First Draft of Report #14
Recommendations for
Definitions for Offenses Against Persons

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

This Draft Report has two 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. 14, *Recommendations for Definitions for Offenses Against Persons*, is March 2, 2018 (about ten weeks from the date of issue). Oral comments and written comments received after March 2, 2018 may not be reflected in the Second Draft of Report No. 14. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Chapter 10. Offenses Against Persons Subtitle Provisions.

Section 1001. Offense Against Persons Definitions.
Section 1002. Reserved [Possession of Firearm and Dangerous Weapons During Crime of Violence].

Section 1001. Offense Against Persons Definitions.

In this subtitle, the term:

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

(2) "Citizen patrol" means a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for District of Columbia neighborhoods with the goal of crime prevention.

(3) "Coercion" means causing another person to fear that, unless that person engages in particular conduct, then another person will:

(A) Inflict bodily injury on another person;
(B) Damage or destroy the property of another person;
(C) Kidnap another person;
(D) Commit any other offense;
(E) Accuse another person of a crime;
(F) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule;
(G) Notify a law enforcement official about a person's undocumented or illegal immigration status;
(H) Take, withhold, or destroy another person's passport or immigration document;
(I) Inflict a wrongful economic injury on another person;
(J) Take or withhold action as an official, or take action under color or pretense of right; or
(K) Perform any other act that is calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships.

(4) (A) "Consent" means words or actions that indicate an agreement to particular conduct.

(B) For offenses against property in Subtitle III of this Title:

(i) Consent includes words or actions that indicate indifference towards particular conduct; and

(ii) Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.

(5) "Dangerous weapon" means:

(A) A firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;
(B) A prohibited weapon as defined at § 22A-1001(14);

(C) A sword, razor, or a knife with a blade over three inches in length;
(D) A billy club;
(E) A stun gun; or
(F) Any object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury.

(6) (A) "Deceive" and "deception" mean:

(i) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions;

(ii) Preventing another person from acquiring material information;

(iii) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or

(iv) For offenses against property in Subtitle III of this Title, failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record.

(B) The terms "deceive" and "deception" do not include puffing statements unlikely to deceive ordinary persons, and deception as to a person's intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.

(7) "District official or employee" means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.

(8) "Effective consent" means consent obtained by means other than coercion or deception.

(9) "Family member" means an individual to whom a person is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship.

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

(11) "Law enforcement officer"

(A) A sworn member or officer of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;
(B) A sworn member or officer of the District of Columbia Protective Services;
(C) A licensed special police officer;
(D) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections;
(E) Any probation, parole, supervised release, community supervision, or pretrial services officer or employee of the Court Services and Offender Supervision Agency or the Pretrial Services Agency;

(F) Metro Transit police officers;
(G) An employee of the Family Court Social Services Division of the Superior Court charged with intake, assessment, or community supervision; and
(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.

(12) "Owner" means a person holding an interest in property that the accused is not privileged to interfere with.

(13) "Physical force" means the application of physical strength.

(14) "Prohibited weapon" means:
(A) A machine gun or sawed-off shotgun, as defined at D.C. Code § 7-2501;
(B) A firearm silencer;
(C) A blackjack, slungshot, sandbag cudgel,or sand club;
(D) Metallic or other false knuckles as defined at D.C. Code § 22-4501; or
(E) A switchblade knife.

(15) "Protected person" means a person who is:
(A) Less than 18 years old, and, in fact, the defendant is at least 18 years old and at least 2 years older than the other person;
(B) 65 years old or older;
(C) A vulnerable adult;
(D) A law enforcement officer, while in the course of official duties;
(E) A public safety employee while in the course of official duties;
(F) A transportation worker, while in the course of official duties;
(G) A District official or employee, while in the course of official duties; or
(H) A citizen patrol member, while in the course of a citizen patrol.

(16) "Public safety employee" means:
(A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and
(B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph.

(17) "Serious bodily injury" means bodily injury or significant bodily injury that involves:
(A) A substantial risk of death;
(B) Protracted and obvious disfigurement; or
(C) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

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

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

(20) "Transportation worker" means:

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

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

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

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

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

RCC § 22A-1001. Offense Against Persons Definitions

Commentary

This section establishes the definitions that are applicable to offenses against persons in Subtitle II of the Revised Criminal Code (RCC), unless otherwise specified. Each definition is discussed separately, below.

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

Explanatory Note. The RCC definition of "bodily injury" specifies the requirements for proving a "bodily injury" in the revised offenses against persons. "Bodily injury" is the lowest of the three levels of physical injury defined in the offenses against persons. "Bodily injury" includes physical harms that cause pain, as well as illnesses and impairments of physical condition that do not cause pain. No minimum threshold of pain is specified for "physical pain." "Illness" includes any viral, bacterial, or other physical sickness or physical disease.[1] "Any" impairment of physical condition is intended to be construed broadly and includes cuts, scratches, bruises, and abrasions.[2] The definition does not require a minimum threshold of impairment. Subject to causation requirements, the definition of "bodily injury" may include indirect causes of pain, illness, or impairment, such as exposing another individual to inclement weather or administration of a drug or narcotic that has a negative effect.

"Bodily injury" is statutorily defined in Title 22 of the current D.C. Code only for sexual abuse offenses,[3] however there are undefined references to "bodily injury" in the current child cruelty,[4] obstruction of a police report,[5] and animal cruelty statutes.[6] Similar terms are used in other Title 22 statutes,[7] and there is a definition[8] and several uses[9] of "serious bodily injury" in

[1] For example, "bodily injury" would include sexually transmitted diseases.

[2] *Compare* State v. Jarvis, 665 N.W.2d 518, 521-22 (Minn. 2003) (concluding that "any impairment of physical condition" in the definition of "bodily harm" means "any injury that weakens or damages an individual's physical condition" and finding the evidence sufficient for bodily harm when the complaining witness involuntarily ingested drugs), *and* Hanic v. State, 406 N.E.2d 335, 337-38 (Ind. Ct. App. 1980) (finding that red marks and bruises on a woman's arms and "minor scratches" on her breast area were sufficient evidence for "bodily injury."), *with* Harris v. State, 965 A.2d 691, 694 (Del. 2009) (holding that a red mark on complainant's skin from being elbowed to the forehead and scratches on the complainant's knee did not constitute impairment of physical condition as required by the definition of "physical injury" because they "did not reduce the [complainant's] ability to use the affected parts of his body."), *and* State v. Higgins, 165 Or.App. 442 (2000) (holding that "scratches and scrapes that go unnoticed by the victim, that are not accompanied by pain and that do not result in the reduction of one's ability to use the body or a bodily organ for any period of time, do not constitute an impairment of physical condition" as required by the definition of "physical injury.").

[3] D.C. Code § 22-3001 (2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[4] D.C. Code § 22-1101 ("creates a grave risk of bodily injury to a child, and thereby causes bodily injury").

[5] D.C. Code § 22-1931 ("It shall be unlawful for a person to knowingly … block access to any telephone…with a purpose to obstruct, prevent, or interfere with…[t]he report of any bodily injury.")

[6] D.C. Code § 22-1001 ("'serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, mutilation, or protracted loss or impairment of the function of a bodily member or organ.").

[7] *See, e.g.,* D.C. Code § 22-407 ("Whoever is convicted in the District of threats to do bodily harm….").

the current D.C. Code. The RCC definition of "bodily injury" is used in the revised definitions of "significant bodily injury"[10] and "serious bodily injury,"[11] as well as the revised offenses of robbery,[12] assault,[13] criminal menacing,[14] criminal threats,[15] and [other revised offenses against persons statutes].

Relation to Current District Law. The RCC definition of "bodily injury" is generally consistent with District statutory and case law. The RCC definition includes the same conditions as the current statutory definition of "bodily injury" with respect to sexual abuse offenses,[16] except the revised definition does not require an injury to involve "significant" pain[17] and covers a loss or impairment of a "mental faculty" only insofar as such a loss or impairment stems from an impairment of physical condition.[18] Eliminating the current limitation of "significant" pain avoids difficult and subjective assessments[19] as to the appropriate degree of pain and improves the clarity of the revised offense.

The RCC "bodily injury" definition may result in additional changes of law as applied to particular offenses. For example, the RCC assault gradations are based in part on whether a

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[8] D.C. Code § 22-3001 (7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[9] *See, e.g.,* D.C. Code § 22-404.01 ("A person commits the offense of aggravated assault if: (1) By any means, that person knowingly or purposely causes serious bodily injury to another person….").

[10] RCC § 22A-1001(14).

[11] RCC § 22A-1001(13).

[12] RCC § 22A-1201.

[13] RCC § 22A-1202.

[14] RCC § 22A-1203.

[15] RCC § 22A-1204.

[16] D.C. Code § 22-3001 (2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain."). The references to impairment of a "bodily member" or "organ," and "physical disfigurement" in the current definition are superfluous to the more inclusive term of "impairment of physical condition" in the RCC definition of bodily injury. Similarly, the current definition's references to "disease, sickness" are covered by the RCC definition's reference to "illness."

[17] It is arguably unclear from the current syntax of the definition of a "bodily injury" in D.C. Code § 22-3001 (2) that the phrase "involving significant pain" modifies only "injury" and not also the preceding nouns in the series: "physical disfigurement, disease, sickness." However, per the statutory rule of construction regarding last antecedents, "involving significant pain" is better construed as modifying only "injury" in D.C. Code § 22-3001 (2). (*Perkins v. District of Columbia Bd. of Zoning Adjustment*, 813 A.2d 206, 211 (D.C.2002) ("The Rule of Last Antecedent provides that '[o]rdinarily, qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote.' United States v. Pritchett, 470 F.2d 455, 459 (D.C.Cir.1972); see also District of Columbia v. Smith, 329 A.2d 128, 130 (D.C.1974). The rule is not inflexible, and it is not applied if the context of the language in question suggests a different meaning."). If under current law the current phrase "involving significant pain" were construed to modify the phrase "physical disfigurement, disease, sickness," the revised definition would also eliminate this qualification as to illness. Eliminating such a limitation on illnesses involving "significant pain" would reduce an unnecessary gap in liability by including within the definition of bodily injury forms of disease or sickness that are severe but may be asymptomatic in the victim in the short term or indefinitely (e.g. human immunodeficiency virus (HIV)).

[18] The RCC definition of "bodily injury" does not include psychological harms.

[19] The difficulty in assessing pain thresholds at the low end of the spectrum is similar to such assessments at the high end, which the DCCA has criticized in the context of interpreting "extreme physical pain" in the definition of "serious bodily injury." *Swinton v. United States*, 902 A.2d 772, 777 (D.C. 2006) ("The term [extreme physical pain] is regrettably imprecise and subjective, and we cannot but be uncomfortable having to grade another human being's pain.").

"bodily injury"[20] was inflicted. The District's current assault statute, by contrast, includes physical contacts that are even more minor.[21] Use of the revised "bodily injury" definition in the RCC assault statute consequently changes District law on assault.[22] Differentiating offenses that involve infliction of physical pain, illness, or physical impairment from minor physical contacts improves the proportionality of the revised offenses against persons.

Relation to National Legal Trends. The Model Penal Code (MPC) defines "bodily injury" for offenses against persons as "physical pain, illness or any impairment of physical condition."[23] A plurality of jurisdictions with codified definitions of bodily injury follow the precise language of the MPC definition,[24] although many others codify variants on the MPC definition.[25]

(2) "Citizen patrol" means a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for District of Columbia neighborhoods with the goal of crime prevention.

Explanatory Note. The RCC definition of "citizen patrol" specifies the requirements for what constitutes a "citizen patrol" group in the revised offenses against persons. The RCC definition of "citizen patrol" replaces the current definition of "citizen patrol" in D.C. Code § 22-3602(a).[26] The RCC definition is used in the definition of "protected person."[27]

Relation to Current District Law. The RCC definition is substantively identical to the District's current statutory definition of "citizen patrol."[28] However, the revised definition deletes references to specific local patrol groups that are in the current definition. Deleting the references to these groups does not exclude them from the definition, but no longer categorically includes them regardless of the organizations' current operations.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define "citizen patrol."

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[20] RCC § 22A-1202.

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

[22] Note, however, that the RCC crime of offensive physical contact, RCC § 22A-1205, includes the same minor physical contacts included within the scope of the current assault statute that do not rise to the level of "bodily injury."

[23] Model Penal Code § 210.0(2).

[24] *See, e.g.,* Haw. Rev. Stat. Ann. § 707-700; Me. Rev. Stat. Tit. 17-A, § 2; Neb. Rev. Stat. Ann. § 28-109; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-1-601; Vt. Stat. Ann. Tit. 13 § 1021.

[25] *See, e.g., Alaska Stat.* § 11.81.900 ("'physical injury' means a physical pain or an impairment of physical condition."); Ind. Code § 35-31.5-2-29 ("'Bodily injury' means any impairment of physical condition, including physical pain.).

[26] D.C. Code § 22-3602(a) ("For purposes of this section, the term "citizen patrol" means a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for certain District of Columbia neighborhoods with the goal of crime prevention. The term shall include, but is not limited to, Orange Hat Patrols, Red Hat Patrols, Blue Hat Patrols, or Neighborhood Watch Associations.").

[27] RCC § 22A-1001(#).

[28] D.C. Code § 22-3602(a) ("For purposes of this section, the term "citizen patrol" means a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for certain District of Columbia neighborhoods with the goal of crime prevention. The term shall include, but is not limited to, Orange Hat Patrols, Red Hat Patrols, Blue Hat Patrols, or Neighborhood Watch Associations.").

(3) "Coercion" means causing another person to fear that, unless that person engages in particular conduct, then another person will:

(A) Inflict bodily injury on another person;
(B) Damage or destroy the property of another person;
(C) Kidnap another person;
(D) Commit any other offense;
(E) Accuse another person of a crime;
(F) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule;
(G) Notify a law enforcement official about a person's undocumented or illegal immigration status;
(H) Take, withhold, or destroy another person's passport or immigration document;
(I) Inflict a wrongful economic injury on another person;
(J) Take or withhold action as an official, or take action under color or pretense of right; or
(K) Perform any other act that is calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships.

Explanatory Note. The RCC definition of "coercion" lists forms of threatened conduct that constitute coercion. "Coercion" involves pressuring a person to engage in some particular conduct by making the person fear that someone other than the person being coerced[29] will inflict a list of designated harms on some other person.[30] "Coercion" may come in the form of verbal or written communication; however, intimidating conduct, such as making a threatening gesture, could also suffice.

Subsections (A)-(D) include forms of conduct that would be criminal if actually committed. Subsection (A) covers threats of conduct constituting assaults or homicide; subsection (B) covers threats to destroy or damage another's property; and subsection (C) covers threats to engage in conduct constituting kidnapping of another person. Last, subsection (D) includes a threat to commit any other criminal offense.

Subsections (E)-(J) address other forms of coercive conduct that, standing alone, would not generally constitute a criminal offense.

Subsection (E) includes threats to accuse a person of a crime. The victim of this threat need not have actually committed the offense the defendant threatens to accuse the victim of. Similarly, the threat still constitutes coercion even if the victim did commit the offense.

Subsection (F) covers conduct that previously constituted a provision within blackmail. Threats to reveal information that would subject a person to intense public shame and ridicule constitute coercion.

[29] Often, the person coercing will threaten to personally carry out the coercive conduct himself or herself, but that need not be the case. For example, a mafia don may well make extortive threat to inflict bodily injury on a shopkeeper by threatening to send one of his enforcers to rough up the shopkeeper. Although the mafia don himself may not be the one who will personally assault the victim, the mafia don has still made a coercive threat for purposes of the RCC.

[30] Frequently, the person being coerced is the one who will be threatened with harm, but that need not be the case. For example, a family member or friend of the victim may be the person who will suffer the threatened harm.

Subsection (G) is similar to subsection (E) in that it covers threats to accuse a person of unlawful conduct. Rather than a threat to accuse the person of a criminal offense, however, subsection (G) covers threats to reveal a person's undocumented immigration status. Because of the unique consequences stemming from such an accusation, coercion includes these threats.

Subsection (H) concerns the seizure, withholding, or destruction of a person's passport or immigration documents. The provision prohibits threats to harm the immigration status of another person.

Subsection (I) covers threats to inflict wrongful economic injury on another person. It is intended to include not only causing wrongful financial losses but also situations such as threatening labor strikes or consumer boycotts when such threats are issued in order to personally enrich a person, and not to benefit the workers as a whole.

Subsection (J) covers threats to take or withhold action as a government official. This provision covers threats such as citing someone for violation of a regulation, making an arrest, or denying the award of a contract or permit.

Subsection (K) is a residual provision that is intended to cover a broad array of conduct. Threats to materially harm a person's health, safety, business, career, reputation, or personal relationships are all included. Conduct such as threatening to demote a person at work, to interfere with the receipt of medical care, or to ruin a person's marriage or partnership are all intended to fall within this provision. Because the harm must be material, threats of trivial or insubstantial harms would not be encompassed within the definition of coercion. For example, threatening to refuse to give an invitation to a birthday party, or to diminish a person's standing within a club or private organization, or to publish a single, derogatory social media comment about a person's business are not intended to be covered.

