetting the enemy⟩ foment implies persistence in goading. ⟨fomenting rebellion⟩").

[35] *See* Commentary to RCC § 22A-4101, Rioting.

[36] In an earlier draft of the disorderly conduct legislation, before the Council formed the Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence, Bill 18-151 defined "public" as "affecting or likely to affect persons in a place to which the public has access; including but not limited to highways, streets, sidewalks, transportation facilities, schools, places of business or amusement."

RCC states that "open to the general public" excludes locations that require payment or permission to enter or leave. The revised definition effectively excludes public conveyances, private event arenas, schools, and detention facilities from the purview of the disorderly conduct statute. However, disorderly conduct in any of these locations may result in other criminal liability under current law and the RCC,[37] giving law enforcement officers authority to immediately intervene and arrest when necessary to restore public order.[38] The new definition clarifies the scope of the revised statute.

Fifth, the revised statute does not criminalize conduct that raises concerns about self-harm. The current disorderly conduct statute states that it is unlawful for a person to "intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that *a person* or property in *a person*'s immediate possession is likely to be harmed or taken."[39] Although there are no published opinions addressing the issue, this current wording apparently criminalizes causing fear of harm to one's own person or property.[40] It is unclear if the Council intended to include liability for conduct related to one's own person or property.[41] The RCC clarifies that raising concerns solely about self-harm is not a basis for disorderly conduct liability.[42]

[37] Current law separately punishes conduct that is disruptive to riders on public conveyances and authorizes the Washington Metropolitan Area Transit Authority ("WMATA") to refuse service to any rider who violates its rules of conduct. *See* DC Code §§ 22-1321(c), 35-252, 35-251, and 35-216. Additionally, any person who remains on a public conveyance without WMATA's effective consent is guilty of trespass and subject to arrest on that basis. *See generally* RCC § 22A-2601. Similarly, a private arena may eject any patron from their premises at any time and failure to leave as directed amounts to a trespass. The Central Detention Facility ("DC Jail") and the Central Treatment Facility ("CTF") are empowered to quell any threat of public alarm or breach of peace by immediately separating inmates, placing inmates in protective custody, and placing inmates in disciplinary detention. *See* D.C. Department of Corrections Inmate Handbook 2015-2016. Public and private schools also have authority to remove and suspend rulebreakers. *See* Tex. Penal Code § 42.01 (providing that its disorderly conduct statute categorically "do[es] not apply to a person who, at the time the person engaged in conduct prohibited under the applicable subdivision, was a student younger than 12 years of age, and the prohibited conduct occurred at a public school campus during regular school hours.").

[38] "Disorderly conduct is distinct from many other statutes in that most criminal prohibitions are intended to punish and deter crimes, whereas disorderly conduct is meant to give police the power to defuse a situation that disturbs the public. The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or otherwise causing a disturbance." Committee on Public Safety and the Judiciary Report on Bill 18-425 at Page 3.

[39] DC Code §22-1321(a)(1).

[40] Examples of conduct that may be within the scope of the current statute include a person angrily kicking the fender of their broken-down car which is parked on the street, and a skate-boarder doing jaw-dropping tricks at a public park.

[41] In an earlier draft of the disorderly conduct legislation, before the Council formed the Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence, Section 3(b) of Bill 18-425 required that the speech or conduct involved "harm *another's* person or property in such a manner that is likely to cause an immediate breach of the peace." It is unclear if the final phrasing is the result of a deliberate decision regarding harms to oneself and one's property or merely a drafting change to address the grammatical difficulty of distinguishing between the actor, the observer (described as "another person"), and the target of the harm inside a single sentence.

[42] There is separate authority for an officer to detain and transport for emergency medical care any person believed to be mentally ill and likely to injure herself. *See* D.C. Code § 21–521.

