First Draft of Report #24:
Failure to Disperse and Rioting

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrc.dc.gov

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. 24, *Failure to Disperse and Rioting*, 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. 24. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Chapter 41. Rioting and Failure to Disperse.

RCC § 22A-4102. FAILURE TO DISPERSE.

(a) *Offense.* A person commits failure to disperse when that person:
  (1) In fact:
    (A) Is in the immediate vicinity a course of disorderly conduct, as defined in § 22A-4001, being committed by five or more persons;
    (B) The course of disorderly conduct is likely to cause substantial harm to persons or property; and
    (C) The person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct; and
  (2) The person knowingly fails to obey a law enforcement officer's dispersal order;
  (3) When the person could safely have done so.

(b) *Penalties*. Failure to disperse 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 "knowingly" has the meaning specified in § 22A-206;
  (2) The term "in fact" has the meaning specified in § 22A-207; and
  (3) The term "law enforcement officer" has the meaning specified in § 22A-1001.

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

(e) *Jury Trial*. A defendant charged with violating this offense may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

COMMENTARY

Explanatory Note. *This section establishes the failure to disperse offense for the Revised Criminal Code (RCC). The offense codifies in the D.C. Code longstanding authority exercised under DCMR 18-2000.2 (Failure to obey a lawful police order)*[1] *in the context of group disorderly conduct.*

In subsection (a)(1), "In fact," a defined term,[2] is used to indicate that there is no culpable mental state requirement as to the elements in the subsection.

[1] "No person shall fail or refuse to comply with any lawful order or direction of any police officer, police cadet, or civilian crossing guard invested by law with authority to direct, control, or regulate traffic. This section shall apply to pedestrians and to the operators of vehicles."
[2] RCC § 22A-206.

Subsection (a)(1)(A) requires proof that five or more persons are engaged in disorderly conduct at the same time and in the same place.[3] This language mirrors an element of the revised rioting offense.[4]

Subsection (a)(1)(B) requires proof that the course of disorderly conduct is likely to cause substantial harm to persons or property. Substantial harm is more than trivial damage.[5]

Subsection (a)(1)(C) requires proof that the presence of the person substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct. Substantial impairment is more than trivial difficulty.[6] Pretextual assertions that a crowd of demonstrators must disperse in order to allow law enforcement to stop the disorderly conduct of some persons in the crowd would not satisfy this element of the failure to disperse offense. The actor's engagement in conduct that is protected by the First Amendment, Fourth Amendment, or District law is not a defense to failure to disperse because such rights are outweighed by the need for law enforcement to effectively address group disorderly conduct.

Subsection (a)(2) requires a culpable mental state of "knowingly", a term defined in RCC § 22A-206, that here means a person must be practically certain that he or she received a dispersal order from someone he or she is practically certain is a law enforcement officer. The order may be personalized to the individual or directed to the entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the dispersal order.

Subsection (a)(3) also requires a culpable mental state of "knowingly", a term defined in RCC § 22A-206, that here means a person must be practically certain that he or she can safely comply with the dispersal order. A person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop engaging in disorderly conduct or to disperse from the scene.[7] Where a person is uncertain as to whether they can safely comply with the dispersal order, there is no liability for failure to comply.

Subsection (b) provides the penalties for each offense gradation. [RESERVED.]

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

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[3] As in the disorderly conduct statute, RCC § 22A-4001, the term "immediate vicinity" refers to the area near enough for the accused to see or hear others' activities. Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[4] RCC §22A-4101(a)(2).

[5] For example, the risk that persons involved in group disorderly conduct could trample landscaping or bump into nearby persons (without harm) would not amount to substantial harm.

[6] For example, the need for a law enforcement officer to walk around a peaceable demonstrator in order to reach the place where the group disorderly conduct is occurring would not alone amount to substantial impairment.

[7] *See Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

Subsection (d) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute. The statute codifies in the D.C. Code longstanding authority exercised under DCMR 18-2000.2 (Failure to obey a lawful police order) in the context of group disorderly conduct. DCMR 18-2000.2 has long been prosecuted by the Attorney General for the District of Columbia.