"Coercion" is statutorily defined in Title 22 of the current D.C. Code only for human trafficking offenses,[31] although the undefined term is used in the definition of an "act of terrorism,"[32] the definition of "undue influence" in financial exploitation,[33] involvement with

[31] D.C. Code § 22-1831 (3) "Coercion" means any one of, or a combination of, the following:

(A) Force, threats of force, physical restraint, or threats of physical restraint;

(B) Serious harm or threats of serious harm;

(C) The abuse or threatened abuse of law or legal process;

(D) Fraud or deception;

(E) Any scheme, plan, or pattern intended to cause a person to believe that if that person did not perform labor or services, that person or another person would suffer serious harm or physical restraint;

(F) Facilitating or controlling a person's access to an addictive or controlled substance or restricting a person's access to prescription medication; or

(G) Knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business.

[32] D.C. Code § 22-3152 ("Act of terrorism" means an act or acts that constitute a specified offense as defined in paragraph (8) of this section and that are intended to:

(A) Intimidate or coerce a significant portion of the civilian population of:

(i) The District of Columbia; or

(ii) The United States; or

(B) Influence the policy or conduct of a unit of government by intimidation or coercion.").

[33] D.C. Code § 22-933.01 ("The term "undue influence" means mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being.").

criminal street gangs,[34] and the definition of "consent" in sexual abuse offenses[35] in Title 22. The RCC definition of "coercion" in the offenses against persons subtitle is used in the definition of "effective consent[36] and [other revised offenses against persons].

Relation to Current District Law. Coercion is not referenced in the District's current assault, robbery, or threats statutes, nor does District case law for these offenses discuss coercion. The RCC definition of "coercion" for offenses against persons clarifies the meaning of the term.

Relation to National Legal Trends. The Model Penal Code (MPC) has no definition of "coercion." However, it has a similar list of threatening conduct in the definition of "theft by extortion."[37] Additionally, within the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[38] four additions to the list of prohibited threats in coercion (subsections (D), (G), (H), and (J)) are used.[39]

(4) (A) "Consent" means words or actions that indicate an agreement to particular conduct.

(B) For offenses against property in Subtitle III of this Title:

(i) Consent includes words or actions that indicate indifference towards particular conduct; and

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[34] D.C. Code § 22-951 ("It is unlawful for a person to use or threaten to use force, coercion, or intimidation against any person or property, in order to….").

[35] D.C. Code § 22-3001(3) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[36] RCC § 22A-1204.

[37] The conduct the MPC includes is: "threatening to: (1) inflict bodily injury on anyone or commit any other criminal offense; or (2) accuse anyone of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action; or (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) inflict any other harm which would not benefit the actor." MPC § 223.4.

[38] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[39] Other state statutes that include threats to report a person's immigration status include: Cal. Penal Code § 519; Colo. Rev. Stat. Ann. § 18-3-207; Md. Code Ann., Crim. Law § 3-701; Or. Rev. Stat. Ann. § 164.075; Va. Code Ann. § 18.2-59. Three of these states are not, however, part of the reformed code jurisdictions (specifically, California, Maryland, and Virginia). One of these states also includes threatened destruction of immigration documentation, such as green cards. Va. Code Ann. § 18.2-59. Among the twenty-nine reformed code jurisdictions, states that include threats of to commit any crime include: Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.41.520; Ariz. Rev. Stat. Ann. § 13-1804; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Ky. Rev. Stat. Ann. § 514.080; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; Ohio Rev. Code Ann. § 2905.11 (threaten to commit any felony); Or. Rev. Stat. Ann. § 164.075; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406. And states that include a threat to materially harm a list of designated interests include: Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.41.520; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Utah Code Ann. § 76-6-406; Wash. Rev. Code Ann. § 9A.04.110.

(ii) Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.

Explanatory Note. "Consent" means a person has expressed (by word or act) an agreement to some conduct. "Consent" generally means to agree to some act or to choose some act. There are several important aspects of the RCC definition of "consent."

First, "consent" is an expression or action that indicates agreement. Such expressions include words, such as saying, "Yes, I agree," or writing the same in an email. "Consent" also includes actions, such as nodding or gesturing positively. Actions that indicate preferences could also include well-recognized customs.[40] On the other hand, the absence of any communication would indicate that no consent was given.[41]

Second, the agreement must be to some particular conduct. Typically, in the RCC's offenses against persons, the particular conduct is defined by the use of consent within an offense definition or within an affirmative defense.

Third, "consent" can be conditioned or unconditioned.[42] This means that "consent" can be the product of completely free decision making (unconditioned),[43] or it can be the product of decision making driven by external pressures placed on the person giving consent (conditioned).[44] Although it is not "freely given," conditioned "consent" may be present even

[40] For example, raising one's fists or assuming a fighting stance are commonly understood to indicate that the person has agreed to mutual combat, and handing a merchant currency or a method of payment is commonly understood to indicate that the person has agreed to the transaction.

[41] For example, imagine a case of assault where a person is walking down a street late at night, and the defendant sees the person and strikes him from behind. There would be no evidence in this case that the victim consented to mutual combat, because the victim gave no words or actions that indicated consent to the defendant's strikes. Or, imagine a case of theft where a person leaves his laptop out on a table at a café while he goes to use the restroom. A thief sees the person step away from the laptop, and promptly takes it. The taking would be completely without consent, because the owner gave no words or actions that indicated consent to the taking.

[42] This characteristic of consent is important: often, the term "consent" used both casually and in the law can mean one of two things. It can mean "agreeing to something," and it can also mean, "agreeing to something with sufficient freedom and knowledge." Imagine, for example, a person who is tricked by a fraudster into giving over her life savings. It would be correct in one sense to say that she consented to giving the money, because she voluntarily handed over her fortune. On the other hand, it could also be correct to say that she did not consent to the transaction, because her consent was vitiated by the fraudster's deception.

Both descriptions are arguably correct: if one takes "consent" to mean "agreement," then the victim has consented because she has agreed. But if one takes "consent" to mean "agreement given pursuant to certain normative conditions, such as having sufficient knowledge about the nature of the transaction," then the victim has not given consent, because she did not have sufficient knowledge about the actual nature of the transaction. She had no idea, after all, that her money was getting put in a fraudulent scheme. Both descriptions of the hypothetical are equally valid depending on what the definition of "consent" in use.

Unfortunately, having dual, competing, and equally valid meanings for a single term is a recipe for confusion. How can one know which sense of "consent" is being used at a given time? It is impossible to say. Therefore, rather than persist in confusing these two distinct but useful concepts by employing a single word to describe them, the Revised Criminal Code distinguishes them. "Consent" is employed to refer to mere agreement, while "effective consent" is employed to refer to consent given under sufficient conditions of knowledge and freedom (i.e., consent free from problematic coercion and deception).

[43] E.g., if a person went to a store and said, "I am going to buy the largest television in this store, no matter the cost!" This is an expression of an unconditional preference - the person has stated that he or she will purchase the property no matter what.

[44] E.g., if a person went to a store and said, "I would like to buy the largest television in this store - but because the largest television is too expensive, I'll settle for this smaller one." The person here has an unconditional preference

when there is an extreme or normatively disturbing condition inducing a person's agreement.[45] In the RCC, the degree to which "consent" may be subject to conditions is specified by the elements of particular offenses or the use of the phrase "effective consent."[46]

Fourth, for offenses against property in Subtitle III of this Title, "consent" includes those instances where an agent gives "consent" on behalf of a principal.[47] Thus, an employee may sell her employer's merchandise by giving "consent" on behalf of the employer to a transaction.

Fifth, for offenses against property in Subtitle III of this Title, "consent" also includes expressions of indifference. This is intended to cover situations wherein a person, does not agree to particular conduct, but signals their neutrality as to the conduct.[48]

"Consent" is statutorily defined in Title 22 of the current D.C. Code only for sexual abuse offenses,[49] although the undefined term is used in numerous other statutes[50] in Title 22. The RCC definition of "consent" is used in the offenses against persons subtitle for the definition of "effective consent,[51] defenses to various statutes,[52] and [other revised offenses against persons]. The RCC definition of "consent" is used in the offenses against property subtitle for offenses of: theft,[53] unauthorized use of a motor vehicle,[54] fraud,[55] payment card fraud,[56] identity theft,[57] financial exploitation of a vulnerable adult,[58] and extortion.[59]

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for the largest television, just as the person in the previous footnote does; but here, the person's budget is an external condition that has pressured the person to choose something other than his or her unconditional preference.

[45] E.g., a defendant walks into the victim's store and says, "You better pay me some protection money, or you might find you suffer an unfortunate accident!" The victim's preference in this situation may well be to pay the protection money, rather than risk being murdered or assaulted -- therefore, the victim hands the cash over to the extortionist. In this case, the victim has given consent to the transaction. Admittedly, the victim's unconditioned preference is likely that he have to provide the money at all. But faced with either giving the money or suffering a physical harm, the person may well consent to giving the money. This is not to say that the extortionist in this hypothetical will avoid liability, of course: under the RCC, the extortionist would have obtained the victim's consent by means of coercion.

[46] E.g., RCC §§ 22A-1202(h), 1205(d) (affirmative defense of consent to assault and offensive physical contact).

[47] [The RCC at present does not address whether and under what circumstances a person may consent, on behalf of another person, to conduct constituting an offense against person. Generally, it would be improper for one person to give consent to conduct on behalf of another where that conduct harms the person. However, there may be categorical exceptions to this general rule for offenses against persons. For example, it may be that a parent or guardian may consent to an elective medical procedure, ear piercing, or participation in a karate lesson on behalf of their child or ward. The RCC does not, at present, address these issues.]

[48] E.g., Person A asks Person B, "May I borrow your car on Saturday?" and Person B responds, "Whatever, I don't care either way." If Person A then takes the car on Saturday, Person A would not have committed the offense of unlawful use of a motor because Person B has given "consent" by manifesting indifference to Person A's use of the car.

[49] D.C. Code § 22-3531 ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[50] *See, e.g.*, Voyeurism, D.C. Code § 22-3001(3) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…."); First degree and second degree unlawful publication, D.C. Code §§ 22-3053, 3054 ("It shall be unlawful in the District of Columbia for a person to knowingly publish one or more sexual images of another identified or identifiable person when . . . the person depicted did not consent to the disclosure or publication of the sexual image . . . .").

[51] RCC § 22A-1204.

[52] RCC § 22A-1201(g)-(h); RCC § 22A-1201(i); RCC § 22A-1203(e); RCC § 22A-1204(e); RCC § 22A-1205(e).

[53] RCC § 22A-2101.

[54] RCC § 22A-2103.

[55] RCC § 22A-2201.

Relation to Current District Law. Consent is not referenced in the District's current assault, robbery, or threats statutes. However, two DCCA rulings state that, in certain circumstances, "consent" is a defense to the District's simple assault statute and is not a defense to the District's felony assault statute.[60] These rulings do not define the precise meaning of consent, however. Regarding a consent defense to the non-violent sexual touching form of simple assault, case law has said the consent may be "actual or apparent"[61] without discussing the difference between these terms.[62] The RCC definition of "consent" for offenses against persons is consistent with existing District case law for assault-type crimes and clarify the meaning of the term.

Consent is an explicit element of several of the District's current property offenses and theft-type offenses, as noted above. In addition, DCCA rulings have recognized the relevance of consent in proving theft[63] and other property offenses.[64] Additionally, DCCA case law has acknowledged that an agent's consent is relevant to determining whether a defendant has been given consent by the actual owner of the property.[65] And some current offense definitions explicitly include agents.[66]

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[56] RCC § 22A-2202.
[57] RCC § 22A-2205.
[58] RCC § 22A-2208.
[59] RCC § 22A-2301.
[60] *Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956) ("Generally where there is consent, there is no assault."); see also *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2014) (declining to determine "whether and when consent is an affirmative defense to charges of simple assault" while rejecting consent as a defense to assault in a street fight resulting in significant bodily injury [i.e., felony assault]).
[61] *Guarro*, 237 F.2d at 581.
[62] The language, however, suggests that "actual consent" refers to the internal, subjective wishes of the person giving consent, whereas the "apparent consent" refers to the *expressed* wishes or desires of the person giving consent. *See Guarro*, 237 F.2d at 581 ("In a case like the present, to *let the suspect think there is consent* in order to encourage an act which furnishes an excuse for an arrest will defeat a prosecution for assault.") (emphasis added). To the extent that "apparent consent" refers to expressed consent, the RCC definition is consistent with current District case law.
[63] D.C. Code § 22-3201. *See* D.C. Crim. Jur. Instr. § 5.300. According to the Redbook, theft requires proof of "taking . . . property against the will or interest of" the owner. The Redbook Committee "included 'against the will'" because "the [Judiciary] Committee report making clear that the concept of 'taking control' was supposed to cover common law larceny, which only could be committed by taking property against the will of the complainant." *Id.* Indeed, the Judiciary Committee report states that "the term 'wrongfully' [in theft] is used to indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property." Committee on the Judiciary, Extend Comments on Bill 4-133, the D.C. Theft and White Collar Crime Act of 1982, at 16-17.
[64] *See McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation."); *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("They had both obtained consent to their entry into the premises under the pretext that they were looking for another person who was expected to arrive shortly."). All of these cases distinguish "consent" from the conditions used to obtain consent ("ruse" in *McKinnon*, "trickery, fraud, or misrepresentation" in *Jeffcoat*, and "pretext" in *Kearney*). See also, *Fussell v. United States*, 505 A.2d 72, 73 (D.C. 1986).
[65] *Russell v. United States*, 65 A.3d 1172, 1174 (D.C. 2013).
[66] E.g., D.C. Code § 22-3302. Trespass requires that entry into land be "against the will of the lawful occupant or of the person lawfully in charge thereof." *Id.*

Relation to National Legal Trends. The Model Penal Code (MPC) has no equivalent definition, although it does use the term "consent" in some provisions.[67] Other states and commentators have definitions that are very similar to the RCC definition.[68] The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and has provided a draft definition of "consent" that is similar to the RCC's.[69]

(5) "Dangerous weapon" means:

(A) A firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;

(B) A prohibited weapon as defined at § 22A-1001(14);

(C) A sword, razor, or a knife with a blade over three inches in length;

(D) A billy club;

(E) A stun gun; or

(F) Any object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury.

Explanatory Note. Subsection (A) of the definition establishes that a "firearm," as defined in D.C. Code § 22-4501(2A), including an unloaded firearm, is always a dangerous weapon. Similarly, per subsection (B), a "prohibited weapon" as specified in RCC § 22A-1001(14) is always a dangerous weapon. Subsection (C) specifies that any sword, razor, or knife with a blade over three inches is also a dangerous weapon. Subsection (D) makes a billy club a dangerous weapon, and subsection (E) does the same for a stun gun. Subsection (F) establishes three different ways that a context-sensitive determination may be made by a factfinder that an object or substance is a dangerous weapon—depending on its "actual, attempted, or threatened" use.

The definition's reference in subsection (F) to "[a]ny object or substance" is to be interpreted broadly, including, for example, not only solid objects but fluids and gases. A boot, false knuckles, or other objects used by a person's hands or feet potentially may be dangerous weapons. However, under the RCC definition, a dangerous weapon must be something that is not an integral[70] part of the defendant's own physical body. Body parts such as teeth, nails, hands, and feet are not "dangerous weapons," regardless of how they are used.

The term "dangerous weapon" is not statutorily defined for offenses against persons in Title 22 of the D.C. Code, although two statutes codify non-exclusive lists of items that are

[67] The clearest example is in the MPC's affirmative consent defense. Model Penal Code § 2.11.

[68] Wash. Rev. Code Ann. § 9A.44.010(7) ("Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."). *See also* Stephen J. Schulhofer, *Consent: What it Means and Why It's Time To Require It*, 47 U. PAC. L. REV. 665, 669 (2016). Schulhofer offers a tripartite definition of consent specific to sexual assault. The first part of the definition contains similar language to the RCC definition of consent: "'Consent' means a person's behavior, including words and conduct -- both action and inaction -- that communicates the person's willingness to engage in a specific act of sexual penetration or sexual conduct."

[69] Model Penal Code: Sexual Assault and Related Offenses § 213.0(3) (Tentative Draft No. 3, April 6, 2017) ("'Consent' . . . means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact. Consent may be express or it may be inferred from behavior -- both action and inaction -- in the context of all the circumstances.").

[70] Bodily fluids are not considered a body part and may constitute a "dangerous weapon" under the RCC definition.

treated as "dangerous weapons."[71] The term "dangerous weapon" is used in one of the District's assault statutes,[72] the while-armed penalty enhancement,[73] and multiple other District offenses. The RCC definition of a "dangerous weapon" is used in the offenses of robbery,[74] assault,[75] criminal menacing,[76] and [other revised offenses against persons statutes].

Relation to Current District Law.

The new RCC definition of a dangerous weapon is generally, but not entirely, consistent with current District law for weapons in offenses against persons.