Sixth, the revised disorderly conduct statute eliminates the separate, archaic offense of affrays.[43] The current D.C. Code codifies a penalty for committing an "affray," however, no elements of the offense are specified.[44] There are no published cases where an individual has been convicted under the codified 'affray' statute in the District, however a District court opinion from the mid-1800s indicates that a common law affray occurs when two persons fight in public.[45] The revised disorderly conduct statute appears to include the conduct prohibited by the current affrays statute, rendering a separate affrays statute duplicative and unnecessary. The revised disorderly conduct statute punishes public fighting whenever a person recklessly causes another to reasonably believe that there is likely to be immediate and unlawful[46] bodily injury. Under the RCC disorderly conduct statute, even if two people consent to fight each other, their consensual conduct may be criminal if it is in a public place. This criminalization of public fighting is consistent with dicta in District assault case law finding that a public assault is punishable to the extent that it breaches public peace and order.[47] By generally criminalizing disorderly conduct based on the actor's intent and its effects on others, the RCC avoids the need to create a stand-alone offense for each of the countless types of actions that could be performed in a manner that causes a breach of peace. The change clarifies and improves the consistency of District laws.

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

First, the revised statute replaces the word "fear" with "reasonably believe" that that there will be immediate and unlawful harm. The current disorderly conduct statute states that it is unlawful for a person to "cause another person to be in reasonable fear..." of specified harms that generally appear to be entail immediate acts.[48] The statute does not define the term "fear," and there is no case law on point.[49] The revised disorderly conduct statute instead specifies that the observer must reasonably believe that there will be immediate and unlawful harm. The revised offense's word choice clarifies that it is the observer's reasoned judgment, not their emotion that matters as to liability. It also

[43] DC Code § 22-1301 provides, "Whoever is convicted of an affray in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

[44] The offense is an example of a "common law" offense whose elements are defined wholly by courts in past case opinions rather than in legislative acts.

[45] *Hedgpeth v. Rahim*, 213 F. Supp. 3d 211, 223 (D.D.C. 2016) (citing *United States v. Herbert*, 26 F. Cas. 287, 289, F. Cas. No. 15354a, 2 Hay. & Haz. 210 (D.C. Crim. Ct. 1856) ("In the case of sudden affray, where parties fought on equal terms, that is, at the commencement or onset of the conflict, it matters not who gave the first blow.")

[46] Some instances of mutual combat are lawful and others are not. RCC § 22A-1202 explains that a person may not consent to significant bodily injury or serious bodily injury or to use of a firearm. "Consent", "significant bodily injury", and "serious bodily injury" are defined in RCC § 22A-1001. "Firearm" is defined in D.C. Code § 22- 4501(2A).

[47] *See Woods v. United States*, 65 A.3d 667, 669-671 (D.C. 2013) (explaining consent is no defense to an assault that occurs in a public place because a public assault is a crime against the public generally).

[48] DC Code §22-1321(a)(1).

[49] In common usage the word is generally understood to indicate distress or anxiety. *See Fear*, Merriam-Webster's Dictionary (2018 edition).

clarifies, through the requirement of immediacy, that the harm must be imminent. These changes improve the clarity and consistency[50] of the revised statute.

Second, the revised statute eliminates distinctions between various modes of misconduct that constitute disorderly conduct. The current disorderly conduct statute punishes three different types of misconduct in public: putting others in fear (subsection (a)(1)),[51] incitement of violence (subsection (a)(2)),[52] and fighting words (subsection (a)(3)).[53] The language providing liability in subsections (a)(1)-(a)(3) differs, but all require an assessment by some person that an harm to a person or property is likely to occur. No District case law addresses how these three means of committing a breach of peace differ from each other, and legislative history provides no explanation, other than indicating that such provisions generally cover conduct considered disorderly.[54] The revised disorderly conduct statute provides just one description of what constitutes a breach of peace, eliminating duplicative and unnecessary distinctions. As described above,[55] the language differences in subsections (a)(1)-(a)(3) of the current statute may not indicate legally distinct elements rendering the tripartite division of the current law to be more or less general descriptions of the same kind of underlying conduct.[56] The RCC disorderly conduct broadly punishes behavior of any kind that is not protected by the First Amendment or District law, so long as it recklessly causes a person to reasonably believe a specified unlawful act is likely to occur and the conduct is not directed at a law enforcement officer.[57] The revised disorderly statute clarifies the law by eliminating duplicative, potentially confusing provisions.