Finally, subsection (e) provides a jury trial for defendants charged with failure to disperse. Inclusion of a jury trial right is intended to ensure that the First Amendment rights of demonstrators. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[8]

Relation to Current District Law. *The revised failure to disperse statute codifies in the D.C. Code longstanding authority exercised under DCMR 18-2000.2 (Failure to obey a lawful police order) in the specific context of group disorderly conduct. The revised failure to disperse statute does not clearly make any substantive changes to existing District law under DCMR 18-2000.2. However, two aspects of the revised offense may constitute substantive changes of law.*

First, the revised statute specifies that a culpable mental state of knowing is required for failing to disperse and the ability to disperse safely. Current District statutory law is silent as to the culpable mental state, if any, required for the offense. Case law holds that a knowing refusal to obey a lawful order is sufficient for liability under DCMR § 18-2000.2.[9] The RCC clearly specifies that knowledge, defined in RCC § 22A-206 is the applicable mental state. The focus of the offense is the person's response to a law enforcement order. Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[10] 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.[11]

Second, the revised statute specifies that no culpable mental state requirement need be proven as to the existence of group disorderly conduct, the likelihood of the conduct causing harm, and the substantial impairment to law enforcement resulting from the person's failure to disperse. Current District statutory law is silent as to the culpable mental state, if any, required for the offense. Case law on DCMR § 18-2000.2 suggests that a person need not believe or agree that an order is lawful before being required obey

[8] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Committee on the Judiciary (April 28, 2006) at Page 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties.").

[9] *Karriem v. District of Columbia*, 717 A.2d 317, 322 (D.C. 1998)("According to his own testimony, Karriem *knowingly* refused to comply with lawful police orders. That refusal provided an objective basis for the police officers' probable cause determination, and thus as a matter of law their arrest of Mr. Karriem was valid.)(emphasis added).

[10] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015)("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[11] Were a person strictly liable for conduct that causes liability under DCMR 18-2000.2, even mistakes or accidents by a defendant could be the basis of criminal liability for failing to obey a lawful police order. For example, a person who starts to disperse but twists their ankle and cannot move further without severe pain would be liable.

it.[12] The RCC clearly specifies that no culpable mental state is required through use of the term "in fact," defined in RCC § 22A-207, is the applicable mental state. The focus of the revised offense is the person's response to a law enforcement order, and in some situations a person in a crowd may not know that others in the crowd are engaged in disorderly conduct that is likely to cause harm, and/or that the person's continued presence in the crowd substantially impairs law enforcement's ability to respond. Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[13] This change improves the clarity and the 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 revised offense requires both that that there be proof that the person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct being committed by others, and that the disorderly conduct of others is likely to result in substantial harm to persons or property. In such circumstances, a law enforcement order to disperse is a "lawful" order under current District law. Under current law, a refusal to follow a necessary[14] and lawful[15] move-on order may subject a person to arrest in a variety of circumstances.[16] Crowd control measures in current law are designed ensure law enforcement has adequate authority to immediately intervene when necessary to restore public order.[17] Subsection (a)(1) of the revised offense merely clarifies the particular circumstances in which a law enforcement dispersal order is valid.

Relation to National Legal Trends. *The revised failure to disperse statute is broadly supported by national legal trends.*

Of the twenty-nine states (hereafter "reform jurisdictions") that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,[18] 27 criminalize failure to disperse as a separate low-

[12] *Karriem v. District of Columbia*, 717 A.2d 317, 322 (D.C. 1998).

[13] *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015)("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)*).*

[14] *See Bolz v. District of Columbia*, 149 A.3d 1130, 1137 (D.C. 2016).

[15] *See Streit v. District of Columbia*, 26 A.3d 315, 319 (D.C. 2011).

[16] *See, e.g.*, DCMR § 18-2000.2 (Failure to Obey a Lawful Order of a Police Officer); DCMR § 24-2100 (Crowd and Traffic Control); D.C. Code § 22-1307 (Crowding, obstructing, or incommoding); D.C. Code § 22-1314.02 (Prohibited acts); D.C. Code § 22-1321 (Obstructing bridges connecting D.C. and Virginia); D.C. Code § 22-2752 (Engaging in an unlawful protest targeting a residence); D.C. Code § 22-3302 (unlawful entry on property); D.C. Code § 22-3321 (Obstructing public highway).

[17] "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.

[18] 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).

level misdemeanor offense or as a type of disorderly conduct, unlawful assembly, or rioting.[19]