First, subsections (A) - (E) of the revised definition specify a complete list of items which constitute inherently "dangerous weapons." The "dangerous weapons" in subsection (A) are limited to firearms, including unloaded firearms. The "dangerous weapons" in subsection (B) are limited to "prohibited weapon[s]," a defined term in RCC § 22A-1001(14). Prohibited weapons are items that are extremely dangerous or contraband with no use other than use as a weapon. Subsection (C) is limited to knives of significant length and swords, subsection (D) is limited to billy clubs, and subsection (E) is limited to stun guns. Together, subsections (A) - (E) include nearly all the objects specifically listed in the District's current possession of a prohibited weapon offense[77] and while armed penalty enhancement.[78] There are various differences between the items listed in these current statutes and the RCC statute,[79] but perhaps the most

[71] D.C. Code § 22-4502(a) ("Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)…"); D.C. Code § 22-4514 ("(a) No person shall within the District of Columbia possess any machine gun, sawed-off shotgun, knuckles, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, sand club, sandbag, switchblade knife, nor any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms; (b) No person shall within the District of Columbia possess, with intent to use unlawfully against another, an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other dangerous weapon."). Notably, the weapons listed in D.C. Code § 22-4514(b) have the additional requirement that they be possessed with "intent to use unlawfully;" unlike the items in D.C. Code § 22-4502(a), although there is some overlap in the weapons in each statute. Outside Title 22 the term "dangerous weapon" is defined in D.C. Code § 10-503.26(3) ("The term "dangerous weapon" includes all articles enumerated in § 22-4514(a) and also any device designed to expel or hurl a projectile capable of causing injury to persons or property, daggers, dirks, stilettoes, and knives having blades over 3 inches in length.").

[72] D.C. Code § 22-402 (codifying offense of assault with a dangerous weapon).

[73] D.C. Code § 22-4502(a) (establishing the "while armed" enhancement for committing specified crimes "when armed with or having readily available" any dangerous weapon).

[74] RCC § 22A-1201.

[75] RCC § 22A-1202.

[76] RCC § 22A-1203.

[77] D.C. Code § 22-4514.

[78] D.C. Code § 22-4502(a).

[79] Specifically, D.C. Code § 22-4502(a) mentions an "imitation" firearm, "dirk," "bowie knife," and "butcher knife" which are not specifically included in subsections (A) - (E) of the RCC definition of "dangerous weapon." References to a dirk, bowie knife, and butcher knife are omitted as they will typically have blades at least three inches in length, and be covered by subsection (C). D.C. Code § 22-4514(a) items are all within the RCC definition of "dangerous weapon." D.C. Code § 22-4514(b) references an "imitation pistol," a "dagger," "dirk," and a "stiletto" which are not specifically included in subsections (A) - (E) of the RCC definition of "dangerous weapon." References to a dagger, dirk, and stiletto are omitted as they will typically have blades at least three inches in length, and be covered by subsection (C). Swords are added to the RCC list of inherently dangerous items because even though they are not referenced in current District statutes, they have been cited as per se dangerous weapons in case law. *See Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982).

significant is the omission of "imitation pistols"[80] and "imitation firearms."[81] In the RCC offenses against persons subtitle, however, an "imitation weapon" is separately defined in RCC § 22A-1001(11) and is not a per se dangerous weapon.[82] District case law has recognized that many of the objects listed in the possession of a prohibited weapon offense and while armed penalty enhancement are inherently dangerous.[83] However, District case law has been unclear as to what other weapons may be per se dangerous weapons besides those listed in the statutes, and at times has appeared to say that inherently dangerous weapons, even those included in the statutes, are actually dangerous only in certain circumstances and ordinarily the matter of weather a weapon is dangerous is a question of fact.[84] Under the RCC "dangerous weapon" definition, only the items listed in subsections (A) - (E) are considered inherently or per se dangerous weapons, based on their design rather than the manner of their use.[85] Providing a single, complete list of items that are inherently dangerous clarifies District law.

Second, the RCC definition in Subsection (F) provides a functional list of ways an item may be deemed a dangerous weapon. Any "object or substance, other than a body part" can be a "dangerous weapon" if "the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury." The DCCA has said that, to determine whether an item is a dangerous weapon, "the manner [in which an item] is used, intended to be used, or threatened to be used"[86] should be considered. However, there is also District case law which suggests that

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[80] D.C. Code § 22-4514(b).

[81] D.C. Code § 22-4502(a). The same is also true for the definition of "dangerous weapon" in ADW. *Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016).

[82] The commentaries for relevant RCC offenses against persons discuss further, below, how excluding imitation firearms affects current District law. Besides the current while-armed penalty enhancement statute, DCCA case law currently establishes that an imitation pistol may be sufficient for ADW liability. *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975).

[83] *See Dade v. United States*, 663 A.2d 547, 553 (D.C. 1995) ("The only grammatical way to construe this statute [D.C. Code § 22-4502(a)] is to read it, first, as including all pistols and other firearms (or imitations thereof) within the category of dangerous or deadly weapons, and second, as identifying a dozen other objects as dangerous or deadly weapons, in addition to pistols and other firearms. Thus any pistol or other firearm is, by statutory definition, a dangerous or deadly weapon, and the jury need not find specifically that a particular pistol is a dangerous or deadly weapon in order to find the defendant guilty of an armed offense."); *Jones v. United States*, 67 A.3d 547, 550–51 (D.C. 2013) ("We have acknowledged that § 22–4515(b) includes a "non-exhaustive list of weapons readily classifiable as dangerous per se." (citing *In re D.T.*, 977 A.2d 346, 349, 353 (D.C.2009)).

[84] *See Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) ("Some weapons, under appropriate circumstances, are so clearly dangerous that it is prudent for the court to declare them to be such, as a matter of law. Included in this class are rifles, pistols, swords, and daggers, when used in the manner that they were designed to be used and within striking distance of the victim. Whether an object or material which is not specifically designed as a dangerous weapon is a "dangerous weapon" under an aggravated assault statute, however, is ordinarily a question of fact to be determined by all the circumstances surrounding the assault. See generally 2 C. Torcia, Wharton's Criminal Law § 200 (14th ed. 1979). The trier of fact must consider whether the object or material is known to be "likely to produce death or great bodily injury" in the manner it is used, intended to be used, or threatened to be used. The jurors' knowledge of the dangerous character of the weapon used generally can be based on "familiar and common experience." [citation omitted].)"

[85] The design of an object may be an important fact in determining whether the object is a "dangerous weapon" per subsection (F), but it is not determinative.

[86] *See, e.g., Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (emphasis in original omitted) (internal quotations omitted). Although *Williamson* is an ADW case, several cases use the same standard to determine whether an object is a "dangerous weapon" under the "while armed" enhancement in D.C. Code § 22-4502. its standard for determining whether an object is a "dangerous weapon" is used in "while armed" enhancement cases under D.C. Code § 22-4502. *See, e.g., Arthur v. United States*, 602 A.2d 174, 177-78 (D.C. 1992) (discussing *Williamson v. United States*, 445 A.2d 975 (D.C. 1982) and other District precedent for determining whether an

"intended use" may be the same as "attempted use."[87] Subsection (F) of the RCC definition of "dangerous weapon" codifies actual use and threatened use, but codifies "attempted use" instead of "intended use." Under the RCC definition, a mere "intended use" of an item as a dangerous weapon (separate from an actual, attempted, or threatened use) still may be sufficient to make that item a dangerous weapon, but only if such an intended use of the weapon is sufficient to satisfy the requirements of a criminal attempt.[88] Notably, current District practice with respect to charges of assault with a dangerous weapon does not appear to distinctly recognize as dangerous weapons either objects that are "intended to be used" or are involved in an "attempted" use to cause serious bodily injury or death.[89] Creating a functional test as to whether an item is a dangerous weapon based on its actual, attempted, or threatened use clarifies District law with respect to attempts, and may provide a more objective basis for determining liability as compared to a general inquiry, per current law, as to the defendant's intent for the item.

Third, under the RCC definition of "dangerous weapon" in subsection (F) the object or substance must be "likely" to cause death or serious bodily injury. The DCCA has discussed whether an object or substance is a "dangerous weapon" both in terms of whether it is "capable" of producing death or serious bodily injury, as well as "likely" to produce death or serious bodily injury.[90] However, no case law discusses what difference, if any, there is between "capable" and "likely." The RCC definition adopts a "likely" standard as is consistent with current District practice[91] and long-established case law.[92] This change clarifies District law.

Fourth, the RCC definition of dangerous weapon in subsection (F) refers to the revised definition for "serious bodily injury." Current DCCA case law has discussed whether an object or substance is a "dangerous weapon" both in terms of causing death or "great bodily injury,"[93] and death or "serious bodily injury."[94] The DCCA has explicitly stated that the terms "great" and "serious" are interchangeable.[95] Using "serious bodily injury" does not appear to constitute

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object is a "dangerous weapon" in an assault with intent to kill while armed case charged under the "while armed" enhancement in D.C. Code § 22-4502).

[87] *McGill v. United States*, 270 F.2d 329, 331 (D.C. Cir. 1959) ("A pistol [used as a club] is undoubtedly a dangerous weapon; and the fact that the attempt to pistol-whip the complaining witness did not result in physical injury does not make the action any less an assault with a dangerous weapon.").

[88] *See* RCC § 22A-301. For example, if a person carries an iron spike in their pocket with intent to use that object as a weapon to cause serious bodily injury to an enemy, that person may be guilty of an attempted assault with a dangerous weapon if the person satisfies the requirements for attempt liability, including the requisite intent as to the result (i.e. causing serious bodily injury by means of the spike) and being "dangerously close" to completing the offense.

[89] *See,* D.C. Crim. Jur. Instr. § 4-101. ("An object is a dangerous weapon if it designed to be used, actually used, or threatened to be used, in a manner likely to produce death or serious bodily injury.").

[90] *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) ("A deadly or dangerous weapon is an object "which is *likely* to produce death or great bodily injury by the use made of it. Thus, an instrument capable of producing death or serious bodily injury by its manner of use qualifies as a dangerous weapon whether it is used to effect an attack or is handled with reckless disregard for the safety of others.") (internal citations omitted)).

[91] D.C. Crim. Jur. Instr. §§ 4.101 (jury instruction for ADW); 8.101 (jury instruction for "while armed" enhancement under D.C. Code § 22-4502).

[92] *See, e.g., Tatum v. United States*, 110 F.2d 555, 556 (D.C. Cir. 1940) ("A dangerous weapon is one likely to produce death or great bodily injury.")

[93] *See, e.g., Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982).

[94] *Arthur v. United States*, 602 A.2d 174, 177 (D.C. 1992) ("Similarly, "an instrument capable of producing death or serious bodily injury *by its manner of use* qualifies as a dangerous weapon, whether it is used to effect an attack or is handled with reckless disregard for the safety of others.").

[95] *In re D.T.*, 977 A.2d 346, 356 (D.C. 2009) ("This court has interpreted the term "great bodily injury" to be equivalent to the term "serious bodily injury . . .") (citing *Alfaro v. United States*, 859 A.2d 149, 161 (D.C. 2004).

a change in District law, except to the extent the RCC definition of "serious bodily injury" differs from the current definition.[96] Referencing "serious bodily injury" in the RCC definition of "dangerous weapon" improves the consistency of language and definitions across offenses.

Fifth, the RCC definition of a dangerous weapon excludes items that a complaining witness incorrectly perceives as a dangerous weapon, changing current District law.[97] Imitation firearms are now separately defined in RCC § 22A-1001(11) and do not constitute per se dangerous weapons. Liability for use of such apparently dangerous objects is provided by the aggravated criminal menacing offense in RCC § 22A-1203(a). Excluding these objects from the scope of "dangerous weapon" does not change District case law holding that circumstantial evidence may be sufficient to establish an object or substance is a dangerous weapon.[98] These changes clarify and improve the proportionality of the definition of a dangerous weapon, basing the definition on objective criteria and increasing penalties based on the actual increased risk of harm.

Sixth, the RCC definition of a "dangerous weapon" in subsection (F) precludes a body part from being deemed a dangerous weapon. A panel of the DCCA has specifically upheld a conviction for assault of a police officer using a deadly or dangerous weapon based on the defendant's use of his teeth to bite an officer's leg.[99] Dicta in the case indicated that any other body part could similarly be a deadly or dangerous weapon depending on its usage,[100] although there does not appear to be an appellate ruling to date in the District on whether other body parts may be considered dangerous weapons. The DCCA ruling that some uses of a person's body parts—without an external item—may constitute use of a dangerous weapon creates uncertainty as to what types of physical contacts should and should not be subject to enhanced liability. The RCC definition, by contrast, clarifies that a person's integral body parts, including teeth, nails, feet, hands, etc. categorically cannot constitute a dangerous weapon.[101] This change clarifies the law by providing a bright-line distinction as to what may be a "dangerous weapon," penalizing more severely a defendant's use of external objects to inflict damage.

The revised definition of a "dangerous weapon" does not change other DCCA case law as to whether certain objects—be they cars,[102] flip flops[103] or stationary bathroom fixtures[104]—

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[96] See Commentary to RCC § 22A-1001(16), below.

[97] D.C. Code § 22-4502(a) ("Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof)…"). *See, also Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."); *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) ("[P]resent ability of the weapon to inflict great bodily injury is not required to prove an assault with a dangerous weapon. Only apparent ability through the eyes of the victim is required.").

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

[99] *In re D.T.*, 977 A.2d 346 (D.C. 2009).

[100] *In re D.T.*, 977 A.2d 346, 352 (D.C. 2009) ("We no more implied that bare feet were not dangerous weapons in our shod foot cases by highlighting the presence of the shoe, than we intimated that a cold clothes iron could not be a dangerous weapon when we held that a "hot" one was.").

[101] However, as noted above, bodily fluids are not considered a body part and may constitute a "dangerous weapon" under the RCC definition. For example, a defendant who recklessly exposes another person to infectious bodily fluids that results in harm to that person may be liable for assault by means of a dangerous weapon—his or her own bodily fluid.

[102] *See, e.g., Frye v. United States*, 926 A.2d 1085, 1097 (D.C. 2005) ("The complainant's testimony concerning the manner in which appellant used his vehicle, trying to run her off the road and force her into oncoming traffic, over a substantial stretch of roadway was sufficient to permit the jury to find reasonably that appellant used his vehicle as a

constitute dangerous weapons under the facts in those cases. Inoperable[105] and unloaded[106] firearms also remain dangerous weapons under the RCC definition.

Relation to National Legal Trends.

First, the MPC and all 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[107] incorporate into their assault statutes inherently dangerous weapons and/or a broader category of objects or substances that can cause death or serious bodily, although the precise labeling of the terms used varies.[108] The MPC and at least 27 of these reformed jurisdictions statutorily define the weapon terms used in their assault statutes. These definitions generally do not address whether imitation firearms or other weapons constitute either category of weapon, presumably leaving the matter to case law, although at least one jurisdiction statutorily defines a deadly weapon or dangerous

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dangerous weapon in committing an assault against [the complaining witness]."); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (finding the evidence sufficient for ADW and the "while armed" enhancement because the "evidence adduced at trial permitted the jury to conclude beyond a reasonable doubt that the Cadillac, driven at the speeds and in the manner that appellant employed, was likely to produce death or serious bodily injury because of the wanton and reckless manner of its use in disregard of the lives and safety of others.").

[103] *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005) ("Even viewing the evidence in a light most favorable to the government, we hold as a matter of law that the flip flop was not a prohibited weapon under § 22-4514(b) [possession of a dangerous weapon]."

[104] *Edwards v. United States*, 583 A.2d 661, 662 (D.C. 1990) ("We hold that the evidence was insufficient to support the jury's finding that Edwards inflicted his wife's injuries while armed, within the meaning of Section 22–3202, when his alleged weapon consisted of one or more fixed or stationary plumbing fixtures against which he hurled his hapless wife.").

[105] The RCC definition of a dangerous weapon, in subsection (A), incorporates deadly weapons, a defined term per RCC § 22A-1001(6) that, in turn, includes firearms as defined by current D.C. Code § 22-4501(2A): "'Firearm' means any weapon, regardless of operability, which will…".

[106] The RCC definition of a dangerous weapon, in subsection (A), incorporates deadly weapons, a defined term per RCC § 22A-1001(6) that, in turn specifies that the term includes firearms "regardless of whether the firearm is loaded." Notably, the definition of "firearm" in D.C. Code § 22-4501(2A) does not specifically mention whether the firearm is loaded. However, DCCA case law establishes that unloaded firearms are dangerous weapons. *See, e.g.*, *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) ("Hence, even an imitation or blank pistol used in an assault by pointing it at another is a 'dangerous weapon' in that it is likely to produce great bodily harm.").