[50] The revised criminal menace statute, RCC § 22A-1203, also requires the predicate conduct to indicate that a harm will immediately take place.
[51] DC Code §22-1321(a)(1).
[52] DC Code §22-1321(a)(2).
[53] DC Code §22-1321(a)(3).
[54] *See* CCE Report at 9 ("The subcommittee believes that these prohibitions comply with the applicable limitations imposed by the courts and that they cover the great majority of misconduct that reasonable people would consider so disorderly that it should result in the arrest of the offender.").
[55] *See* Commentary regarding the revised offense's: consistent application of culpable mental states; consistent exception for conduct directed at law enforcement officers on duty; and elimination of specific reference to incitement of violence.
[56] Given that each subsection is subject to consistent culpable mental states and that incitement of violence merely references a type of provocative behavior, subsection (a)(1) of the current statute is the broadest of the three subsections as it applies to both persons and property that is likely subject to harm.
[57] *See Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 116 (D.C. Cir. 1977) (finding both words and actions could cause a breach of the peace by provoking violence or creating a nuisance.).

RCC § 22A-4002. PUBLIC NUISANCE.

(a) *Offense.* A person commits public nuisance when that person:
  (1) Purposely engages in conduct that causes an unreasonable interruption of:
    (A) a lawful public gathering;
    (B) the orderly conduct of business in a public building;
    (C) any person's lawful use of a public conveyance; or
    (D) any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am;
  (2) While that person is in a location that, in fact, is:
    (A) Open to the general public; or
    (B) A communal area of multi-unit housing.

(b) *Penalty.* Public nuisance is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:
  (1) The term "purposely," has the meaning specified in § 22A-206;
  (2) The term "bodily injury" has the meaning specified in § 22A-1001;
  (3) The term "property" has the meaning specified in § 22A-2001;
  (4) The term "lawful public gathering" includes any religious service, funeral, or similar organized proceeding;
  (5) The term "public building" means a building that is occupied by the District of Columbia or federal government;
  (6) The term "public conveyance" means any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat; and
  (7) The phrase "open to the general public" excludes locations that require payment or permission to enter or leave at the time of the offense.

(d) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq.

(e) *Prosecutorial Authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.

COMMENTARY

Explanatory Note. *This section establishes the public nuisance offense for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct that deliberately disturbs others and is not protected by the First Amendment or District law. The revised offense replaces subsections (b), (c), (c-1), (d), and (e) of DC Code § 22-1321 (Disorderly Conduct).*[58]

Subsection (a)(1) specifies that, to commit a public nuisance offense, a person must act purposefully, a term defined in RCC § 22A-206. The accused must consciously

[58] Subsection (a) of D.C. Code § 22-1321 is replaced by RCC § 22A-4001 (Disorderly Conduct). [Subsections (f) and (g) of D.C. Code § 22-1321 concerning prowling and jostling have not yet been addressed in the RCC.]

desire that his or her conduct cause an unreasonable interruption of lawful, orderly activity.[59] An interruption is a disruption of activity, not merely a distraction or annoyance.[60] An interruption is unreasonable only if it is unjustified[61] and, under an objective standard,[62] would seriously interfere with the activity of a person of ordinary sensitivity.

Subsections (a)(1)(A)-(D) list four specific types of nuisance that are prohibited. Subsection (a)(1)(A) replaces D.C. Code § 22-1321(b) and prohibits the purposeful disruption of a lawful public gathering. Subsection (c)(3) clarifies that a lawful public gathering includes a religious service, funeral, or similar proceeding.[63] The accused's conduct must have the intent and effect of interrupting the event, not merely upsetting participants and onlookers.[64]

Subsection (a)(1)(B) replaces D.C. Code § 22-1321(c-1) and prohibits purposeful interference with the orderly conduct of business in a public building. Subsection (c)(4) clarifies that a public building is a building that is occupied by the District of Columbia or federal government.[65] Accordingly, this subsection does not apply to efforts to dissuade customers from patronizing a privately-owned business.[66]

Subsection (a)(1)(C) replaces D.C. Code § 22-1321(c) and prohibits purposeful interruption of any person's lawful use of a public conveyance. Subsection (c)(5) defines a public conveyance as any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat. The accused must have the intent and effect of diverting a reasonable passenger's

[59] Persisting in disruptive conduct after receiving a law enforcement officer's warning may be evidence of that person's purposeful conduct.