[19] Ala.Code 1975 § 13A-11-6; Ala.Code 1975 § 13A-11-7(a)(6); Alaska Stat. Ann. § 11.61.110; Ariz. Rev. Stat. § 13-2902(A)(2); Ariz. Rev. Stat. § 13-2904(A)(5); Ark. Code Ann. § 5-71-206; Ark. Code Ann. § 5-71-207(a)(6); Del. Code Ann. tit. 11, § 1301(1)(e) and (2); Haw. Rev. Stat. Ann. § 711-1102; Haw. Rev. Stat. Ann. § 711-1101(b); 720 Ill. Comp. Stat. Ann. 5/25-1(b)(4); Kan. Stat. Ann. § 21-6202(c)(2); Ky. Rev. Stat. Ann. § 525.060 (1)(c); Me. Rev. Stat. tit. 17-A, § 502; Minn. Stat. Ann. § 609.715; Mo. Ann. Stat. § 574.060; Mont. Code Ann. § 45-8-102; N.H. Rev. Stat. § 644:1(II); N.H. Rev. Stat. § 644:2(IV)(c); N.J. Stat. Ann. § 2C:33-1(b); N.Y. Penal Law § 240.20(6); N.D. Cent. Code Ann. § 12.1-25-04; Ohio Rev. Code Ann. § 2917.04; Ohio Rev. Code Ann. § 2917.11(3)(a); 18 Pa.C.S.A. § 5502; S.D. Codified Laws § 22-10-11; Tenn. Code Ann. § 39-17-305(a)(2); Utah Code Ann. § 76-9-104; Utah Code Ann. § 76-9-102(1)(a); Wash. Rev. Code Ann. § 9A.84.020; Wis. Stat. Ann. § 947.06(3)-(4).

RCC § 22A-4101. RIOTING.

(a) *Offense.* A person commits rioting when that person:
  (1) Commits disorderly conduct as defined in § 22A-4001;
  (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct;
  (3) And the conduct is committed:
    (A) With intent to commit or facilitate the commission of a crime involving:
      (i) Bodily injury to another person;
      (ii) Damage to property of another; or
      (iii) The taking of property of another;
    (B) While knowingly possessing a dangerous weapon; or
    (C) While knowing any participant in the disorderly conduct is using or plans to use a dangerous weapon.

(b) *Penalties*. Rioting 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 terms "reckless", "with intent", and "knowing" have the meanings specified in § 22A-206;
  (2) The terms "bodily injury" and "dangerous weapon" have the meaning specified in § 22A-1001; and
  (3) The term and "property of another" has the meaning specified in § 22A-2001.

(d) *Exclusion 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.

COMMENTARY

Explanatory Note. *This section establishes the rioting offense for the Revised Criminal Code (RCC). The offense proscribes engaging in disorderly conduct in the immediate vicinity of four or more others similarly engaging in disorderly conduct, with intent to commit or facilitate the commission of a specified type of crime, while possessing a dangerous weapon, or knowing any participant in the disorderly conduct plans to use or is using a deadly weapon. Rioting liability is limited to public places and conduct that is not protected by the First Amendment or District law. The revised offense replaces D.C. Code § 22-1322 (Rioting or inciting to riot).*

Subsection (a)(1) requires that the accused personally engage in disorderly conduct.[20] A person who is merely present in or near a group of disorderly persons is not criminally liable under the revised rioting statute,[21] nor is a person engaged in First

[20] Behavior that constitutes another offense, such as assault or criminal damage to property, may also constitute disorderly conduct and rioting.

[21] S*ee United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("The mere accidental presence of the Defendant among persons engaged in such a public disturbance, however, without more, does not establish

Amendment activities or seeking to prevent criminal activities liable.[22] Disorderly conduct is an offense defined in RCC § 22A-4001 as requiring reckless conduct that causes another person to reasonably believe that unlawful harm is likely to immediately occur. A person who is engaging in conduct that is merely obnoxious, disruptive, or provocative but does not meet the requirements for disorderly conduct may be subject to criminal liability under other laws[23] and possible arrest.[24] However, such a person is not liable for rioting.

Subsection (a)(2) requires proof that four[25] or more persons are also engaged in disorderly conduct at the same time, in the immediate vicinity.[26] Subsection (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22A-206, which here means the accused must disregard a substantial risk that four or more persons are engaged in disorderly conduct in the immediate vicinity and simultaneously. A person may become aware of a risk of others' engaging in disorderly conduct by direct observation[27] or by indirect means.[28] The revised statute does not require that five

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willful conduct or involvement."). For example, the following persons who are not engaged in disorderly conduct are not liable under the RCC rioting statute: a journalist who is present to observe and report on riotous activities; a demonstrator (or counter-demonstrator) who decides to peacefully remain at a particular location in protest; a community leader who acts as a "counterrioter" and attempts to calm the crowd; a local resident using public ways to leave and return home through a group engaged in riotous activity.

[22] For example, the following persons who are not engaged in disorderly conduct are not liable under the RCC rioting statute: a journalist who is present to observe and report on riotous activities; a demonstrator (or counter-demonstrator) who decides to peacefully remain at a particular location in protest; or a community leader who acts as a "counterrioter" and attempts to calm the crowd.

[23] *See* RCC § 22A-2603, Criminal Obstruction of a Public Road or Walkway; RCC § 22A-2604 Unlawful Demonstration; and RCC § 22A-2605, Criminal Obstruction of a Bridge to Virginia.