[107] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[108] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Alaska Stat. Ann. §§ 11.41.200(a)(1), 11.41.210(a)(1), 11.41.220(a)(1)(B), (a)(1)(C), (a)(4), 11.41.230(a)(2); Ark. Code Ann. §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Ariz. Rev. Stat. Ann. § 13-1204(A)(2); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(1)(a); Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), (a)(5), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-2(c)(1), 5/12-3.05(e)(1), (f)(1); Ind. Code Ann. § 35-42-2-1(g)(2); Kan. Stat. Ann. §§ 21-5412(b)(1), 21-5413(b)(1)(B), (b)(2)(B); Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(b), 508.025(1)(a), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(B), 208-B(1)(A), (1)(B); Minn. Stat. Ann. § 609.222; Mo. Ann. Stat. §§ 565.052(1)(2), (1)(4), 565.056(1)(2); Mont. Code Ann. §§ 45-5-201(1)(b), 45-5-213(1)(a); N.H. Rev. Stat. Ann. §§ 631:1(I)(b), 631:2(I)(b), 631:2-a(I)(c); N.J. Stat. Ann. §§ 2C:12-1(a)(2), (b)(2), (b)(3); N.Y. Penal Law §§ 120.00(3), 120.05(2), (4), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(1)(b), 12.1-17-01.1(2), 12.1-17-02(1)(b); Ohio Rev. Code Ann. §§ 2903.13(A)(2), 2903.12(A)(2), 2903.14; Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(1)(a), (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a); 18 Pa. Stat. Ann. § 2701(a)(2), 2702.1(a)(4); S.D. Codified Laws §§ 22-18-1(3), 22-18-1.1(2); Tenn. Code Ann. § 39-13-102(a)(1)(A)(iii), (a)(1)(B)(iii); Tex. Penal Code § 22.02(a)(2); Utah Code Ann. § 76-5-103(1)(b)(i); Wis. Stat. Ann. § 940.24(1).

weapon as including "a facsimile or representation . . . if the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury."[109] In addition, two reformed jurisdictions include gradations in their assault statues for the use of imitation weapons or a complaining witness's perception of an object.[110]

Second, of the 29 reformed jurisdictions, nine define dangerous weapons or similar terms by the item's actual use, attempted use, and threatened use,[111] as does the RCC definition. In contrast, the MPC[112] and nine reformed jurisdictions[113] define dangerous weapons or similar terms by the item's use or intended use. The remaining jurisdictions take a variety of different approaches[114] or do not appear to statutorily define dangerous weapons or similar terms.

Third, the majority of the 27 reformed jurisdictions that statutorily define the weapons terms used in their assault statutes refer to the weapon as being "capable,"[115] "highly capable,"[116] or "readily capable"[117] of causing death or serious bodily injury. However, four reformed jurisdictions use "likely"[118] as does the RCC. The MPC definition of "deadly weapon" uses "known to be capable,"[119] as do three reformed jurisdictions.[120]

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[109] Utah Code Ann. § 76-1-601(5)(b)(i).

[110] Ariz. Rev. Stat. Ann. § 13-1204(A)(11) (including as a grade of aggravated assault that a "simulated deadly weapon" was used); Mont. Code Ann. § 45-5-213 (including in assault offense causing "reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon.").

[111] Ala. Code § 13A-1-2(5) (definition of "dangerous instrument."); Alaska Stat. Ann. § 11.81.900(15) (definition of "dangerous instrument."); Ariz. Rev. Stat. Ann. 13-105(12) (definition of "dangerous instrument."); Conn. Gen. Stat. Ann. § 53a-3(7) (definition of "dangerous instrument."); Del. Code Ann. tit. 11, § 222(4) (definition of "dangerous instrument."); Ky. Rev. Stat. Ann. § 500.080(3) (definition of "dangerous instrument."); N.Y. Penal Law § 10.00(13) (definition of "dangerous instrument."); Or. Rev. Stat. Ann. § 161.015(1) (definition of "dangerous weapon."); Wash. Rev. Code Ann. § 9A.04.110(6) (definition of "deadly weapon.").

[112] Model Penal Code § 210.0(4).

[113] Ark. Code Ann. § 5-1-102(4) (definition of "deadly weapon."); Colo. Rev. Stat. Ann. § 18-1-901(e)(II); Haw. Rev. Stat. Ann. § 707-700 (definition of "dangerous instrument."); Minn. Stat. Ann. § 609.02(6) (definition of "dangerous weapon."); 18 Pa. Stat. Ann. § 2301 (definition of "deadly weapon."); Tenn. Code Ann. § 39-11-106(5) (definition of "deadly weapon."); Tex. Penal Code Ann. § 1.07(17) (definition of "deadly weapon."); Wis. Stat. Ann. § 939.22(10) (definition of "dangerous weapon."); N.J. Stat. Ann. § 2C:11-1(c) (definition of "deadly weapon.").

[114] *See, e.g.*, Ind. Code Ann. § 35-31.5-2-86 ("in the manner it : (A) is used; (B) could ordinarily be used; or (C) is intended to be used."); Mont. Code Ann. § 45-2-101(79) (defining "weapon," in part, "regardless of its primary function.").

[115] Utah Code Ann. § 76-1-601(5) (definition of "dangerous weapon."); Tex. Penal Code Ann. § 1.07(17) (definition of "deadly weapon."); Tenn. Code Ann. § 39-11-106(5) (definition of "deadly weapon."); Ohio Rev. Code Ann. § 2923.11(A) (definition of "deadly weapon."); Me. Rev. Stat. Ann. tit. 17-A, § 2(9); Conn. Gen. Stat. Ann. definition of "deadly weapon." 53a-3(7) (definition of "dangerous instrument."); Colo. Rev. Stat. Ann. § 18-1-901(e) (definition of "deadly weapon."); Alaska Stat. Ann. § 11.81.900(15) (definition of "dangerous instrument.").

[116] Ala. Code §13A-1-2(5) definition of "dangerous instrument.")

[117] Wash. Rev. Code Ann. § 9A.04.110(6) (definition of "deadly weapon."); Or. Rev. Stat. Ann. § 161.015(1) (definition of "dangerous weapon."); N.Y. Penal Law § 10.00(13) (definition of "dangerous instrument."); Mont. Code Ann. § 45-2-101(79) (definition of "weapon."); Mo. Ann. Stat. § 556.061(20) (definition of "dangerous instrument."); Ky. Rev. Stat. Ann. § 500.080(3) (definition of "dangerous instrument."); Ind. Code Ann. § 35-31.5-2-86 (definition of "deadly weapon."); Del. Code Ann. tit. 11, § 222(4) (definition of "dangerous instrument.")

[118] Wis. Stat. Ann. § 939.22(10) (definition of "dangerous weapon."); S.D. Codified Laws § 22-1-2(10) (definition of "dangerous weapon."); 18 Pa. Stat. Ann. § 2301 (definition of "deadly weapon."); Minn. Stat. Ann. § 609.02(6) (definition of "dangerous weapon.");

[119] Model Penal Code § 210.0(4).

[120] N.J. Stat. Ann. § 2C:11-1(c) (definition of "deadly weapon."); N.H. Stat. Ann. § 625:11(V) (definition of "deadly weapon."); Haw. Rev. Stat. Ann. § 707-700 (definition of "dangerous instrument.");

Fourth, the MPC and the majority of the 27 reformed jurisdictions that statutorily define the weapons terms used in their assault statutes generally do not address whether body parts can constitute dangerous weapons. However, at least one reformed jurisdiction statutorily defines "dangerous instrument" as including "parts of the human body when a serious physical injury is a direct result of the use of that part of the human body."[121] There is extensive and conflicting case law in many jurisdictions on whether body parts can be dangerous weapons.[122]

(6) (A) "Deceive" and "deception" mean:

(i) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions;

(ii) Preventing another person from acquiring material information;

(iii) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or

(iv) For offenses against property in Subtitle III of this Title, failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record.

(B) The terms "deceive" and "deception" do not include puffing statements unlikely to deceive ordinary persons, and deception as to a person's intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.

Explanatory Note. This definition specifies the means by which a person can "deceive" (or use "deception," an equivalent term in the statute and this commentary). Although other conduct may be deemed deceptive in the ordinary use of the word, for purposes of the RCC, "deceive" and "deception" only include the means listed in this definition.

Subsection (A)(i) defines "deception" to include creating or reinforcing a false impression. It is not necessary that the defendant create the false impression. Even if another person has a pre-conceived false impression, a person can deceive by merely reinforcing that false impression. "Deception" requires a false impression, but not necessarily false statements. A person can "deceive" by making statements that are factually true to create or reinforce a false impression. Creating or reinforcing a false impression does not require any oral or written communications. Acts and gestures that create or reinforce false impressions can also constitute deception under this definition.

Subsection (A)(i) also requires creating or reinforcing a false impression as to a material fact. The false impression must relate to a fact that a reasonable person would deem relevant given the circumstances. A material fact can include a false impression as to law[123] or the value of the property. However, this is a fact specific inquiry and materiality may vary greatly depending on the context in which the deception occurs. What constitutes materiality in the context of property offenses may vary greatly from what constitutes materiality in the context of offenses against persons.

[121] Ky. Rev. Stat. Ann. § 500.080(3).

[122] 67 A.L.R.6th 103 (Originally published in 2011).

[123] For example, a person can deceive another by creating a false impression that a car for sale is street-legal, when in fact it is not.

Subsection (A) also defines "deception" to include creating or reinforcing false impressions as to an intention to perform future actions. However, mere failure to perform the promised future action does not constitute deception. The defendant must have had the requisite mental state as to whether he would not perform at the time he made the promise.[124]

Subsection (A)(ii) defines "deception" to include preventing a person from acquiring material information.[125]

Subsections (A)(iii) and (A)(iv) include two exceptions to the general rule that there is no duty to correct a false impression. Ordinarily, a person has no duty to correct another's pre-existing false impression, and is free to take advantage of that false impression.[126] However, if a person had previously created or reinforced a false impression, even if innocently, that person can "deceive" by later failing to correct that false impression. Subsection (A)(iii) also states that a person can "deceive" if he or she has a fiduciary or other confidential relationship with another person, and fails to correct a false impression held by that person.

Subsection (A)(iv), applicable only to offenses against property, defines "deception" to include failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not the impediment is a matter of official record. This is a specialized form of deception that only arises in the context of real estate transactions.

Subsection (B) provides one limitation to the definition of "deception," and an evidentiary rule regarding false intentions to perform a future act. First, "deception" excludes puffery that is unlikely to deceive ordinary persons. Such statements that exaggerate or heighten the attractiveness of a product or service do not go so far as to constitute deception. When representations go beyond mere exaggeration to actually create or reinforce an explicit false impression, however, then the defendant may cross the line into criminal deception. In many cases, this exception is unnecessary as puffery ordinarily does not, and is not intended to, actually create or reinforce a false impression. However, advertising may include puffing statements that will create a false impression in at least some listeners. In this context, there is no "deception" if the puffery is unlikely to deceive ordinary persons. With non-puffing statements however, there is no requirement that the deception be likely to fool an ordinary person.

Notably, the "deception" definition does not itself require any culpable mental state. If a person creates a false impression, it is not required that he knew that the impression was false. However, specific statutes in the RCC that use the "deception" definition may specify a mental state for that particular offense. For example, if an offense requires a culpable mental state of "knowingly", and the deception is premised on creating or reinforcing a false impression, then the defendant must have been practically certain that the impression was actually false. If another offense requires a culpable mental state of "recklessly," and the deception is premised on creating or reinforcing a false impression, then the defendant must only have been consciously aware of a substantial risk that the impression was actually false.

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[124] *See Warner v. United States*, 124 A.3d 79 (D.C. 2015) (the trial judge noted that whether a promise is fraudulent or not depended on "whether or not at the time the defendant made the promise, he knew he was going to [fail to perform the promise.]").

[125] For example, if a person selling a car that had been seriously damaged in an accident hides or destroys records of the accident to prevent a buyer from learning that information, he may have deceived the other person, even if he did not actually create or reinforce the false impression that the car had never been in an accident.

[126] For example, if a person is selling a ring that he believes is made of fool's gold, but a buyer realizes that the ring is made of real gold, the buyer has no obligation to correct the seller's false impression.

This term is not statutorily defined in Title 22 the D.C. Code. The RCC definition of "deception" is used in the offenses against persons subtitle for the definition of "effective consent[127] and [other revised offenses against persons]. RCC definition of "deception" is used in property offenses in the definition of "effective consent[128] and offenses of: fraud,[129] forgery,[130] and identity theft.[131]

Relation to Current District Law. The RCC "deception" definition does not itself change current District law, but may result in changes of law as applied to particular offenses.

The RCC definition of "deception" may have an effect on current law with respect to those offenses which include such conduct as an element. Most notably, the current fraud and theft offenses criminalize taking property of another by means of creating a false impression.[132]

However, there is no known case law that would be negated by use of the RCC definition of deception. The D.C. Court of Appeals (DCCA) has not explicitly held whether fraud or theft include obtaining property by reinforcing a false impression, preventing another from obtaining information, failing to correct a false impression that the defendant first created or when a person has a fiduciary or confidential relationship with another[133], or failing to disclose a lien or other adverse claim to property. However, the "deception" definition appears consistent with current theft and fraud law in several respects. First, the DCCA has held that both fraud and theft criminalize taking property of another by means of "false representation."[134] Second, the current fraud statute explicitly includes using a false promise to obtain property of another.[135] Third, the U.S. Supreme Court has held that the federal mail fraud statute, which served as a model for the District's current fraud statute,[136] "require[es] a misrepresentation or concealment of *material* fact."[137] Although the DCCA has never squarely held that fraud or theft requires a false impression as to a material fact, the Redbook Jury Instructions for fraud state that a "false representation or promise is any statement that concerns a material or important fact or a material or important aspect of the matter in question."[138].

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[127] RCC § 22A-1001(8).
[128] RCC § 22A-2001(11).
[129] RCC § 22A-2201.
[130] RCC § 22A-2204.
[131] RCC § 22A-2205.
[132] The current theft statute states that the offense "includes conduct previously known as . . . larceny by trick, larceny by trust . . . and false pretenses." D.C. Code § 22-3211. The current fraud statute criminalizes "engag[ing] in a scheme ort systematic course of conduct with intent to defraud or to obtain property of another by means of false or fraudulent pretense, representation, or promise[.]" D.C. Code 22-3221.
[133] Some federal courts however, have held that "[mail fraud statutes] are violated by affirmative misrepresentations or by omissions of material information that the defendant has a duty to disclose." *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000).
[134] *United States v. Blackledge*, 447 A.2d 46 (D.C. 1982) ("To convict a defendant for the crime of false pretenses, the government must prove that the defendant made a false representation"); *see also Youssef v. United States*, 27 A.3d 1202, 1207-08 (D.C. 2011) ("To convict for fraud, the jury had to conclude that the appellant engaged in 'a scheme or systematic course of conduct' composed of at least two acts calculated to deceive, cheat, or falsely obtain property."); *See also* D.C. Crim. Jur. Instr. § 5-300 (stating that "deception" is any act or communication made by [the defendant] she s/he knows to be false[.]").
[135] D.C. Code § 22-3221.
[136] Commentary to the District of Columbia Theft and White Collar Crime Act of 1982 at 40 ("The language 'obtain property of another by means of false or fraudulent pretense, representation, or promise' is basically derived from the federal mail fraud statute.").
[137] *Neder v. United States*, 527 U.S. 1, 22 (1999) (emphasis original). See also, Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1 (1998); LAFAVE, WAYNE. 3 SUBST. CRIM. L. § 19.7.
[138] D.C. Crim. Jur. Instr. § 5-200.

Relation to National Legal Trends. The "deception" definition is not broadly supported by law in a majority of jurisdictions, but is largely consistent with law in a significant minority of jurisdictions with reformed criminal codes. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[139] nearly half,[140] as well as the Model Penal Code[141] (MPC), have statutory definitions of "deception," either in standalone form, or incorporated into a specific offense.[142] The "deception" definition is broadly consistent with the definitions in the MPC and other jurisdictions, with a few exceptions.

First, only a minority of the reformed code jurisdictions define "deception" to require materiality.[143] However, the MPC[144] and six states require that the false impression must be of "pecuniary significance."[145]

Second, although the revised "deception" definition is consistent with the MPC[146] in including a failure to correct a false impression when the defendant has a fiduciary duty or is in any other confidential relationship, most reformed code jurisdictions with statutory "deception" definitions have not followed this approach. Only three reformed code jurisdictions[147] with statutory "deception" definitions criminalize failure to correct a false impression when the actor has a legal duty to do so.

Third, the MPC[148] and a majority of reformed code jurisdictions with statutory "deception" definitions also include false impressions as to a person's state of mind.[149] The definition includes false impressions as to state of mind insofar as the state of mind relates to false intentions to perform acts in the future. However, false impressions as to states of mind more generally are not included in the definition.

(7) "District official or employee" means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.

Explanatory Note. "Official or employee" is currently defined in D.C. Code § 22-851(a)(1). The RCC definition of a District official or employee is used in the revised definition

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[139] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[140] Alaska Stat. Ann. § 11.81.900; Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 843; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010 ; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401; Wash. Rev. Code Ann. § 9A.56.010.

[141] MPC § 223.3.

[142] For example, the MPC does include a general deception definition, but instead defines the types of deceptions that would constitute theft by deception. MPC § 223.3.

[143] Mo. Ann. Stat. § 570.010; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[144] MPC § 223.3.

[145] Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3.

[146] MPC § 223.3.

[147] Ala. Code § 13A-8-1; N.H. Rev. Stat. Ann. § 637:4; S.D. Codified Laws § 22-30A-3.

[148] MPC § 223.3.

[149] Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-36-101; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922.

of a "protected person,"[150] in the revised assault statute,[151] and [other revised offenses against persons statutes].

Relation to Current District Law. The revised definition is identical to the current definition in the protection of District public officials statute.[152]

(8) "Effective consent" means consent obtained by means other than coercion or deception.