[60] As the Council observed during its recent rewrite of the disorderly conduct statute, "Freedom of speech permits loud and annoying language, which some people might find 'threatening' or 'abusive,' so more is required. The speech should have *both* the 'intent and effect' of impeding or disrupting a gathering. In this regard, 'disturbing' is too subjective." *See* Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-425 at Page 8.

[61] For example, a person who calls out to seek help for a medical emergency or to warn someone of a hazard may interrupt others but such conduct would not amount to a public nuisance offense.

[62] Whether conduct is reasonable is a fact-sensitive inquiry and depends on the time, place, and manner of the conduct. For example, loud church bells at 12:00 pm may be reasonable, whereas a quiet knock on a private door at 1:00 am may not be.

[63] Subsection (b) prohibits impeding "a lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding." The current District statute concerning such gatherings was intended to broaden an 1892 law titled "Disturbing Religious Congregation" beyond churches to include other worship services and funerals. *See* Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-425 at Page 8.

[64] *See Snyder v. Phelps*, 562 U.S. 443, 445 (2011) (upholding First Amendment protections where there was no indication that the picketing interfered with the funeral service itself.)

[65] Legislative adoption of the "public building" language in subsection (c-1) of the current disorderly statute occurred as part of the Council's 2011 amendments that were in significant part based on recommendations by the Council for Court Excellence (CCE). *See* CCE Report. While D.C. Code § 22-1321 does not define a "public building," the CCE recommendations encouraged the Council to enact a provision that forbids disruption of the D.C. Council or other public meetings, comparable to D.C. Code §10-503.15, which prohibits the disruption of Congress. CCE Report at Page 11.

[66] Consider, for example, a strike by a labor union. A picket that prevents shoppers from entering a privately owned grocery store would not be a violation of subsection (a)(1)(B) of the RCC public nuisance offense. However, preventing children from entering a public school or citizens from entering a police station may be a public nuisance.

pathway. Even with such an intent and effect, speech may nevertheless be protected by the First Amendment, particularly if it concerns public issues.[67]

Subsection (a)(1)(D) replaces D.C. Code § 22-1321(d) and prohibits purposefully disturbing any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am. An interruption of quiet enjoyment means a serious interference with the in-home activities of a person of ordinary sensitivity.[68] The intrusion may be a noise, smell, light, disturbing image or otherwise.[69] The accused must have the purpose of disturbing the home occupant.[70] However, the nuisance need not force the resident out of his or her home.[71]

Subsection (a)(2) provides that, in addition to causing one of the results described in subsection (a)(1), the accused's conduct must occur in a place that is either open to the general public or the communal area of multi-unit housing. As in RCC § 22A-4001, the term "open to the general public" excludes locations that require payment or permission to enter or leave.[72] A given location may be open to the general public at some times and closed to the public at other times.[73] "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to whether the location is open to the general public or a communal area of multi-unit housing.[74]

Subsection (b) provides the penalty for the offense. [RESERVED.]

Subsection (c) cross-references applicable definitions located elsewhere in the RCC and provides additional definitions specific to this offense.

Subsection (d) cross-references the District's First Amendment Assemblies Act, codified in Title 5 of the D.C. Code. This reference does not change or alter any person's rights or liabilities under the statute. Instead, it is merely intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the

[67] Speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to special protection. *Connick v. Myers*, 461 U.S. 138, 145, (1983); *NAACP* v. *Claiborne Hardware Co*., 458 U.S. 886, 913 (1982); *Carey* v. *Brown*, 447 U.S. 455, 467 (1980). Additionally, public spaces occupy a "special position in terms of First Amendment protection." *Snyder v. Phelp*s, 562 U.S. 443, 456, (2011) (citing *United States v. Grace*, 461 U.S. 171, 180 (1983)).