[24] D.C. Code § 23-581(a)(1)(B) provides, "A law enforcement officer may arrest, without a warrant having previously been issued therefor a person who he has probable cause to believe has committed or is committing an offense in his presence." *See also Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *Sepulveda-Hambor v. District of Columbia*, 885 A.2d 303, 309 (D.C. 2005).

[25] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses.").

[26] The term "immediate vicinity" in the revised rioting statute refers to the area near enough for the accused to see or hear others' activities. Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[27] For example, a person who sees four others nearby prepare to throw stones at a store window may be reckless as to their engagement in disorderly conduct.

[28] For example, a person who viewed an electronic message from a friend at the other end of a block saying that people there were getting ready to break some windows, or a person who heard multiple shouts calling

persons engage in identical conduct[29] or share the same intent. Nor does it require that the five persons act in concert with one another[30] or organize together in advance.[31]

Subsection (a)(3) describes three different conditions that trigger rioting liability. In contrast to simple disorderly conduct,[32] in which the accused need only be reckless as to whether his or her conduct will cause public alarm, in these three circumstances, the participant either acts with intent to contribute to harmful damage or injury or knows a dangerous weapon is involved in the conduct.

Subsection (a)(3)(A) prohibits participation in group disorderly conduct with intent to commit or facilitate the commission of certain crimes. "Intent" is a term defined in RCC § 22A-206 and means the accused must believe his or her conduct is practically certain to further the commission of a crime. Subsections (a)(3)(A)(i), (ii), and (iii) itemize the types of crimes that will elevate collective disorderly conduct to riotous conduct. Subsection (a)(3)(A)(i) identifies "bodily injury to another person" as one unlawful intent. "Bodily injury", a term defined in RCC § 22A-1001, means physical pain, illness, or any impairment of physical condition. "Another person" means any person who is not a participant in the rioting. Subsection (a)(3)(A)(ii) identifies "damage to property of another" and subsection (a)(3)(A)(iii) identifies "the taking of property of another" as additional prohibited criminal intentions. "Property of another" is a defined term that includes "any property that a person has an interest in that the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property."[33] This includes buildings and tangible objects that belong to individuals other than the accused, private entities, or government agencies. Criminal acts within the scope of this subsection include, but are not limited to, RCC assaults,[34] murder,[35] destruction of property,[36] and theft[37].

Subsection (a)(3)(B) provides that possession of a dangerous weapon also may make group disorderly conduct subject to liability for rioting. "Dangerous weapon" is a defined term[38] and includes firearms, blackjacks, brass knuckles, long knives, stun guns,

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for destruction of property and glass breaking nearby may be reckless as to others' engagement in disorderly conduct.

[29] Conduct may consist of actions, movements, gestures, or speech such as "fighting words" which cause public alarm, as explained in RCC § 22A-4001. 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). Fighting words do not include words directed at a law enforcement officer. RCC § 22A-4001(a)(1)(B).

[30] The revised statute does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

[31] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969)("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

[32] RCC § 22A-4001.

[33] RCC § 22A-2001.

[34] RCC § 22A-1202.

[35] RCC § 22A, Chapter 11.

[36] RCC § 22A-2101.

[37] RCC § 22A-2503.

[38] RCC § 22A-1001(5) and (14).

and other life-threatening devices. Subsection (a)(3)(B) specifies that the culpable mental state as to weapons is knowledge, a term defined in RCC § 22A-206. The accused must be practically certain that he or she actually possesses at the time a dangerous weapon.

Subsection (a)(3)(C) provides that group disorderly conduct with knowledge that another participant plans to use a dangerous weapon will also make a person liable as a rioter. The phrase "any person participating in the disorderly conduct" is notably broader than the phrase "persons in the immediate vicinity", which appears in subsection (a)(2) and is not restricted by place. As in subsection (a)(3)(B), "knowledge" means the accused is practically certain of the other participant's malintent.

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

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

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

Relation to Current District Law. *The revised rioting statute changes current District law in three main ways to use clear and plain language, apply consistent and clearly articulated definitions, describe all elements, including mental states, that must be proven, logically reorganize offenses, ensure constitutionality, and adjust the gradation of offenses to provide for proportionate penalties.*

First, the revised statute establishes rioting as a form of group disorderly conduct. The District's current rioting statute states that a riot is a "public disturbance…which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons,"[40] but does not further define these terms. In general, District courts have also said that while rioting conduct sometimes overlaps with and involves disorderly conduct,[41] the rioting statute is a distinct offense based on the common law offense of rioting.[42] District courts have interpreted the "public disturbance" in the current rioting statute to include significant breaches of the peace that are "frightening" to others[43] and are not protected by the First Amendment to the United

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

[40] D.C. Code § 22-1322(a).