Explanatory Note. This definition explains when "consent" can, in certain statutes, have legal effect. For "effective consent" to exist, there must be consent. However, "effective consent" does not exist if it is obtained by coercion or by deception.

"Effective consent" is not statutorily defined for, or used in, Title 22 of the current D.C. Code, although the related term "consent" is codified in the current D.C. Code for sexual abuse offenses.[153] The RCC definition is used in the revised offenses of robbery,[154] assault,[155] criminal menace,[156] criminal threat,[157] offensive physical contact,[158] and [other revised offenses against persons].

Relation to Current District law. While current District offenses do not use a unified definition equivalent to "effective consent," the component concepts of consent, coercion, and deception have been used in the statutes and case law concerning consent defenses to current offenses against persons.[159] In general, to the extent that lack of consent is relevant to proving current District offenses, consent obtained by coercion or deception has not been recognized as true consent—consistent with the revised definition of effective consent.[160] The RCC definition of "effective consent" clarifies the law and is consistent with existing case law regarding the conditions that may render consent ineffective.

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[150] RCC § 22A-1001(15).

[151] D.C. Code § 22A-1202.

[152] D.C. Code § 22-851(a)(2) ("'Official or employee' means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.").

[153] D.C. Code § 22-3531 ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[154] RCC § 22A-1201.

[155] RCC § 22A-1202.

[156] RCC § 22A-1203.

[157] RCC § 22A-1204.

[158] RCC § 22A-1205.

[159] *See, e.g., Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956) ("In some situations consent is irrelevant. Thus when sexual assaults are committed upon children or idiots or patients of a fraudulent doctor, consent is not a defense. The reason is that the victims in these cases, *because of ignorance or deceit*, do not understand what is happening to them. Therefore their 'consent' is of no significance.") (emphasis added);

[160] *See, e.g., Johnson v. United States*, 426 F.2d 651, 653 (D.C. Cir. 1970) ("acquiescence may be deemed nonconsensual in the absence of force if the victim is put in genuine apprehension of death or bodily harm."); *Guarro v. United States*, 237 F.2d at 581 n. 4 (citing Clark & Marshall, Crimes, § 212 (5th ed. 1952) for the proposition that, "In criminal law, an act does not constitute an assault, or an assault and battery, if the person on or against whom it is committed freely consents to the act, provided he or she is capable of consenting, and the act is one to which consent may be given, and the consent is not obtained by fraud."); *McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation.").

Relation to National Legal Trends. Distinguishing offenses using the same principles of consent and "effective consent" is rare in other jurisdictions' statutes.

Two states, Texas and Tennessee, codify a definition of "effective consent" for use in property offenses,[161] and a comparable distinction between consent and effective consent is made in Missouri,[162] and case law in one state has used the distinction in the context of burglary.[163] The Texas and Tennessee statutes first identify "consent" as a basic foundation for finding effective consent (or in the case of Tennessee, "assent" and then "consent") then the statutes provide a list of circumstances that render consent ineffective. In addition, Texas and Tennessee both state that consent given by certain people (generally, people with disabilities or children) is ineffective.[164] Also, both Texas and Tennessee address the issue of consent given to detect the

[161] Texas defines "effective consent" as: "consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." Tex. Penal Code Ann. § 31.01(3). This definition of "effective consent" is specific to the property offenses; Texas also has a general "effective consent" definition that applies broadly to the entire penal code. Tex. Penal Code Ann. § 1.07(19). The only difference between the two definitions is that the property-specific definition does not include "force" subsection (3)(A), and subsection (3)(E) in the property-specific section above is not included in the general definition. Tennessee defines effective consent as "assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when: (A) Induced by deception or coercion; (B) Given by a person the defendant knows is not authorized to act as an agent; (C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or (D) Given solely to detect the commission of an offense." Tenn. Code Ann. § 39-11-106(9).

[162] Mo. Ann. Stat. § 556.061 ("consent or lack of consent may be expressed or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of youth, mental disease or defect, intoxication, a drug-induced state, or any other reason is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) It is induced by force, duress or deception"). Unlike Tennessee and Texas, however, Missouri does not define force, duress, or deception. This gives very little guidance when attempting to ascertain what kinds of pressures may vitiate "consent" in Missouri. For example, will "assent" induced by any deception fail to constitute assent? Will the smallest amount of duress do the same? If not, then what degree of duress or deception is sufficient to meet the law's demand? Ultimately, while Missouri's definition of "consent" is useful, it is also inadequate. The RCC differs from Missouri in that it sets out not only the kinds of pressures render consent ineffective, but also the degree of pressure that must be brought to bear against the victim. The kinds of pressures are identified other in the offense definitions (e.g., deception in fraud, RCC § 22A-2201), or by the definition of effective consent. The degree of pressure is identified in the definitions of force, coercion, and deception themselves.

[163] Minnesota's burglary offense distinguishes between entries *without consent* and entries made "by using artifice, trick, or misrepresentation to obtain consent to enter." See *State v. Zenanko*, 552 N.W.2d 541, 542 (Minn. 1996) (affirming conviction of defendant who "misrepresented his purpose for being [in the dwelling] and gained entry by ruse") (internal quotations omitted), citing *State v. Van Meveren*, 290 N.W.2d 631, 632 (Minn. 1980) (affirming conviction of defendant who gained entrance to a dwelling by telling the occupant he needed to use the occupant's bathroom, and after entering, immediately began to sexually assault the occupant). *See* Minn. Stat. Ann. § 609.581. By comparison, the RCC says that burglary can be committed without consent and with consent obtained by deception. The RCC also covers burglaries committed with consent obtained by coercion.

[164] Tex. Penal Code Ann. § 31.01(3)(C) and (3)(E); Tenn. Code Ann. § 39-11-106(9)(C).

commission of an offense.[165] The RCC does not address the issue of incompetence or consent given to detect the commission of an offense, but otherwise closely resembles these jurisdictions' statutes.

The Model Penal Code (MPC) contains a definition of "ineffective consent" in its General Part, in its description of the affirmative consent defense.[166] But that definition of ineffective consent does not appear to be applied elsewhere in the MPC.

The relative lack statutory or case law use of the conceptual distinction between consent and "effective consent" may be due to the relatively recent origin of scholarly work on the topic.[167] However, in recent years, use of the conceptual distinction between "effective consent" and simple consent has become widespread among new proposals for substantive criminal law.[168]

(9) "Family member" means an individual to whom a person is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship.

Explanatory Note. The RCC definition of "family member" specifies the requirements for being considered a "family member" in the revised offenses against persons. "Family member" is currently defined in D.C. Code § 22-851(a)(1). The RCC definition of "family

[165] Tex. Penal Code Ann. § 31.01(3)(D); Tenn. Code Ann. § 39-11-106(9)(D). The effect of this provision, it would seem, is to provide complete liability for an offense when a police officer makes a transaction with a criminal in an undercover operation. For example, when attempting to catch a defendant engaged in fraud, a police officer might pose as an innocent and unsuspecting victim. When the defendant tries to deceive the officer into giving money, the officer would clearly be aware of the defendant's deception. If thereafter convicted, the defendant might argue that the officer's consent to the transaction was not "obtained by deception," and therefore, that the defendant is not guilty of fraud. Rather, the defendant would seemingly be at most guilty of attempted theft, because the defendant mistakenly believed the consent *was* induced by the defendant's deception. The definition of effective consent operating in Texas and Tennessee obviate this defense. *See Smith v. States*, 766 S.W.2d 544 (Tex. App. 1989). Similar facts are at work in *Fussell v. United States*, 505 A.2d 72 (D.C. 1986), and the DCCA reversed the defendant's conviction entirely. *Id*. at 73.

[166] Model Penal Code § 2.11(3) ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.").

[167] In large part, the conceptual structure involved in thinking through consent and effective consent—as well as the attendant pressures of force, coercion, and deception—is based on the influential work of Peter Westen. *See* PETER WESTEN, THE LOGIC OF CONSENT (2004); Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 333 (2004). Although Westen's work primarily focuses on the use of consent in the context of rape, his basic approach to understanding consent in criminal law has been adopted by other scholars in other areas of substantive criminal law. For the use of the Westen's theory of consent with respect to theft in particular, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE (2012).

[168] James Grimmelmann, *Consenting to Computer Use*, 84 GEO. WASH. L. REV. 1500, 1517 (2016) (applying conceptual distinctions in consent to offenses involving computers); Stuart P. Green, *Introduction: Symposium on Thirteen Ways to Steal A Bicycle*, 47 NEW ENG. L. REV. 795 (2013) (discussing the use of differences of consent within the context of property offenses); Michelle Madden Dempsey, *How to Argue About Prostitution*, 6 CRIM. L. & PHIL. 65, 70 (2012) (using Westen's consent framework to discuss the ethics of prostitution); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402 (2016).

member" is used in the revised assault statute,[169] and [other revised offenses against persons statutes].

Relation to Current District Law. The revised definition is substantively identical to the current definition in the protection of District public officials statute,[170] except that it no longer internally refers to officials or employees of the District of Columbia government. However, this is not a change to current District law. The family members of District government officials and employees are specifically included in the relevant grades of the revised assault offense.[171]

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

Explanatory Note. The RCC definition of "imitation dangerous weapon" specifies the requirements for being considered an "imitation dangerous weapon" in the revised offenses against persons. To be an imitation weapon, the object must either be used (e.g. visually brandished or pressed against a person's back) or fashioned (e.g. a starter gun) in a manner that would cause a reasonable person to believe the object is a dangerous weapon.

"Imitation dangerous weapon" is not currently defined in the D.C. Code, although in Title 22 the undefined term "imitation pistol" is used in two statutes[172] and the undefined term "imitation firearm" is used in four others.[173] The RCC definition of "imitation dangerous weapon" is used in the revised aggravated criminal menace statute,[174] and [other revised offenses against persons].

Relation to Current District Law. The revised definition of "imitation dangerous weapon" closely follows District case law defining an imitation pistol or firearm, and current District practice. In several cases, the DCCA has upheld jury instructions stating, with minor variations, that "[a]n imitation [pistol] is any object that resembles an actual firearm closely enough that a person observing it in the circumstances would reasonably believe it to be a [pistol]."[175] District practice appears to rely on a similar definition at present.[176] The revised

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[169] D.C. Code § 22A-1202.

[170] D.C. Code § 22-851(a)(1) ("'Family member' means an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship.").

[171] D.C. Code § 22A-1202(a)(4)(B(v), (c)(2)(B)(v), and (e)(1)(B)(v).

[172] D.C. Code § 22-4510(a)(6) ("No pistol or imitation thereof or placard advertising the sale thereof shall be displayed…"); D.C. Code § 22-4514(b) ("No person shall within the District of Columbia possess, with intent to use unlawfully against another, an *imitation pistol*…").

[173] D.C. Code § 22-2603.01(2)(A) ("'Class A Contraband' means…A firearm or *imitation firearm*, or any component of a firearm;"); D.C. Code § 22-2803(b)(1) ("A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other *firearm (or imitation thereof*)…"); D.C. Code § 22-3020 ("The defendant was armed with, or had readily available, a pistol or other *firearm (or imitation thereof*)…"); D.C. Code § 22-4502(a) ("Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other *firearm (or imitation thereof*) …"); D.C. Code § 22-4504(b) ("No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or *imitation firearm* while committing a crime of violence or dangerous crime …").

[174] D.C. Code § 22A-1203(a).

[175] *Smith v. United States*, 777 A.2d 801, 810 n. 15 (D.C.2001). *See also Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016); Bates v. United States, 619 A.2d 984, 985 (D.C.1993).

definition similarly provides that any object may be an imitation weapon if it is used or fashioned in a manner that would cause a reasonable person to believe that the article is a dangerous weapon. Codification of this definition clarifies District law.

It should be noted, however, that the definition of an "imitation dangerous weapon" may result in changes of law as used in particular offenses. The definition of "imitation dangerous weapon" is not included in the list of per se (inherently) dangerous weapons in RCC § 22A-1001(5). Combined with the fact that the revised assault statute requires bodily injuries to be caused by means of a dangerous weapon, the RCC imitation dangerous weapon definition often[177] will preclude penalty enhancements for assaults involving imitation dangerous weapons.[178] However, the RCC does provide enhanced liability for use of imitation dangerous weapons in the aggravated criminal menace statute, RCC § 22A-1203, and in second degree robbery based on commission of an aggravated criminal menace RCC § 22A-1201(c). The RCC's manner of addressing the use of imitation dangerous weapons ensures that such weapons are penalized the same as real dangerous weapons when used with intent to frighten victims. However, imitation dangerous weapons are not treated as automatically equivalent to real dangerous weapons when grading more serious assault charges involving actual harms and actual risks of death or serious bodily injury. By confining penalty enhancements for imitation dangerous weapons to intent-to-frighten offenses, the proportionality of District offenses involving an imitation weapon is improved.[179]

(11) "Law enforcement officer" means:

(A) A sworn member, officer, reserve officer, or designated civilian employee of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;

(B) A sworn member or officer of the District of Columbia Protective Services;

(C) A licensed special police officer;

(D) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections;

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[176] D.C. Crim. Jur. Instr. § 8.101 (jury instruction for "while armed" enhancement under D.C. Code § 22-4502, referring in comment to definition of "imitation firearm" in *Bates v. U.S.*, 619 A.2d 984, 985 (D.C. 1993)).

[177] Even though imitation weapons are not per se dangerous weapons in the RCC, it is still is possible, depending on the facts of a particular case, that an imitation weapon (e.g. a starter pistol) constitutes a dangerous weapon per RCC § 22A-1001(5)(F) due to the manner in which it is used (e.g. "pistol-whipping" a victim) to inflict injury.

[178] A defendant may still be liable for assault by virtue of causing the other person harm, even if the imitation weapon does not make the person liable for an enhanced assault gradation.

[179] The RCC definition of "imitation weapon" resolves judicial concern that has been expressed over whether to distinguish an object designed as an imitation dangerous weapon (e.g., a starter gun) and an object that merely appears to the victim to be a dangerous weapon (e.g., a cell phone, metal pipe, or finger used in a manner that it reasonably appears to be a dangerous weapon) for purposes of assessing penalties. See Washington v. United States, 135 A.3d 325, 332 (D.C. 2016) (C.J. Washington, concurring)(Concluding from legislative history that the actual design of the object rather than a victim's perception is the critical consideration for whether an object is an imitation firearm for purposes of District's assault with a deadly weapon and possession of firearm during crime of violence statutes). Under the RCC definition of an imitation dangerous weapon, objects not fashioned or designed to look like a dangerous weapon (e.g., a finger jabbed into someone's back) may nonetheless be an "imitation dangerous weapon." However, such additional liability for the use of such "imitation dangerous weapons" is provided in the RCC only for aggravated criminal menace, second degree robbery based on an aggravated criminal menace, and [other revised offenses against persons], but not assault.

(E) Any probation, parole, supervised release, community supervision, or pretrial services officer or employee of the Court Services and Offender Supervision Agency or the Pretrial Services Agency;

(F) Metro Transit police officers;

(G) An employee of the Family Court Social Services Division of the Superior Court charged with intake, assessment, or community supervision; and

(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (B), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.

Explanatory Note. The RCC definition of "law enforcement officer" specifies the requirements for being considered a "law enforcement officer" in the revised offenses against persons. "Law enforcement officer" is currently defined in D.C. Code § 22-405(a),[180] assault on a police officer (APO), and D.C. Code § 22-2106(b)(1), murder of a law enforcement officer.[181] The RCC definition is used in the revised assault offense,[182] and [other revised offenses against persons statutes].

Relation to Current District Law. The RCC definition of "law enforcement officer" is substantively identical to the current definition of "law enforcement officer" in the District's murder of a law enforcement officer statute, except for the addition of three types of law enforcement personnel from the current definition of "law enforcement officer" in the current APO.[183] In addition, the revised definition excludes certain groups referenced in the definition of "law enforcement officer" in the current APO statute's definition, either because they are

[180] D.C. Code § 22-405(a) Assault on member of police force, campus or university special police, or fire department. ("For the purposes of this section, the term 'law enforcement officer' means any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision.").

[181] D.C. Code § 22-2106(b)(1). ("'Law enforcement officer' means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.").

[182] RCC § 22A-1202. Specifically, the following provision in the D.C. Code § 22-405(a) definition of a law enforcement officer is now covered by the definition of a "public safety employee": "any officer or member of any fire department operating in the District of Columbia."

[183] Specifically, D.C. Code § 22-405(a) includes in its definition of a law enforcement officer: "any…reserve officer, or designated civilian employee of the Metropolitan Police Department;" "any licensed special police officer"; and "any officer or employee…of the Social Services Division of the Superior Court…charged with intake, assessment, or community supervision."

separately defined in the RCC § 22A-1001(16) as "public safety employees"[184] or are a "District official or employee."[185] These changes clarify District law by distinguishing persons who are regularly involved with criminal law enforcement from others who are not, and create one broad, consistent definition as to who constitutes a law enforcement officer.