[68] What is reasonable, depends on the time, place, and manner of the activity. For example, at midnight on New Year's Day it may be reasonable to blare noisemakers for several seconds, but unreasonable to do so for several minutes.

[69] Intrusions into the enjoyment of one's home may be appropriately regulated without offending the First Amendment, under the captive audience doctrine. *See Rowan v. Post Office Dept.*, 397 U.S. 728, 736-738 (1970); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

[70] Loud noise that recklessly or negligently disturbs others may be punished under DCMR § 20-2701, depending upon the volume and location.

[71] By contrast, in District landlord-tenant law concerning the implied covenant of quiet enjoyment, an occupant must demonstrate that he or she was constructively evicted and relinquished possession of the premises, as a result of the disturbance. *See Weisman v. Middleton*, 390 A.2d 996, 1001 (D.C. 1978).

[72] For example, in a Metro train station, a location outside the fare gates normally would be open to the general public during business hours, but a location inside the fare gates would not be open to the general public. Locations for which the general public always needs special permission to enter, such as public schools while in session or the Central Detention Facility (D.C. Jail), are not "open to the general public" for the purposes of this statute.

[73] Consider, for example, a church that is holding a mass open to all versus a church that is hosting a wedding ceremony. Disruption of the mass may constitute a public nuisance, whereas disruption of the wedding may constitute another offense such as trespass, in violation of RCC § 22A-2601.

[74] Pursuant the rules of construction in RCC § 22A-207, the term "in fact" holds actors strictly liable.

offense.[75] Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Subsection (e) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Relation to Current District Law. *The revised public nuisance statute changes current District law in four ways to apply consistent, clearly articulated definitions, improve consistency, and reduce unnecessary overlap between criminal offenses.*

First, the RCC criminalizes public nuisances in a stand-alone offense. Under current District law, conduct constituting a public nuisance is criminalized in the disorderly conduct statute,[76] along with crimes such as stealthily looking into a dwelling where there is an expectation of privacy and engaging in conduct that puts someone in reasonable fear a crime is to occur. In contrast, the RCC groups and subjects to the same punishment only public nuisance-type offenses. This reorganization ensures that disorderly conduct, which under the RCC is a predicate to rioting,[77] is separate from other lower level offenses. This change logically reorganizes offenses that are conceptually related and significantly improves the clarity and consistency of the law.

Second, the revised statute limits liability to conduct that occurs in a location that is open to the general public or the communal area of multi-unit housing, and defines "open to the general public" to exclude locations that require payment or permission to enter or leave.[78] The District's current disorderly conduct statute does not appear to include any restriction on the location of conduct that interferes with worshippers,[79] passengers on public transit,[80] or people in their homes at night.[81] However, by adding a location element, the revised statute avoids overlap with other, broader laws concerning nuisances that occur in private,[82] yet gives law enforcement officers authority to immediately intervene and arrest when necessary to restore public order.[83] In conjunction with other RCC offenses, this change improves the consistency of District law by drawing a bright line between public and private disorder.

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[75] The RCC public nuisance statute does not outlaw "all 'offensive conduct' that disturbs 'any neighborhood or person.'" *See Cohen v. California*, 403 U.S. 15, 22 (1971).

[76] D.C. Code § 22-1321.

[77] RCC § 22A-4101.

[78] An identical definition appears in RCC § 22A-4001(c)(3).

[79] D.C. Code §§ 22-1321(b).

[80] D.C. Code §§ 22-1321(c).

[81] D.C. Code §§ 22-1321(d).

[82] The municipal regulations punish loud noise whether it occurs in a public or private place, without requiring the accused to cause or intend any disruption of lawful activity. DCMR § 20-2701. Relatedly, the RCC's trespass provision punishes refusal to leave private property upon request, without requiring the accused to engage in any misconduct. RCC § 22A-2601. The D.C. Code also authorizes the Washington Metropolitan Area Transit Authority ("WMATA") to refuse service to any rider who violates its rules of conduct. *See* DC Code §§ 22-1321(c), 35-252, 35-251, and 35-216.