[41] *See, e.g., Rodgers v. United States*, 290 A.2d 395, 397 (D.C. 1972)(evidence supported finding of guilt of disorderly conduct and incitement to riot); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 123 (1977)(noting that a person arrested for disorderly conduct might eventually be charged with conspiracy to riot).

[42] *United States v. Bridgeman*, 523 F.2d 1099, 1113 (D.C. Cir. 1975)(finding that the District's rioting statute was a codification of common law rioting except for its requirement of 5 participants).

[43] *See, e.g., United States v. Matthews*, 419 F.2d 1177, 1184-85 (1969) ("The conduct involved must be something more than mere loud noise-making or minor breaches of the peace. The offense requires a condition that has aroused or is apt to arouse public alarm or public apprehension where it is occurring. It involves frightening group behavior. Tumultuous and violent conduct will usually be accompanied by the use of actual force or violence against property or persons. At the very least it must be such conduct as has

States Constitution.[44] In contrast, the revised rioting statute establishes that rioting is a form of group disorderly conduct as that offense is defined in the RCC.[45] By basing the revised rioting statute on the RCC disorderly conduct statute, the scope of the offense is narrowed to exclude prisons and other locations not open to the general public.[46] Similarly, based on changes to the RCC disorderly conduct statute, the revised rioting statute may expand liability for low-level bodily injury or property damage,[47] or reduce rioting liability for disorderly conduct aimed solely at law enforcement officers.[48] Basing the revised rioting offense on the RCC disorderly conduct significantly improves the clarity and consistency of the law.

Second, the revised statute eliminates incitement as a distinct basis for rioting liability. Subsection (c) of the current rioting statute separately criminalizes behavior that "incites or urges other persons to engage in a riot," and subsection (d) imposes heightened liability for conduct that "incited or urged others to engage in the riot" and serious bodily harm or property damage in excess of $5,000 resulted.[49] The terms "incite" and "urge" are not defined in the statute or in case law. Legislative history suggests that Congress' targeting of incitement as a form of rioting may have been based

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a clear and apparent tendency to cause force or violence to erupt and thus create a grave danger of damage or injury to property or persons.").

[44] "In the District of Columbia riot statute speech is only regulated under (b) where it is so closely brigaded with illegal action as to be an inseparable part of it." *United States v. Jeffries*, 45 F.R.D. 110, 117 (D.D.C. 1968)(citing *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, 426 (1966)(J. Douglas concurring)).

[45] RCC § 22A-4001(a)(1)(A) ("A person commits disorderly conduct when that person "causes another person to reasonably believe that there is likely to be immediate and unlawful: bodily injury to another person; damage to property; or taking of property.").

[46] Under the District's current rioting law "the location of a disturbance is immaterial to the determination whether it fits the statutory definition of riot." *United States v. Bridgeman*, 523 F.2d 1099, 1114 (1975). By contrast, under the current and RCC disorderly conduct statute the criminal behavior must occur in a location that is either open to the general public or in the common areas of multi-unit housing. RCC § 22A-4001(a)(2). In the RCC disorderly conduct statute the phrase "open to the general public" is a defined term and excludes locations that require payment or a permit to enter or leave, such as public conveyances, private arenas, public schools, and D.C. Jail. RCC § 22A-4001(c)(3). Recklessly causing a breach of peace in a location not open to the general public may result in other criminal liability under current law and the RCC. For example, a person who remains on a public conveyance or in a private arena without effective consent is guilty of Trespass. *See generally* RCC § 22A-2601.

[47] Under the current rioting statute, the group's conduct must create a "grave danger" of damage or injury, but it is unclear whether this refers to the likelihood or the seriousness of the threatened unlawful conduct. *See United States v. Matthews*, 419 F.2d 1177, 1187 (1969) (J. Skelly Wright dissenting). The revised disorderly conduct statute, by contrast, makes clear that the threat of harm must be objectively credible, but does not require that the threatened harm be severe, provided that it is immediate. The term "immediate" in the revised rioting codifies existing case law. See *United States v. Matthews*, 419 F.2d 1177, 1185 (1969).

[48] The current rioting statute makes no exception for riotous conduct directed solely toward law enforcement officers, nor does case law address the issue. The revised disorderly conduct statute, by contrast, makes clear that conduct directed solely at a law enforcement officer is categorically excluded from liability. This reflects the Council's intent, when recently revising the disorderly conduct statute, to draw "a bright line: that offensive language directed at police officers is not disorderly conduct." *See* Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-425 at Page 8. Conduct that solely threatens a law enforcement officer may, however, constitute a criminal threat (RCC § 22A-1204) or an assault on a law enforcement officer (RCC § 22A-1202), or an attempt to commit such an offense.