Because the RCC definition of a "protected person" includes a "law enforcement officer," "public safety employee," and "District official or employee" revising the definition of "law enforcement officer" to include law enforcement personnel from both the current APO and murder of a law enforcement statutes, offenses subject to a penalty enhancement for harm to a "protected person" include all groups within the current APO definition of "law enforcement officer."[186]

National Legal Trends. The MPC does not enhance its offenses against persons based on the status of the complainant.

(12) "Owner" means a person holding an interest in property that the accused is not privileged to interfere with.

Explanatory Note. The RCC definition of "owner" specifies the requirements for being considered an "owner" in the revised offenses against persons. Under the RCC definition, there can be more than one "owner" for a given piece of property. The RCC definition also includes a person whose interest in property is possessory but otherwise unlawful. For example, it is possible for a third party to rob from a thief.[187]

"Owner" is not statutorily defined in Title 22 of the current D.C. Code. The RCC definition is used in the revised robbery offense,[188] and [other revised offenses against persons statutes].

Relation to Current District Law. There is no D.C. Court of Appeals (DCCA) case law discussing "owner" or a similar term, nor is the term statutorily defined. Yet, the revised definition is consistent with case law on a claim of right defense to robbery.[189] The revised definition also is consistent with District practice apparently recognizing that in robbery, the victim need not have strict legal ownership of the item taken, but merely some legally superior custody and control over the item.[190] The revised definition of "owner" for offenses against

[184] D.C. Code § 22-405(a) defines a "law enforcement officer" to include "any officer or member of any fire department operating in the District of Columbia."

[185] RCC § 22A-1001(7). Specifically, the following provision in the D.C. Code § 22-405(a) definition of a law enforcement officer is now covered by the definition of a "District official or employee": "any investigator or code inspector employed by the government of the District of Columbia."

[186] Note, however, that the RCC assault statute does treat law enforcement officers differently than protected persons for some purposes. *See, e.g.*, RCC § 22A-1202(e)(1)(B)(i).

[187] The thief has an unlawful, but superior, possessory interest in the third party as to the third party.

[188] D.C. Code § 22A-1201.

[189] The DCCA has cited with approval authority stating that a claim of right defense exists only where a person believes the property taken to be legally his own or that he has a legal right to the property. *Townsend v. United States*, 549 A.2d 724, 727 (D.C. 1988). *See also* D.C. Crim. Jur. Instr. § 9.521.

[190] D.C. Crim. Jur. Instr. § 4.300 commentary ("While larceny remains an offense against possession, robbery is essentially a crime against the person. *U.S. v. Dixon*, 469 F.2d 940 (D.C. Cir. 1972). Thus, "possession" under the robbery statute does not require strict legal ownership in the larcenous sense, but only some custody and control by the victim. *See, e.g., U.S. v. Spears*, 449 F.2d 946 (D.C. Cir. 1971) (although money stolen did not belong to foreman, it was in his control at the time of a robbery); *U.S. v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975) (where different parties owned property taken, it was nevertheless either in the control of the complainant or under his custody and control at the time it was stolen); *Jones v. U.S.*, 362 A.2d 718 (D.C. 1976) (it is not required to show

persons is identical to the definition applicable to RCC property offenses. Codifying a definition of "owner" improves the clarity and consistency of District law.

Relation to National Legal Trends. The Model Penal Code (MPC) does not codify a definition of "owner," although it uses the term in at least one of its property offenses.[191]

Several of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[192] have a definition of "owner" that is similar to the definition in the RCC, but the precise language varies.[193]

(13) "Physical force" means the application of physical strength.

Explanatory Note. The RCC definition of "physical force" specifies the requirements for proving "physical force" in the revised offenses against persons. The definition of "physical force" includes any physical touching, however slight, and the application may be indirect (e.g., by means of a tool or weapon).

"Physical force" is not statutorily defined in Title 22 of the current D.C. Code, although the broader term "force" is defined for sexual abuse offenses[194] and the term "physical force" is currently used in two statutes[195] in Title 22. The RCC definition is used in the revised robbery,[196] assault,[197] criminal menace,[198] and [other revised offenses against persons statutes].

Relation to Current District Law.

There is no D.C. Court of Appeals (DCCA) case law specifically discussing a definition of "physical force," nor is the term statutorily defined. However, the revised definition is consistent with the description of physical types of "force" in the District's statutes and case law for robbery[199] and sexual abuse[200]. Codifying a definition of "physical force" improves the clarity and consistency of District law.

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that victim of robbery owned property that was taken but only that the victim had custody and control of the property).").

[191] MPC § 223.9 (unauthorized use of a vehicle).

[192] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[193] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/15-2; Conn. Gen. Stat. Ann. § 53a-118; Tenn. Code Ann. § 39-11-106; Haw. Rev. Stat. Ann. § 708-800.

[194] D.C. Code § 22-3001. ("'Force' means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").

[195] D.C. Code § 22-722 ("A person commits the offense of obstruction of justice if that person: (1) Knowingly uses intimidation or physical force…"); D.C. Code § 22-1931 (a) ("It shall be unlawful for a person to knowingly disconnect, damage, disable, temporarily or permanently remove, or use physical force or intimidation to block access…").

[196] RCC § 22A-1201.

[197] RCC § 22A-1202.

[198] RCC § 22A-1203.

[199] There is DCCA case law broadly defining the element of "force" in the District's robbery statute as satisfied by any physical movement that constitutes a taking of an object. *See Leak v. United States*, 757 A.2d 739, 742 (D.C. 2000) ("In distinct contrast to most jurisdictions, the District of Columbia's statutory definition of robbery includes the stealthy snatching of an item, even if the victim is not actually holding, or otherwise attached to the object, or indeed is unaware of the taking. 'To satisfy the 'force' requirement in a charge of robbery by stealthy seizure, the government need only demonstrate the actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person.'") *(quoting (Earl) Johnson v. United States*, 756 A.2d 458, 462 (D.C.2000)). See also D.C. Crim. Jur. Instr. § 4.300 commentary

It should be noted, however, that the definition of a "physical force" may result in changes of law as used in particular offenses. For example, the RCC's robbery, assault, and criminal menace statutes all use the phrase "physical force that overpowers or restrains" another person.[201] Under these provisions, physical force or a threat to use physical force that does not overpower or restrain is insufficient for liability, and may constitute a change to current District law.[202]

Relation to National Legal Trends. The Model Penal Code (MPC) does not provide a definition for "physical force."

(14) "Prohibited weapon" means:

- **(A) A machine gun or sawed-off shotgun, as defined at D.C. Code § 7-2501;**
- **(B) A firearm silencer;**
- **(C) A blackjack, slungshot, sandbag cudgel, or sand club;**
- **(D) Metallic or other false knuckles as defined at D.C. Code § 22-4501; or**
- **(E) A switchblade knife.**

Explanatory Note. The RCC definition of "prohibited weapon" specifies the requirements for proving an object is a "prohibited weapon" in the revised offenses against persons. The definition of "prohibited weapon" consists of weapons that not only are defined as inherently dangerous per the definition of "dangerous weapon" in RCC § 22A-1001(3)(D), but are illegal for non-government personnel to possess in the District regardless of an individual's purpose for possessing or using the weapon.

("[Using actual force or physical violence against [name of complainant] so as to overcome or prevent [name of complainant]'s resistance satisfies the requirement of force or violence.]"). However, the definition of force is so broad under the District's robbery statute and case law as to be satisfied by non-physical interactions. *See Gray v. United States*, 155 A.3d 377, 382 (D.C. 2017) ("A defendant takes property by force or violence when he or she does so 'against resistance or by sudden or stealthy seizure or snatching, or by putting in fear.' D.C. Code § 22–2801.") See also D.C. Crim. Jur. Instr. § 4.300 commentary ("[Putting [name of complainant] in fear, without using actual force or physical violence, can satisfy the requirement of force or violence if the circumstances, such as threats by words or gestures, would in common experience, create a reasonable fear of danger and cause a person to give up his/her property in order to avoid physical harm.]").

[200] Because the RCC definition of physical force includes even the slightest physical contact, the revised definition is actually broader than the physical form of "force" as defined in the District's sexual abuse statutes: "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person." D.C. Code § 22-3001. However, the current sexual abuse statutes' definition of "force" also is defined in terms other than physical contact, and in that respect is much broader than the revised definition of "physical force." Moreover, as used in the revised assault statute, the revised definition of "physical force" is virtually identical to the physical form of "force" in the District's current sexual abuse statutes.

[201] RCC §§ 22A-1201-1203.

[202] For example, the nonconsensual, reckless application of physical force to another, however slight, appears to constitute a simple assault under current District case law. *See Dunn v. United States*, 976 A.2d 217, 222 (D.C. 2009) (holding that a "shove was an assault even if it did not cause [the victim] any physical harm" and recognizing that there is no de minimis defense in the District). Also, the nonconsensual, intentional use of force, however slight, to take property from another may constitute robbery under current District case law. *See Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994) ("To satisfy the 'force' requirement in a charge of robbery by stealthy seizure, the government need only demonstrate the 'actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person.'").

"Prohibited weapon" is not statutorily defined in Title 22 of the current D.C. Code, but the term has been used in District case law[203] and practice[204] to refer to weapons listed in D.C. Code § 22-4514(a). The RCC definition is used in the revised definition of a "dangerous weapon,"[205] and [other revised offenses against persons statutes].

Relation to Current District Law. The revised definition provides a discrete name for items listed in an existing statute. The items in the revised definition are substantively identical[206] to those currently listed in D.C. Code § 22-4514(a).[207] All items listed are recognized in current District case law as being uniquely suspect, even as compared to other per se dangerous weapons listed in D.C. Code § 22-4514(b).[208] Codifying a definition of "prohibited weapon" improves the clarity and consistency of District law.

Relation to National Legal Trends. Given the complexity of other jurisdictions' weapons laws, it is only possible to generally compare the RCC's treatment of the objects specified in the definition of "prohibited weapon" with the treatment of these objects in other jurisdictions and the MPC. The MPC defines "deadly weapon" as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury."[209] Although this definition does not mention specific types of weapons other than firearms, the expansive definition would likely include all the objects in the RCC definition of "prohibited weapon," with the possible exception of a firearm silencer.

The 29 reformed jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[210] generally include the objects in the RCC definition of "prohibited weapon," again with the possible exception of a firearm silencer. Machine guns and sawed-off shotguns are included in many reformed jurisdictions' assault gradations by the inclusion of "firearm"[211] in the definition of "deadly

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[203] *See, e.g., Jones v. United States*, 67 A.3d 547, 549 (D.C. 2013).

[204] D.C. Crim. Jur. Instr. § 6.503. Possession of a Prohibited Weapon.

[205] RCC § 22A-1001(#).

[206] For clarity, the RCC refers to a "sandbag" as a "sandbag cudgel," and simply refers to "any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms" as a "firearm silencer." These changes are not intended to change current District law.

[207] D.C. Code § 22-4514 ("(a) No person shall within the District of Columbia possess any machine gun, sawed-off shotgun, knuckles, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, sand club, sandbag, switchblade knife, nor any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms."). Notably, the weapons listed in D.C. Code § 22-4502(b), mainly long knives, have the additional requirement that they be possessed with "intent to use unlawfully;" unlike the items in D.C. Code § 22-4502(a), current D.C. law does not prohibit their possession under all circumstances.

[208] *United States v. Brooks*, 330 A.2d 245, 247 (1974) ("The wording of subsection (a), which forbids the mere possession of certain specifically named items, is clearly distinguishable from subsection (b) by its total lack of any requirement that the possessor of these items intends to use them unlawfully. The weapons listed in subsection (a) are so highly suspect and devoid of lawful use that their mere possession is forbidden.").

[209] MPC § 210.0(4).

[210] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[211] *See, e.g.*, Wis. Stat. Ann. § 939.22(10) (definition of "dangerous weapon" including "any firearm."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon" including a "firearm."); Mo. Ann. Stat. § 556.061(22) (definition of "deadly weapon."); N.D. Cent. Code Ann. § 12.1-01-04(6) (definition of "dangerous weapon."); Me.

weapon" or similar term, and are also presumably included in the expansive definitions of deadly weapons or dangerous weapons as objects likely to cause death or serious bodily injury.[212] In addition, at least one reformed jurisdiction punishes an assault with a machine gun more seriously than an assault committed with another firearm or other deadly weapon.[213] Several reformed jurisdictions also specifically include blackjacks,[214] slungshots,[215] metallic or other false knuckles,[216] and switchblade knives[217] in their assault gradations through the definitions of "deadly weapon" or other similar term for inherently dangerous weapons. It does not appear that any reformed jurisdictions specifically mention sandbag cudgels or sand clubs, but such weapons would presumably fall under broader categories such as bludgeons,[218] as well as the expansive definitions of deadly weapons or dangerous weapons as objects likely to cause death or serious bodily injury.[219] Firearm silencers appear to be largely excluded from the weapons gradations in reformed jurisdictions' assault offenses, although at least one reformed jurisdiction punishes an assault with a firearm equipped with a silencer more seriously than an assault with another firearm or other deadly weapon.[220]

Rev. Stat. tit. 17-A, § 2 (definition of "use of a dangerous weapon" including "the use of a firearm."); N.H. Rev. Stat. Ann. § 625:11(V) (definition of "deadly weapon" including "any firearm.").

[212] *See, e.g.*, Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon" including "any weapon, whether loaded or unloaded, from which a shot may be discharged ."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon" including "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."); Utah Code Ann. § 76-1-601(5)(a) (definition of "dangerous weapon" including "any item capable of causing death or serious bodily injury.").

[213] Ill. Comp. Stat. Ann. 5/12-3.05(e)(1), (e)(5), (f)(1), (h) (making it a Class X felony to commit a battery by discharging a firearm other than a machine gun or a firearm equipped with a silencer, a Class X felony "for which a person shall be sentenced to a term of imprisonment of a minimum of 12 years and a maximum of 45 years" to commit a battery by discharging a machine gun or a firearm equipped with a silencer with MM, and making it a Class 3 felony to commit a battery by using a deadly weapon other than discharging a firearm).

[214] *See e.g.*, Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); Mo. Ann. Stat. § 556.061(22) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon."); N.D. Cent. Code Ann. § 12.1-01-04(6) (definition of "dangerous weapon.").

[215] *See, e.g.*, N.D. Cent. Code Ann. § 12.01-04(6) (definition of "dangerous weapon.").

[216] *See, e.g.*, Ala. Code § 13A-1-2(7) (definition of "deadly weapon."); Alaska Stat. Ann. § 11.81.900(17) (definition of "deadly weapon."); Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon.").

[217] *See, e.g.*, Ala. Code § 13A-1-2(7) (definition of "deadly weapon."); Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon."); N.D. Cent. Code Ann. § 12.01-04(6) (definition of "dangerous weapon.").

[218] *See, e.g.*, Ala. Code § 13A-1-2(7) (definition of "deadly weapon."); Colo. Rev. Stat. Ann. § 18-1-901(e)(II) (definition of "deadly weapon."); Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); .D. Cent. Code Ann. § 12.1-01-04(6) (definition of "dangerous weapon."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon.").

[219] *See, e.g.*, Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon" including "any weapon, whether loaded or unloaded, from which a shot may be discharged ."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon" including "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."); Utah Code Ann. § 76-1-601(5)(a) (definition of "dangerous weapon" including "any item capable of causing death or serious bodily injury.").

[220] Ill. Comp. Stat. Ann. 5/12-3.05(e)(1), (e)(5), (f)(1), (h) (making it a Class X felony to commit a battery by discharging a firearm other than a machine gun or a firearm equipped with a silencer, a Class X felony "for which a person shall be sentenced to a term of imprisonment of a minimum of 12 years and a maximum of 45 years" to

(15) "Protected person" means a person who is:

(A) Less than 18 years old, and, in fact, the defendant is at least 18 years old and at least 2 years older than the other person;

(B) 65 years old or older;

(C) A vulnerable adult;

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

(E) A public safety employee, while in the course of his or her official duties;

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

(G) A District official or employee, while in the course of his or her official duties; or

(H) A citizen patrol member, while in the course of a citizen patrol.

Explanatory Note. The definition of "protected person" consists of several categories of individuals based on age, occupation, and whether the individual is a "vulnerable adult," a defined term in RCC § 22A-1001.

"Protected person" is not statutorily defined in Title 22 of the D.C. Code. However, the definition includes terms and related provisions that are in the D.C. Code concerning crimes against: A) minors;[221] B) elderly persons;[222] C) vulnerable adults;[223] D) law enforcement

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commit a battery by discharging a machine gun or a firearm equipped with a silencer with MM, and making it a Class 3 felony to commit a battery by using a deadly weapon other than discharging a firearm).

[221] D.C. Code § 22-3611 ("(a) Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both. (b) It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence. (c) For the purposes of this section, the term: (1) "Adult" means a person 18 years of age or older at the time of the offense. (2) "Crime of violence" shall have the same meaning as provided in § 23-1331(4). (3) "Minor" means a person under 18 years of age at the time of the offense.").

[222] D.C. Code § 22-932 ("(c)'Elderly person' means a person who is 65 years of age or older.").