[83] "Disorderly conduct is distinct from many other statutes in that most criminal prohibitions are intended to punish and deter crimes, whereas disorderly conduct is meant to give police the power to defuse a situation that disturbs the public. The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or otherwise causing a disturbance." Committee on Public Safety and the Judiciary Report on Bill 18-425 at Page 3.

Third, the revised public nuisance statute broadens the unreasonably loud noise provision to include all unreasonably offensive conduct that disturbs a person in his or her residence at night. Current District law makes it unlawful for a person to make an unreasonably loud noise between 10:00 pm and 7:00 am that is likely to annoy or disturb one or more other persons in their residences.[84] Legislative history does not explain why the statute specifies only noise and does not include all purposeful, unreasonable intrusions into a residence. The revised statute includes all nuisances that cause an interruption in any person's quiet enjoyment of his or her residence at night, including noises, smells, bright lights, and alarming displays. This change eliminates an unnecessary gap in the law by punishing all methods of purposefully causing the same social harm: deliberate annoyance of people who are at home at night.

Fourth, the revised public nuisance statute eliminates urinating and defecating in a public place as a distinct type of offense. Current District statutory law explicitly punishes public urination or defecation as disorderly conduct[85] and as defacing property.[86] Legislative history indicates that when the Council revised the disorderly conduct statute in 2011, it retained a provision separately criminalizing public urination at subsection (e) only because the executive did not appear to have an adequate process for civil infraction enforcement.[87] In contrast, the RCC does not specifically criminalize urination or defecation, though there may still be liability for such conduct insofar as it causes property damage,[88] causes another person to reasonably believe that it will cause property damage,[89] or involves publicly exposing genitalia.[90] Persons experiencing homelessness and mental illness may be more likely to be affected by criminal sanctions.[91] The revised statute provides for more proportionate penalties by only criminalizing urination or defecation when doing so damages property or rises to the level of disorderly conduct or lewdness.

Beyond these four changes to current District law, one additional aspect of the revised public nuisance statute may be viewed as a substantive change in law.

The revised statute specifies purposeful as the required culpable mental state as to causing an unreasonable interruption of lawful activity. Three of the four relevant subsections of the current disorderly conduct statute, D.C. Code § 22-1321, that are replaced by the revised public nuisance statute require that the accused act "with the

[84] D.C. Code § 22-1321(d).
[85] D.C. Code § 22-1321(e).
[86] D.C. Code § 22-3312.01 (making it unlawful to "place filth or excrement of any kind…upon…[a]ny structure of any kind or any movable property"); *see Scott v. United States*, 878 A.2d 486 (D.C. 2005).
[87] See Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-425 at Page 9 (stating, "The committee agrees that public urination would be better handled as a civil infraction punishable by a ticket and a fine.")
[88] RCC § 22A-2503(c)(5) punishes public urination as fourth degree criminal damage to property only if it causes a permanent, observable or measurable diminution in value to public or private property.
[89] RCC § 22A-4001(a)(1)(A)(i) and (ii).
[90] It is also unlawful "for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus." D.C. Code § 22-1312.
[91] In 2011, Metropolitan Police Department statistics indicated that a large number of the 300-400 persons arrested for public urination each year were not homeless, however, a concern remains that homeless persons are impacted disproportionately. *See* CCE Report at 12.

intent and effect of impeding or disrupting" lawful activity.[92] However, the meaning of acting "with intent" is not defined by the statute. There is no relevant case law.[93] The RCC public nuisance offense requires proof that the defendant acted purposely, a defined term in the RCC.[94] The revised public nuisance statute makes clear that the actor must actually[95] and purposefully disturb an occupant in his or her home. This change clarifies and improves the consistency of District law.