[49] D.C. Code § 22-1322(c).

on an assumption about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated.[50] Regardless, legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation."[51] In contrast, under the revised statute, a person who "incites" or "encourages" rioting is only liable if his or her conduct suffices to meet requirements for liability as an accomplice[52] or is part of a criminal conspiracy.[53] This change improves the clarity and consistency of the RCC rioting statute with other current and RCC offenses which rely on the accessory and conspiracy liability to establish more precisely the limits of what instances of "incitement" or "urging" are criminal.

Third, the revised rioting statute has only one gradation. The current rioting statute is divided into two sentencing gradations, with the felony grade consisting of inciting a riot that results in "a person suffer[ing] serious bodily harm or there is property damage in excess of $5,000."[54] The revised statute sets a well-defined minimum threshold for rioting liability based on the culpable mental state of the individual actor and eliminates the current statute's dramatic escalation of penalty based on the magnitude of the group's harm.[55] Under the revised rioting statute, participants who wrongfully joined in group disorderly conduct but who did not intend or expect damage or injury to property or persons are not punished for the conduct of their peers.[56] The revised statute punishes group disorderly conduct where the accused is involved in the conduct and acts with intent that there be some actual harm to a person or property or knowing a dangerous weapon is involved. Under such circumstances the accused's behavior is more culpable than disorderly conduct alone, but is not dependent on outcomes that may be entirely unexpected or out of the person's control. This change improves the proportionality of the revised statute.

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[50] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.

[51] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.

[52] *See* RCC § 22A-210.

[53] *See* RCC § 22A-303.

[54] D.C. Code § 22-1322(c).

[55] Persons who are personally responsible for damage or injury, or attempting damage or injury are still liable in the RCC for the results of their personal actions. The RCC substantive offenses of assault, theft, and criminal damage to property are graded according to the amount of damage that a person recklessly or knowingly causes.

[56] The felony gradation in subsection (c) of the current rioting statute does not specify any culpable mental state as to the amount of overall injury resulting from the riot. Strict liability for the results of the riot would mean that a person would be liable even if a factfinder found that the defendant could not and should not have been expected to know that the bad results could occur—the defendant is liable even for unforeseeable accidents that may arise from the unanticipated actions of others in the disorderly group.

Beyond these three changes to current District law, one other aspect of the revised rioting statute may constitute a substantive change of law.

The revised statute requires recklessness as to four or more others in the immediate vicinity being simultaneously engaged in disorderly conduct (subsection (a)(2)). The current rioting statute specifies that a person must "willfully" engage in, incite, or urge a riot,[57] however, the current statute does not define "willfully." District case law states that "willfulness" is required of each of the other riot participants,[58] but does not address how the willful mental state applies to other elements of the offense.[59] The RCC specifies recklessness as the culpable mental state for subsection (a)(2) and defines the meaning of "reckless."[60] 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,[61] however, the Supreme Court has left open the possibility that recklessness may suffice[62] for such elements. Requiring recklessness for this element of the RCC rioting statute is consistent with the culpable mental state requirements for the RCC disorderly conduct statute,[63] and may provide for liability when there is some uncertainty as to whether others' behavior is disorderly or violent.[64] The revised statute improves the clarity and consistency of District law.

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

First, the revised statute clarifies that an unlawful taking of property may be a predicate for rioting liability. The current rioting statute[65] criminalizes "tumultuous or violent conduct or the threat thereof [that] creates grave danger of damage or injury to property or persons." District case law has established that this phrase includes "either actual physical damage to property or the taking of another's property without the consent of the owner."[66] Both the revised disorderly conduct statute referenced in subsection (b)(1) of the RCC second degree rioting statute and subsection (a)(2)(B)(iii) of the RCC first degree rioting statute specifically refer to conduct that not only involves

[57] D.C. Code § 22-1322.

[58] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("[Willfully] means the Defendant and at least four members of the assemblage participated in the public disturbance on purpose, that is, that each knowingly and intentionally engaged in tumultuous and violent conduct consciously, voluntarily and not inadvertently or accidentally.").

[59] For example, the fact that there is a threat of grave danger of damage to property.

[60] RCC § 22A-206.

[61] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (a defendant generally must "know the facts that make his conduct fit the definition of the offense," even if he does not know that those facts give rise to a crime. (Internal citation omitted)).

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

[63] RCC § 22A-4001(a)(1).

[64] For example, a person may be liable for rioting if he or she engages in disorderly conduct after hearing breaking glass or seeing a fire break out in the vicinity of others in the immediate area engaged in disorderly conduct. Even though the person may not be practically certain that there was damage to property based on such sounds and sights, these phenomena may make a person aware of a substantial risk that there was unlawful damage to property.