D.C. Code § 22-3601. "(a) Any person who commits any offense listed in subsection (b) of this section against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both. (b) The provisions of subsection (a) of this section shall apply to the following offenses: Abduction, arson, aggravated assault, assault with a dangerous weapon, assault with intent to kill, commit first degree sexual abuse, or commit second degree sexual abuse, assault with intent to commit any other offense, burglary, carjacking, armed carjacking, extortion or blackmail accompanied by threats of violence, kidnapping, malicious disfigurement, manslaughter, mayhem, murder, robbery, sexual abuse in the first, second, and third degrees, theft, fraud in the first degree, and fraud in the second degree, identity theft, financial exploitation of a vulnerable adult or elderly person, or an attempt or conspiracy to commit any of the foregoing offenses. (c) It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[223] D.C. Code § 22-932 ("'Vulnerable adult' means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests.").

officers;[224] E) public safety employees;[225] F) taxicab drivers,[226] transit operators and Metrorail station managers;[227] G) District employees;[228] and H) citizen patrol members.[229] The RCC definition is used in the revised robbery,[230] assault,[231] [other revised offenses against persons].

[224] D.C. Code § 22-405. ("(a) For the purposes of this section, the term "law enforcement officer" means any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision. (b) Whoever without justifiable and excusable cause assaults a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned not more than 6 months or fined not more than the amount set forth in § 22-3571.01, or both. (c) A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both. (d) It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.").

D.C. Code § 22-2106(b)(1). ("'Law enforcement officer' means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.").

[225] D.C. Code § 22-2106(b)(2). ("'Public safety employee' means: (A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and (B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph.").

[226] D.C. Code § 22-3751. ("Any person who commits an offense listed in § 22-3752 against a taxicab driver who, at the time of the offense, has a current license to operate a taxicab in the District of Columbia or any United States jurisdiction and is operating a taxicab in the District of Columbia may be punished by a fine of up to one and 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[227] D.C. Code § 22-3751.01: ("(a) Any person who commits an offense enumerated in § 22-3752 against a transit operator, who, at the time of the offense, is authorized to operate and is operating a mass transit vehicle in the District of Columbia, or against Metrorail station manager while on duty in the District of Columbia, may be punished by a fine of up to one and ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and ½ times the maximum term of imprisonment otherwise authorized by the offense, or both. (b) For the purposes of this section, the term: (1) "Mass transit vehicle" means any publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia. (2) "Metrorail station manager" means any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station. (3) "Transit operator" means a person who is licensed to operate a mass transit vehicle.").

[228] D.C. Code § 22-851(a)(2) ("'Official or employee' means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.").

Relation to Current District Law.

The substance of subsections (A) and (B) reflects current District law. Subsection (A) refers to a person who is "[l]ess than 18 years old, and, in fact, the defendant is at least 18 years old and at least 2 years older than the other person," which is substantively identical to the persons who are protected under the current penalty enhancement for certain crimes against minors.[232] Rather than separately defining the terms of "adult" and "minor" as under current law, however, subsection (A) incorporates the definitions of these terms that are used in the current minor victim enhancement,[233] improving the clarity of the definition. Use of the phrase "in fact" in Subsection (A) clarifies that no culpable mental state applies to the required age difference between the accused and the complainant. Such a culpable mental state requirement is consistent with the corresponding minor victim enhancement in current law[234] and District practice, [235] although there is no case law on point. Applying strict liability to the required age difference between the accused and the complainant clarifies and potentially fills a gap in District law. Similarly, subsection (B) refers to a person who is "65 years old or older" and is substantively identical to the persons protected in the current offenses for criminal abuse and neglect of an adult and the senior citizen victim penalty enhancement.[236]

Although the substance of the provisions for minors and the elderly in the definition of "protected person" is similar to current law, the RCC assault and robbery offenses effectively eliminate the defenses under the current penalty enhancements for assaulting or robbing the elderly or minors. This is a change to current District law. Under current District law it is a defense to the senior citizen victim enhancement that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed."[237] Similarly, under the current minor victim enhancement, it is a defense that "the accused reasonably believed that the victim was not a minor [person less than 18 years old] at the time of the offense."[238] Instead of an affirmative defense, the RCC assault and robbery offenses use

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[229] D.C. Code § 22-3602 ("For purposes of this section, the term 'citizen patrol' means a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for certain District of Columbia neighborhoods with the goal of crime prevention. The term shall include, but is not limited to, Orange Hat Patrols, Red Hat Patrols, Blue Hat Patrols, or Neighborhood Watch Associations.").

[230] RCC § 22A-1201.

[231] RCC § 22A-1202.

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

[233] D.C. Code § 22-3601(c) (defining "adult" as a "person 18 years of age or older at the time of the offense" and "minor" as a "person under 18 years of age at the time of the offense.").

[234] The current enhancement contain an affirmative defense that the accused "reasonably believed" that the victim was not a minor at the time of the offense. D.C. Code § 22-3611(b). However, the affirmative defense does not apply to the required age difference, suggesting that a similar requirement was not intended for the age difference.

[235] D.C. Crim. Jur. Instr. § 8.103.

[236] D.C. Code § 22-932 ("(c)'Elderly person' means a person who is 65 years of age or older."); D.C. Code § 22-3601. "(a) Any person who commits any offense listed in subsection (b) of this section against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.

[237] D.C. Code § 22-3601(c).

[238] D.C. Code § 22-3611(b).

gradations for a "protected person" that apply a "reckless" culpable mental state to whether the complaint was a "protected person." "Reckless" is defined in RCC § 22A-206 and means that, under the RCC gradations of robbery and assault based on the age of the complainant, the accused must disregard a substantial and unjustifiable risk that the complainant was under 18 or was 65 years of age or older.[239] The "reckless" culpable mental state will preserve the substance of the defenses for both the senior citizen enhancement and minor enhancement.[240] Using a reckless culpable mental state to limit the scope of age-based penalty enhancements in the RCC assault and robbery statutes improves the clarity and consistency of the offenses because the RCC assault and robbery statutes apply a "recklessly" mental state to the other categories of individuals in the definition of "protected person."

The inclusion of "vulnerable adult"[241] in subsection (C) of the definition of "protected person" effectively makes harms to a "vulnerable adult" subject to new enhanced penalties in RCC assault and robbery offenses. Under current District law, a vulnerable adult is extended special protection under the criminal abuse of a vulnerable adult (D.C. Code § 22-933), financial exploitation of a vulnerable adult or elderly person (D.C. Code § 22-933.01), and criminal negligence (D.C. Code § 22-934) statutes. As vulnerable adults are among those least able to resist criminal acts, the inclusion of a penalty enhancement for assaulting or robbing such persons in the RCC improves these offenses' proportionality.

The inclusion of a "law enforcement officer" and "public safety officer" in subsections (D) and (E) of the definition of "protected person" effectively makes harms to some persons in these groups subject to new enhanced penalties in the RCC assault and robbery offenses. Under current District law, the assault of a police officer (APO)[242] and murder of a law enforcement officer[243] statutes extend special protection to a "law enforcement officer" while in the course of his or her official duties, or on account of his or her status as a law enforcement officer. Through their gradations referencing a "protected person," the RCC robbery and assault offenses also provide enhanced penalties where a law enforcement officer is victimized. However, as the RCC definitions of law enforcement officer and public safety officer are, collectively, slightly more expansive than the current APO definition—because the RCC definition also includes persons

[239] Note that, the use of the "reckless" culpable mental state covers both situations in the current defense for elderly persons. If an accused "knew or reasonably believed" that the complaining witness was not 65 years of age or older, the accused would not satisfy the "reckless" culpable mental state, and the enhanced gradation would not apply. Similarly, if the accused "could not have known or determined the age of the victim because of the manner in which the offense was committed," he or she will not satisfy the "reckless" culpable mental state, and the enhanced gradation will not apply.

[240] The current enhancement for crimes against senior citizens makes it a defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial and unjustifiable risk that the complainant was 65 years of age or older. Similarly, the current enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code Ann. § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial and unjustifiable risk that the complainant was under 18 years of age.

[241] The definition of "vulnerable adult" is discussed in the commentary to the definition in RCC § 22A-1001(21).

[242] D.C. Code § 22-405.

[243] D.C. Code § 22-2106.

referenced in the murder of a law enforcement officer statute's definition—the RCC assault penalty enhancement for assault is slightly broader in applicability.[244] For the RCC robbery statute, providing an enhancement for law enforcement and public safety officers is new, as there is no such enhancement in existing District law. The expansion of a penalty enhancement for harming such persons improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

Fourth, inclusion of "a transportation worker" in subsection (F) of the definition of "protected person" effectively makes harms to some persons in this group subject to new enhanced penalties in the RCC assault and robbery offenses. Under current District law, taxicab drivers,[245] transit operators, [246] and Metrorail station managers[247] are extended special protection while in the course of their official duties. However, as the RCC definition of "transportation worker" is slightly more expansive than the current statutes by including private car service drivers,[248] the RCC penalty enhancement for assault and robbery is slightly broader in its applicability. The expansion of a penalty enhancement for harming car service drivers improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

Fifth, inclusion of "District official or employee" in subsection (G) of the definition of "protected person" effectively makes harms to some persons in this group subject to different enhanced penalties in the RCC assault and robbery offenses. Under current District law, the protection of District public officials statute[249] extends special protection to "assaults" causing injury, or the use of force that interferes with District officials or employees in the course of their duties. Through their gradations referencing a "protected person," the RCC robbery and assault offenses also provide enhanced penalties where a District official or employee is victimized. However, the RCC penalty enhancement for assault and robbery applies to gradations in a more proportionate manner to the resulting harm than under current D.C. Code § 22-851, which has only two gradations.[250] The change improves these offenses' consistency and proportionality of statutes by treating similarly protected persons experience similar harms equally.

Sixth, inclusion of "a citizen patrol member" in subsection (H) of the definition of "protected person" effectively makes harms to some persons in this group subject to different enhanced penalties in the RCC assault and robbery offenses. Current District law provides a penalty enhancement for simple assaults, aggravated assaults, assaults with a deadly weapon, and

[244] For example, the RCC definition of "law enforcement officer" applicable to assaults now includes "Metro Transit police officers" based on identical language in the District's current murder of a law enforcement officer statute defining a "law enforcement officer." Similarly, the RCC definition of "public safety employee" applicable to assaults now includes an "emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician" from another jurisdiction, based on identical language in the District's current murder of a law enforcement officer statute defining a "public safety employee."

[245] D.C. Code § 22-3751.

[246] D.C. Code § 22-3751.01.

[247] D.C. Code § 22-3751.01.

[248] The RCC definition of "transportation worker" applicable to assaults now includes a "person who is registered to operate, and is operating, a personal motor vehicle to provide private vehicle-for-hire service in contract with a private vehicle-for-hire company as defined by D.C. Code 50-301.03(16B)."

[249] D.C. Code § 22-851.

[250] For example, current D.C. Code § 22-851(c) provides a 3 year maximum penalty for any "assault" and D.C. Code § 22-851(d) provides a 5 year maximum penalty for any use of "force" that "impedes" or "interferes" with a District employee in the course of their duties. However, there are no other gradations for more serious resulting harms, unlike in the gradations for the RCC assault and robbery statutes.

robbery of a member of a citizen patrol in the course of their duties.[251] Through their gradations referencing a "protected person," the RCC robbery and assault offenses also provide enhanced penalties where a member of a citizen patrol is victimized. However, the RCC penalty enhancement for assault and robbery applies to gradations in a more proportionate manner to the resulting harm than under current D.C. Code § 22-3602.[252] The change improves these offenses' consistency and proportionality of statutes by treating similarly protected persons experience similar harms equally.

Other changes to the RCC robbery and assault statutes as a result of the use of "protected person" in the gradations are merely clarificatory. For instance, because the element that the complainant is a "protected person" is part of the RCC robbery and assault offense gradations rather than a stand-alone penalty enhancement, there is no need to specify that the complainant must satisfy the requirements of the definition "at the time of the offense" as some current sentencing enhancements do.[253]

***Relation to National Legal Trends*.** The MPC does not enhance assault or robbery on the basis of the identity of the complainant. However, the revisions to the District's current penalty enhancements and offenses for individuals of specific ages, occupations, and status as a "vulnerable adult," as reflected in the definition of "protected person," are supported by national trends.

First, although the substance of the requirements for senior citizens and minors is largely the same in the definition of "protected person" as it is in the current penalty enhancements, the RCC assault and robbery offenses effectively eliminate the defenses for these enhancements that exist under current District law by relying on a culpable mental state requirement. Many of the reformed jurisdictions' assault statutes enhance some or all grades of the offense due to the complaining witness being elderly[254] or young,[255] with varying age thresholds. None of these jurisdictions use an affirmative defense in the penalty enhancement.

Second, inclusion of "vulnerable adult"[256] in the definition of "protected person" effectively makes harms to a "vulnerable adult" subject to new enhanced penalties in RCC assault and robbery offenses. A significant number of the reformed jurisdictions enhance assaults against individuals with physical or mental disabilities that limit their ability to care for themselves.[257]

Third, inclusion of a "law enforcement officer" and "public safety officer" in the definition of "protected person" effectively makes harms to some persons in these groups subject to new enhanced penalties in the RCC assault and robbery offenses. Most reformed jurisdictions

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[251] D.C. Code § 22-3602.

[252] Notably, the current D.C. Code enhancement for assaults to members of citizen patrols does not apply to felony assaults (resulting in significant bodily injury).

[253] D.C. Code § 22-3601; D.C. Code § 22-3611(c)(1), (c)(2); D.C. Code § 22-3751; D.C. Code § 22-3751.01(a).

[254] *See, e.g.*, Ark. Code Ann § 5-13-202(a)(4)(D); Del. Code Ann tit. 11 § 612(a)(6); 720 Ill. Comp. Stat. Ann. 5/12-3.05(d)(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3).

[255] *See, e.g.*, Ark. Code Ann. §§ 5-13-201(a)(7), 5-13-202(a)(4)(d); Ariz. Rev. Stat. Ann. § 13-1204(A)(6); Del. Code Ann tit. 11 § 612(a)(11); 720 Ill. Comp. Stat. Ann. 5/12-3.05(b); Ind. Code Ann. § 35-42-2-1(e)(3), (g)(5); N.H. Stat. Ann. §§ 631:1(I)(d), 631:2(d); N.D. Cent. Code Ann. § 12.1-17-02(2).

[256] The definition of "vulnerable adult" is discussed in the commentary to the definition in RCC § 22A-1001(21).

[257] *See, e.g.*, Ark. Code Ann. § 5-13-202(a)(4)(F); Conn. Gen. Stat. Ann. § 53a-59a; Colo. Rev. Stat. Ann. § 18-6.5-103; 720 Ill. Comp. Stat. Ann. 5/12-3.05(b); Ind. Code Ann. § 35-42-2-1(1)(e)(5), (1)(g)(5)(D); Del. Code Ann. tit. 11, § 1105; Minn. Stat. Ann. § 609.2231(8); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

enhance assaults when the complaining witness is a LEO.[258] The scope of the definition of "law enforcement officer," "peace officer," and similar terms varies amongst jurisdictions, but several seem to include officers similar to Metro transit police.[259] In addition, many reformed jurisdictions enhance assaults to emergency medical first responders, either in the same enhanced gradation for assaults against LEOs,[260] or in a lesser gradation than an assault on a LEO.[261]

Fourth, inclusion of "a transportation worker" in the definition of "protected person" effectively makes harms to some persons in this group subject to new enhanced penalties in the RCC assault and robbery offenses. At least one reformed jurisdiction, New York, enhances assaults against the drivers of private vehicles for hire,[262] and several reformed jurisdictions specifically enhance assaults committed against public transportation workers.[263]

Fifth, inclusion of "District official or employee" in the definition of "protected person" effectively makes harms to some persons in this group subject to different enhanced penalties in the RCC assault and robbery offenses. Several reformed jurisdictions enhance assaults against state officials or employees.[264]

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[258] *See, e.g.*, Ala. Code § 13A-6-21(4); Haw. Rev. Stat. Ann. §§ 707-712.5, 707-712.6; Ky. Rev. Stat. Ann. § 508.025; N.D. Cent. Code Ann. § 12.1-17-01(2); Ohio Rev. Code Ann. §§ 2903.11(D), 2903.13(C)(5); Or. Rev. Stat. Ann. § 163.208; 18 Pa. Stat. Ann. § 2702(a)(2), (a)(3); Conn. Gen. Stat. Ann. §53a-167c(a)(1), (a)(5); Me. Rev. Stat. tit. 17-A, § 752-A; Utah Code Ann. § 76-5-102.4; Del. Code Ann. tit. 11, §§ 601(c), 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. Ann. 5/12-1, 12-2(b)(4.1), (d), 12-3.05(a)(3), (d)(4), (h); Minn. Stat. Ann. §§ 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and 609.2231(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Mont. Code Ann. § 45-5-210; N.J. Stat. Ann. § 2C:12-1(5); S.D. Codified Laws §§ 22-18.1-05; Ind. Code Ann. § 35-42-2-1(e)(2), (g)(5); Ariz. Rev. Stat. Ann. § 13-1204(A)(8), (F); Wis. Stat. Ann. § 940.23; Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (c.5).