Relation to National Legal Trends. *The revised public nuisance statute's above-mentioned substantive changes to current District law have mixed support in national legal trends.*

First, the RCC's reorganization of the existing disorderly conduct statute to distinguish a public nuisance from other disorderly conduct has little precedent. Twenty-nine states (hereafter "reform jurisdictions") have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC).[96] While there is significant variance in how states organize breach of peace offenses, all twenty-nine have a provision criminalizing disorderly conduct as a low-level violation.[97] Unreasonably loud noise falls explicitly within the ambit of disorderly conduct in every reform jurisdiction.[98] Disruption of a public gathering or funeral qualifies as disorderly conduct in sixteen

[92] D.C. Code §§ 22-1321(b), concerning worshippers; subsection (c), concerning public conveyances; and subsection (c-1), concerning public buildings.

[93] Since the disorderly conduct statute was revised in 2011 to significantly change its scope and language, the D.C. Court of Appeals (DCCA) has yet to publish an opinion interpreting the statute.

[94] RCC § 22A-206.

[95] Consider, for example, a person who is likely to be disturbed in his or her residence but is, in fact, not home or is unable to hear or enjoys the noise. No nuisance has occurred under those circumstances.

[96] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[97] Ala. Code § 13A-11-7; Alaska Stat. Ann. § 11.61.110; Ariz. Rev. Stat. Ann. § 13-2904; Ark. Code Ann. § 5-71-207; Colo. Rev. Stat. Ann. § 18-9-106; Conn. Gen. Stat. Ann. § 53a-182; Del. Code Ann. tit. 11, § 1301; Haw. Rev. Stat. Ann. § 711-1101; 720 Ill. Comp. Stat. Ann. 5/26-1; Ind. Code Ann. § 35-45-1-3; Kan. Stat. Ann. § 21-6203; Ky. Rev. Stat. Ann. § 525.060; Me. Rev. Stat. tit. 17-A, § 501-A; Minn. Stat. Ann. § 609.72; Mo. Ann. Stat. § 574.010 ("peace disturbance"); Mont. Code Ann. § 45-8-101; N.H. Rev. Stat. Ann. § 644:2; N.J. Stat. Ann. § 2C:33-2; N.Y. Penal Law § 240.20; N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11; Or. Rev. Stat. Ann. § 166.025; 18 Pa. Stat. and Cons. Stat. Ann. § 5503; S.D. Codified Laws § 22-18-35; Tenn. Code Ann. § 39-17-305; Tex. Penal Code Ann. § 42.01; Utah Code Ann. § 76-9-102; Wash. Rev. Code Ann. § 9A.84.030; Wis. Stat. Ann. § 947.01.

[98] Ala. Code § 13A-11-7(a)(2); Alaska Stat. Ann. § 11.61.110(a); Ariz. Rev. Stat. Ann. § 13-2904(A)(2); Ark. Code Ann. § 5-71-207(a)(2); Colo. Rev. Stat. Ann. § 18-9-106(1)(c); Conn. Gen. Stat. Ann. § 53a-182(a)(3); Del. Code Ann. tit. 11, § 1301(1)(b); Haw. Rev. Stat. Ann. § 711-1101(1)(b); 720 Ill. Comp. Stat. Ann. 5/26-1("any act" that causes public alarm, presumably, including noise); Ind. Code Ann. § 35-45-1-3(a)(2); Kan. Stat. Ann. § 21-6203(a)(3); Ky. Rev. Stat. Ann. § 525.060(1)(b); Me. Rev. Stat. tit. 17-A, § 501-A(1)(A)(1); Mo. Ann. Stat. § 574.010(1)(1)(a); Mont. Code Ann. § 45-8-101(1)(b); N.H. Rev. Stat. Ann. § 644:2(III)(a); N.J. Stat. Ann. § 2C:33-2 (noise must be both unreasonably loud and offensively coarse); N.Y. Penal Law § 240.20(2); N.D. Cent. Code Ann. § 12.1-31-01(1)(b); Ohio Rev. Code Ann. § 2917.11(A)(2); Or. Rev. Stat. Ann. § 166.025(1)(b); 18 Pa. Stat. and Cons. Stat. Ann. § 5503(2); S.D. Codified Laws § 22-18-35(2); Tenn. Code Ann. § 39-17-305(b); Tex. Penal Code Ann. § 42.01(a)(5); Utah Code Ann. § 76-9-102(1)(ii); Wash. Rev. Code Ann. § 9A.84.030 (noise must occur within 500 feet of a funeral); Wis. Stat. Ann. § 947.01(1).