[65] DC Code § 22-1322.

[66] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969).

unlawful "damage" to property but also unlawful "taking" of property. This change clarifies the revised statute.

Second, the revised rioting statute replaces the archaic term "assemblage" with a reference to persons in the immediate vicinity at the time of the target conduct. The current law defines a riot as an "assemblage of 5 or more persons,"[67] but does not define "assemblage." District case law, however, has held that an "assemblage" refers to a group of people in close physical proximity to the defendant.[68] The revised statute requires that a defendant act with recklessness as to the fact that "four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct." No special connection or common purpose is required of the persons. Use of "immediate vicinity" and "simultaneously" clarifies the meaning of the revised statute.

Third, the revised rioting offense explicitly excludes from liability First Amendment activity permitted by the District's First Amendment Assemblies Act of 2004. The current rioting statute does not reference any protections for freedom of expression. Legislative history suggests the First Amendment was not a significant consideration for some of the law's original Congressional supporters.[69] Nonetheless, the Supreme Court has held that all speech, including fighting words and incitement to riot is constitutionally "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[70] The RCC rioting statute aims to avoid constitutional vagueness challenges and, through subsection (d) of the statute, give notice of free speech considerations.

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

First, defining rioting as a form of group disorderly conduct is consistent with criminal codes in a minority of reform jurisdictions. Of the twenty-nine states (hereafter "reform jurisdictions") that have comprehensively reformed their criminal codes

[67] D.C. Code § 22-1322(a).

[68] *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[69] In support of the current law, Rep. Joel Broyhill argued, "Those who incite others to violence should be punished whether or not their freedom of speech is involved." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 9. This position, perhaps clumsily worded, is directly at odds with the First Amendment to the United States Constitution and with the District's First Amendment Assemblies Act of 2004. D.C. Code § 5-331.01. The revised statute more precisely recognizes that freedom of expression and assembly do not extend to all language or to all assemblies.

[70] *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949) (internal citations omitted) (explaining, "There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.").

influenced by the Model Penal Code (MPC) and have a general part,[71] all but two have a rioting statute.[72] Six of these twenty-seven reform jurisdictions with a rioting statute explicitly define rioting as disorderly conduct in a group similar to the RCC.[73] Similarly, the MPC defines rioting as disorderly conduct in a group.[74] The remaining twenty-one rioting statutes do not reference "disorderly conduct",[75] but instead refer to "tumultuous or violent conduct" or a "disturbance of public peace" or similar language without specifying how such conduct relates to disorderly conduct.[76]

Second, eliminating incitement as a distinct basis for rioting liability is broadly supported by criminal codes in reform jurisdictions. Only eleven reform jurisdictions distinctly criminalize incitement to riot at all.[77] Nine of those eleven states punish incitement as a misdemeanor or lower-level felony as compared to the 10-year penalty in the District.[78] Only the Dakotas have a maximum penalty for incitement that is as high as

[71] 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).

[72] All reform jurisdictions except Washington and Wisconsin criminalize engaging in a public riot. Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Me. Rev. Stat. tit. 17-A, § 503; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.J. Stat. 2C:33-1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Ohio Rev. Code Ann. § 2917.03; Or. Rev. Stat. Ann. § 166.015; 18 Pa. Cons. Stat. Ann. § 5501; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104. Washington has a related offense called Criminal Mischief. Wash. Rev. Code Ann. § 9A.84.010.

[73] Delaware, Hawaii, Maine, New Jersey, Ohio, and Pennsylvania. Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; Me. Rev. Stat. tit. 17-A, § 503; N.J. Stat. § 2C:33-1; Ohio Rev. Code Ann. § 2917.03; 18 Pa. Cons. Stat. Ann. § 5501.

[74] Model Penal Code § 250.1. Riot; Failure to Disperse.

[75] Case law research was not performed to determine how many states have held that disorderly conduct is a lesser-included offense of rioting.

[76] Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Or. Rev. Stat. Ann. § 166.015; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104.

[77] Alabama, Arkansas, Colorado, Connecticut, Kansas, Kentucky, Montana, New York, North Dakota, South Dakota, and Tennessee. Ala. Code § 13A-11-4; Ark. Code § 5-71-203; Colo. Rev. Stat. Ann. § 18-9-102; Conn. Gen. Stat. Ann. § 53a-178; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. Ann. § 525.040; Mont. Code Ann. § 45-8-104; N.Y. Penal Law § 240.08; N.D. Cent. Code Ann. § 12.1-25-01; S.D. Codified Laws §§ 22-10-6, 22-10-6.1; Tenn. Code Ann. § 39-17-304.