reform jurisdictions.[99] Twenty-three reform jurisdictions treat disruption of a public gathering or funeral as a separate offense.[100] Two reform jurisdictions do not specifically criminalize disrupting a meeting.[101]

The revised public nuisance statute only proscribes conduct that occurs in a location that is open to the general public or the communal area of multi-unit housing. Many reform jurisdiction statutes are silent as to the location in which the conduct occurs. However, because the various types of conduct prohibited by the revised public nuisance statute often appear as multiple public order offenses in the reform jurisdictions, it is not possible to generalize whether the definition of "public" in each state is coextensive with the locations in the RCC.[102]

Lastly, eliminating urinating and defecating in a public place is broadly supported by criminal codes in reform jurisdictions. Only two reform jurisdictions punish public urination as disorderly conduct.[103] Both states punish public urination only "under circumstances which the person should know will likely cause affront or alarm to another."[104] The revised statute largely captures similar conduct in RCC § 22A-4001.

[99] Ala. Code § 13A-11-7(a)(4); Ariz. Rev. Stat. Ann. § 13-2904(A)(4); Ark. Code Ann. § 5-71-207(a)(4); Conn. Gen. Stat. Ann. § 53a-182(a)(4); Del. Code Ann. tit. 11, § 1301(1)(c); Ind. Code Ann. § 35-45-1-3(a)(3); Kan. Stat. Ann. § 21-6203(a)(2); Me. Rev. Stat. tit. 17-A, § 501-A(1)(D); Mont. Code Ann. § 45-8-101(1)(f); N.H. Rev. Stat. Ann. § 644:2(III)(b)-(c); N.J. Stat. Ann. § 2C:33-8; N.Y. Penal Law § 240.20(A)(4); Or. Rev. Stat. Ann. § 166.025(1)(c); S.D. Codified Laws § 22-18-35(3); Tenn. Code Ann. § 39-17-305("lawful activities", presumably, includes gatherings or meetings); Wash. Rev. Code Ann. § 9A.84.030(1)(d).

[100] Ala. Code § 13A-11-17; Ariz. Rev. Stat. Ann. § 13-2930; Ark. Code Ann. § 5-71-230; Colo. Rev. Stat. Ann. § 18-9-125; Conn. Gen. Stat. Ann. § 53a-183c; Del. Code Ann. tit. 11, § 1303; 720 Ill. Comp. Stat. Ann. 5/26-6(a); Kan. Stat. Ann. § 21-6106; Ky. Rev. Stat. Ann. § 525.155; Minn. Stat. Ann. § 609.501; Mo. Ann. Stat. § 574.160; Mont. Code Ann. § 45-8-116; N.H. Rev. Stat. Ann. § 644:2-bI.; N.J. Stat. Ann. § 2C:33-8.1; N.Y. Penal Law § 240.21; N.D. Cent. Code Ann. § 12.1-31-01.1; Ohio Rev. Code Ann. § 2917.12; 18 Pa. Stat. and Cons. Stat. Ann. § 7517; S.D. Codified Laws § 22-13-17; Tenn. Code Ann. § 39-17-317; Tex. Penal Code Ann. § 42.055; Utah Code Ann. § 76-9-108; Wis. Stat. Ann. § 947.011

[101] Alaska and Hawaii.

[102] Research did not include a review of case law interpreting what locations qualify as public or private in each state.

[103] New Hampshire and Utah. N.H. Rev. Stat. Ann. § 645:1-a; Utah Code Ann. § 76-9-702.3.

[104] N.H. Rev. Stat. Ann. § 645:1-a(b); Utah Code Ann. § 76-9-702.3.