[78] Alabama punishes incitement as a misdemeanor. Ala. Code § 13A-11-4. Arkansas punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Ark. Code § 5-71-203. Colorado punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Colo. Rev. Stat. Ann. § 18-9-102. Connecticut punishes incitement as a misdemeanor. Conn. Gen. Stat. Ann. § 53a-178. Kansas punishes incitement as a low-level felony. Kan. Stat. Ann. § 21-6201. Kentucky punishes incitement as a misdemeanor. Ky. Rev. Stat. Ann. § 525.040. Montana punishes incitement outside a correctional institution as a misdemeanor. Mont. Code

the District of Columbia's current law.[79] The MPC rioting statute does not include an incitement provision.[80]

Third, the revised rioting statute's single gradation structure is consistent with approximately half of the criminal codes in reformed jurisdictions and the MPC.[81] Fifteen reform jurisdictions have multiple gradations of rioting in a public place.[82] Most of these jurisdictions grade more severely either on the presence or use of a dangerous weapon during the rioting,[83] or on the infliction of physical injury or substantial property damage.[84]

Finally, there is strong support in revised statutes for requiring at least recklessness as to the predicate conduct. A majority of the 27 reform jurisdictions that outlaw rioting require at least recklessness as to whether the actor's conduct causes public alarm.[85]

Ann. § 45-8-104. New York punishes incitement as a misdemeanor. N.Y. Penal Law § 240.08. Tennessee punishes incitement as a misdemeanor. Tenn. Code Ann. § 39-17-304.

[79] The rioting statutes in the Dakotas each include an additional limitation. North Dakota punishes incitement as a Class B felony only if: (1) the person incites five or more people or (2) the riot involves 100 or more people. N.D. Cent. Code Ann. § 12.1-25-01. South Dakota punishes incitement as a Class 2 felony only if the person also engages in rioting himself. S.D. Codified Laws §§ 22-10-6, 22-10-6.1.

[80] Model Penal Code § 250.1. Riot; Failure to Disperse.

[81] *Id*.

[82] Arkansas, Colorado, Connecticut, Illinois, Indiana, Kentucky, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, South Dakota, Tennessee, and Utah. Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b); Ind. Code Ann. § 35-45-1-2(Sec. 2); Ky. Rev. Stat. § 525.020; Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); N.Y. Penal Law § 240.06; N.D. Cent. Code Ann. § 12.1-25-01(4); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3). Some states recognize that a penal institution is not a public place or punish prison rioting as a distinct offense. *See* N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-301(3); Wash. Rev. Code Ann. § 9.94.010.

[83] Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Ind. Code Ann. § 35-45-1-2(Sec. 2); Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Utah Code Ann. § 76-9-101(3).

[84] Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b)(3); Ky. Rev. Stat. § 525.020; N.H. Rev. Stat. § 644:1(IV); N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3).

[85] Ala. Code § 13A-11-3 ("intentionally or recklessly"); Ariz. Rev. Stat. Ann. § 13-2903 ("recklessly"); Ark. Code Ann. § 5-71-201 ("knowingly"); Conn. Gen. Stat. Ann. § 53a-176 ("intentionally or recklessly"); Del. Code Ann. tit. 11 § 1302 ("with intent to…"); Haw. Rev. Stat. Ann. § 711-1103 ("with intent to…" or with a weapon); 720 Ill. Comp. Stat. Ann. 5/25-1 ("knowing or reckless"); Ind. Code Ann. § 35-45-1-2 ("recklessly, knowingly, or intentionally"); Ky. Rev. Stat. § 525.030 ("knowingly"); Me. Rev. Stat. tit. 17-A, § 503 ("with intent to…" or with a weapon); Minn. Stat. Ann. § 609.71 ("by an intentional act"); Mo. Ann. Stat. § 574.050 ("knowingly"); Mont. Code Ann. § 45-8-103 ("purposely and knowingly"); N.H. Rev. Stat. § 644:1 ("purposely or recklessly"); N.J. Stat. 2C:33-1("with purpose to…"); N.Y. Penal Law § 240.05 ("intentionally or recklessly"); Ohio Rev. Code Ann. § 2917.03 ("with purpose to…"); Or. Rev. Stat. Ann. § 166.015 ("intentionally or recklessly"); 18 Pa. Cons. Stat. Ann. § 5501 ("with intent to…" or with a weapon); Tenn. Code Ann. § 39-17-302 ("knowingly"); Tex. Penal Code Ann. § 42.02 ("knowingly"); Utah Code Ann. § 76-9-104 ("knowingly or recklessly"). Case law research was not performed to determined the culpable mental states where statutes were silent in Alaska, Colorado, Kansas, North Dakota, and South Dakota.