[259] *See, e.g.*, Ark. Code Ann. § 5-1-102(10) ("'Law enforcement officer" means any public servant vested by law with a duty to maintain public order or to make an arrest for an offense."); Ariz. Rev. Stat. Ann. § 13-105(29) ("'Peace officer" means any person vested by law with a duty to maintain public order and make arrests and includes a constable."); Mont. Code Ann. § 45-2-101(55) ("'Peace officer' means a person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of the person's authority.").

[260] *See, e.g.*, Ala. Code § 13A-6-21(4) ("emergency medical personnel."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (c.5) ("emergency medical service provider" or "emergency medical care provider."); Del. Code Ann. ti. 11, §§ 601(c), 612(a)(3), 613(a)(5) (including emergency medical technicians and paramedics); K.Y. Rev. Stat. Ann. § 508.025(1)(4) ("paid or volunteer emergency medical services personnel certified or licensed pursuant to KRS Chapter 311A, if the event occurs while personnel are performing job-related duties."); Conn. Gen. Stat. Ann. § 53a-167c(a) ("emergency medical . . . personnel."); Mo. Ann. Stat. §§ 565.052, 565.054, 565.056 and 565.002 (defining "special victim," in part, as "[e]mergency personnel, any paid or volunteer firefighter, emergency room, hospital, or trauma center personnel, or emergency medical technician, assaulted in the performance of his or her official duties or as a direct result of such official duties."); N.J. Stat. Ann. § 2C:12-1(b)(5)(a), (b)(5)(c) ("Any person engaged in emergency first-aid or medical services acting in the performance of his duties.").

[261] *See, e.g.*, Ark. Code Ann. §§ 5-13-201(c)(3) (enhancing first degree battery if the complainant is a "law enforcement officer acting in the line of duty" and 5-13-202(a)(4)(A), (a)(4)(E) (enhancing second degree battery when the complainant is a LEO or an emergency medical services provider); Ariz. Rev. Stat. Ann. § 13-1204(A)(8)(a), (A)(8)(c), (E), (F) (making aggravated assault against a peace officer either a class 5 felony, unless it results in physical injury, in which case it is a class 4 felony, and making aggravated assault against an emergency medical technician or paramedic a class 6 felony).

[262] N.Y. Penal Law § 60.07.

[263] *See, e.g.*, Del. Code Ann. tit. §§ 11, 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. 5/12-3.05(d)(7); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); N.J. Stat. Ann. § 2C:12-1(g); Or. Rev. Stat. Ann. § 163.164(d); Tenn. Code Ann. § 39-13-102(d).

[264] *See, e.g.*, Ark. Code Ann. § 5-13-202(4)(D); Del. Code Ann. tit. 11, § 612(a)(9); 720 Ill. Comp. Stat. 5/12-3.05(d)(6); Tenn. Code Ann. § 39-13-102(d); Tex. Penal Code §§ 22.01(b)(1), 22.02(b)(2)(A), (b)(2)(B); Wis. Stat. Ann. § 940.20.

Sixth, inclusion of "a citizen patrol member" in the definition of "protected person" effectively makes harms to some persons in this group subject to different enhanced penalties in the RCC assault and robbery offenses. At least two reformed jurisdictions specifically enhance assaults on similar citizen patrol groups.[265]

(16) "Public safety employee" means:

(A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and

(B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph.

Explanatory Note. "Public safety employee" is currently defined in D.C. Code § 22-2106(b)(1), murder of a law enforcement officer.[266] The RCC definition is used in the revised definition of "protected person,"[267] and [other revised offenses against persons statutes].

Relation to Current District Law. The RCC definition is identical to the current definition in the District's murder of a law enforcement officer statute.

However, through its use in the definition of "protected person," the revised definition of a "public safety officer" effectively makes harms to some persons in these groups subject to new enhanced penalties in the RCC assault and robbery offenses. Under current District law, a law enforcement officer is extended special protection while in the course of his or her official duties under the current assault of a law enforcement (APO) statute[268] and the definition of law enforcement officer in the current APO statute explicitly includes District firefighters. However, under current District law, there are no enhanced penalties specifically for paramedics and emergency medical technicians outside of murder.[269] Through their gradations referencing a "protected person," the RCC robbery and assault offenses effectively provide new, enhanced penalties where a public safety employee—including firefighters, paramedics, and emergency medical technicians—is victimized. The expansion of a penalty enhancement for harming such persons improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

(17) "Serious bodily injury" means a bodily injury or significant bodily injury that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement; or

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[265] Minn. Stat. Ann. § 609.2231(7); 720 Ill. Comp. Stat. Ann. 12-3.05(d)(4).

[266] D.C. Code § 22-2106(b)(1). ("'Public safety employee' means: (A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and (B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph.").

[267] RCC § 22A-1001(15).

[268] D.C. Code § 22-405.

[269] Note however, that assault-type behavior against all District employees in the course of their duties (including paramedics and emergency medical technicians) are subject to higher level penalties under the District's protection of district public officials statute, D.C. Code § 22-851.

(C) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Explanatory Note. "Serious bodily injury" is the highest of the three levels of physical injury defined in the revised offenses against persons. The definition incorporates the definitions of both lower levels: "bodily injury" and "significant bodily injury" in RCC § 22A-1001(1) and (18). The injury must involve a substantial risk of death or result in protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

"Serious bodily injury" is statutorily defined in Title 22 of the current D.C. Code only for animal cruelty[270] and sexual abuse offenses, [271] however there also are undefined references to "serious bodily injury" in the current aggravated assault,[272] terrorism,[273] criminal abuse or neglect of a vulnerable adult,[274] contributing to the delinquency of a minor,[275] and unauthorized use of motor vehicle[276] statutes. The RCC definition of "serious bodily injury" is used in the revised definition of "dangerous weapon,"[277] and the revised offenses of robbery,[278] assault,[279] and [other revised offenses against persons statutes].

Relation to Current District Law. The term "serious bodily injury" is not generally defined in the current District code. However, the DCCA has generally applied the definition of

[270] D.C. Code § 22-1001 ("For the purposes of this section, 'serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, mutilation, or protracted loss or impairment of the function of a bodily member or organ. Serious bodily injury includes, but is not limited to, broken bones, burns, internal injuries, severe malnutrition, severe lacerations or abrasions, and injuries resulting from untreated medical conditions.").

[271] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[272] D.C. Code § 22-404.01 ("A person commits the offense of aggravated assault if: (1) By any means, that person knowingly or purposely causes serious bodily injury to another person…."); D.C. Code § 22-404.03 ("A person commits the offense of aggravated assault on a public vehicle inspection officer if that person…causes serious bodily injury to the public vehicle inspection officer; or…engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.").

[273] D.C. Code § 22-3152 ("Weapon of mass destruction" means: (A) Any destructive device that is designed, intended, or otherwise used to cause death or serious bodily injury…."); D.C. Code § 22-22-3154 ("A person who manufactures or possesses a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries … or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries…."); D.C. Code § 22-3155 ("A person who uses, disseminates, or detonates a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries … or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries….").

[274] D.C. Code § 22-936 ("A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes serious bodily injury….").

[275] D.C. Code § 22-811(b)(4) ("A person convicted of violating subsection (a) of this section that results in serious bodily injury to the minor or any other person shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[276] D.C. Code § 22-3215(d)(2)(ii) ("If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.").

[277] RCC § 22A-1001(5).

[278] RCC § 22A-1201.

[279] RCC § 22A-1202.

"serious bodily injury" that is codified in the current sexual abuse statutes[280] to the offense of aggravated assault.[281] The RCC definition of "serious bodily injury" is identical to the definition for sexual abuse statutes that exists in current DCCA case law with two exceptions.

First, the revised definition does not include "unconsciousness," which is in the current definition of "serious bodily injury" for sexual abuse offenses. Notwithstanding the DCCA's general adoption of the "serious bodily injury" definition for sexual abuse crimes as applicable to assault crimes, the DCCA has specifically declined to hold that for assault, "unconsciousness" is categorically of the same severity as the other harms in the definition of "serious bodily injury."[282] In the RCC offenses against persons, a temporary loss of consciousness constitutes "significant bodily injury" per RCC § 22A-1001(18). More lengthy losses of consciousness still may constitute serious bodily injury if the unconsciousness causes "a protracted loss or impairment of the function of a bodily member, organ, or mental faculty," but unconsciousness is no longer categorically treated as a serious bodily injury. Deleting "unconsciousness" from the revised definition of "serious bodily injury" improves the clarity of District law and the proportionality of the revised offenses because "serious bodily injury" is reserved for the most severe injuries.

Second, the revised definition no longer includes "extreme physical pain," which is in the current definition of "serious bodily injury" for sexual abuse offenses. The DCCA has stated that the term "extreme physical pain" "is regrettably imprecise and subjective, and we cannot but be uncomfortable having to grade another human being's pain."[283] Deleting "extreme physical pain" from the revised definition of "serious bodily injury" improves the clarity and the proportionality of the revised definition because "serious bodily injury" is reserved for only the most severe, objective harms.

Other than these changes, the revised definition does not change existing District law on the meaning of "serious bodily injury." The threshold for such an injury remains high.[284] The

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[280] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[281] *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute.).

[282] *In re D.P.*, 122 A.3d 903, 908 n. 10 (D.C. 2015) ("In light of our conclusion that [appellant] lacked the requisite mens rea for aggravated assault, we do not determine whether the complainant's brief loss of unconsciousness—from which she fully recovered without medical treatment and which did not amount to significant bodily injury . . . amounted to serious bodily injury."); *Vaughn v. United States*, 93 A.3d 1237, 1269 n. 39 (D.C. 2014) ("We question whether the government presented evidence that [the complainant] suffered serious bodily injury at all. The government presented evidence that [the complainant] briefly lost consciousness following the attack, that the head injuries he incurred did not cause substantial pain, and that, although he sought medical care, he fully recovered from these injuries without medical intervention. This appears to fall well below the "high threshold of injury" . . . we have set to prove aggravated assault.") (internal citations omitted).

[283] *Swinton v. United States*, 902 A.2d 772, 777 (D.C. 2006).

[284] *Swinton v. United States*, 902 A.2d 772, 775 (D.C. 2006) ("Our decisions since *Nixon* have emphasized 'the high threshold of injury, that "the legislature intended in fashioning a crime that increases twenty-fold the maximum prison term for simple assault." *Jenkins v. United States*, 877 A.2d 1062, 1069 (D.C.2005) (internal quotation marks and citations omitted). The cases in which we have found sufficient evidence of 'serious bodily injury' to support convictions for aggravated assault thus have involved grievous stab wounds, severe burnings, or broken bones, lacerations and actual or threatened loss of consciousness. The injuries in these cases usually were life-threatening or disabling. The victims typically required urgent and continuing medical treatment (and, often, surgery), carried

syntax of the revised definition clarifies that, as under current District case law interpreting the definition for the sexual abuse statutes,[285] the "substantial risk" applies only to the risk of death.

Relation to National Legal Trends. The Model Penal Code (MPC) defines "serious bodily injury" for offenses against persons as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[286] A majority of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[287] (reformed jurisdictions) have adopted the MPC definition[288] or a substantively similar definition.[289]

The revised definition of "serious bodily injury" is substantially similar to the definitions in the MPC and reformed jurisdictions. In addition, the two revisions to the definition of "serious bodily injury," deleting "unconsciousness" and "extreme physical pain," are well supported by national legal trends. Only three reformed jurisdictions[290] and at least one non-reformed jurisdiction[291] include unconsciousness in the definition of the highest level of bodily

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visible and long-lasting (if not permanent) scars, and suffered other consequential damage, such as significant impairment of their faculties. In short, these cases have been horrific." (internal citations omitted)).

[285] *Scott v. United States*, 954 A.2d 1037, 1046 (D.C. 2008) ("[W]e readily conclude that the 'substantial risk' . . . is only a substantial risk of death, not a substantial risk of extreme pain, disfigurement, or any of the other conditions listed.").

[286] Model Penal Code § 210.0(3).

[287] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[288] *See, e.g.*, Haw. Rev. Stat. Ann. § 707-700 ("'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Utah Code Ann. § 76-6-601(11) ("'Serious bodily injury' means bodily injury that creates serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death."); 18 Pa. Stat. Ann. § 2301 (defining "serious bodily injury" as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.").

[289] *See, e.g.*, Ala. Code § 13A-1-2(14) (defining "serious physical injury as "[p]hysical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ."); Ark. Code Ann. § 5-1-102(21) ("'Serious physical injury' means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ."); Me. Rev. Stat. tit. 17-A, § 2(23) ("'Serious bodily injury' means a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member organ, or extended convalescence necessary for recovery of physical health."); Tex. Penal Code Ann. § 1.07(46) ("'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Mo. Ann. Stat. § 556.061 (defining "serious physical injury" as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."); Wash. Rev. Code Ann. § 9A.04.110 (4)(c) (defining "great bodily harm" as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.").

[290] Ind. Code Ann. § 35-31.5-2-292(2) ("unconsciousness."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("unconsciousness."); Tenn. Code Ann. § 39-11-106(34)(B) ("protracted unconsciousness.").

[291] Wyo. Stat. Ann. § 6-1-104(x) ("unconsciousness.").

injury. Similarly, only four reformed jurisdictions[292] and at least one non-reformed jurisdiction[293] include extreme pain or similar language in the definition of the highest level of bodily injury. The MPC definition of "serious bodily injury" does not include unconsciousness or pain.[294]

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

Explanatory Note. "Significant bodily injury" is the intermediate level of three levels of physical injury defined in the revised offenses against persons. The definition incorporates the definition of "bodily injury" in RCC § 22A-1001(1). The injury must require hospitalization or immediate medical treatment beyond what a layperson can personally administer and the hospitalization or immediate medical treatment must be necessary to either prevent long-term physical damage or to abate severe pain. Regardless whether the requirements in the first sentence of the definition are proven, the injuries specified in the last sentence of the definition constitute at least "significant bodily injury," such as a fracture of a bone or a concussion.

"Significant bodily injury" is statutorily defined in similar terms in Title 22 of the current D.C. Code for the felony assault with significant bodily injury[295] and injuring a police animal[296] statutes. However, there is also an undefined reference to "significant bodily injury" in the assault on a police officer[297] statute. The RCC definition of "significant bodily injury" is used in the definition of "serious bodily injury"[298] and the offenses of robbery,[299] assault,[300] and [other revised offenses against persons].

Relation to Current District Law. The revised definition of "significant bodily injury" is consistent with the current statutory definitions and generally codifies the substantial body of DCCA case law that has developed on the definition.[301] For example, District case law has

[292] Ind. Code Ann. § 35-31.5-2-292(3) ("extreme pain."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("extreme pain."); Ohio Rev. Code Ann. § 2901.01(5) ("any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Tenn. Code Ann. § 39-11-106(34)(C) ("extreme physical pain.")

[293] Wyo. Stat. Ann. § 6-1-104(x) ("severe protracted physical pain.").

[294] Model Penal Code § 210.0(3).

[295] D.C. Code 22-404(b) ("For the purposes of this paragraph, the term "significant bodily injury" means an injury that requires hospitalization or immediate medical attention.").

[296] D.C. Code 22-861(a)(2) ("'Significant bodily injury' means an injury that requires hospitalization or immediate medical attention.").

[297] D.C. Code 22-405(c) ("A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both.").

[298] RCC § 22A-1001(16).

[299] RCC § 22A-1201.

[300] RCC § 22A-1202.

[301] *Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016) ("On the basis of our case law, we can summarize the definition of significant bodily injury as follows: to qualify as a significant bodily injury, the nature of the injury

construed medical "attention" in the current statutory definition to mean medical "treatment,"[302] and has held that the treatment must be "to prevent long-term physical damage or to abate severe pain,"[303] and be "beyond what a layperson can personally administer."[304] By codifying these requirements, the revised definition adopts the position of the DCCA that determining whether an injury is sufficient to constitute a "significant bodily injury" is an objective[305] inquiry as to the nature of the injury. Assessment of the nature of the injury can be a difficult factual issue for a jury or fact finder,[306] and in some cases expert medical testimony may be required to prove a significant bodily injury.[307] Whether a person wants to receive medical care[308] and whether medical care occurs[309] are not dispositive as to whether an injury is "significant bodily injury."

However, the RCC definition of "significant bodily injury" departs from the current statutory definition and DCCA case law in two ways.

First, the revised definition of "significant bodily injury" clarifies that an injury that "requires hospitalization" means the injury requires hospitalization to "prevent long-term

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itself must, in the ordinary course of events, give rise to a practical need for immediate medical attention beyond what a layperson can personally administer, either to prevent long-term physical damage or to abate severe pain.") (internal quotation marks omitted). Note, however, that the DCCA itself has recognized that its opinions have not always been clear or consistent. *Id.* at 1053.

[302] *See, e.g., Quintanilla v. United States*, 62 A.3d 1261, 1264-65 (D.C. 2013) ("medical attention means the treatment that is necessary to preserve the health and wellbeing of the individual, *e.g.*, to prevent long-term physical damage, possible disability, disfigurement, or severe pain . . . the attention required— treatment—is not satisfied by mere diagnosis.") (internal quotation marks omitted); *In re D.P.*, 122 A.3d 903, 911 (D.C. 2015) ("As interpreted by this court, immediate medical attention refers to treatment; in other words, the attention required . . . is not satisfied by mere diagnosis." (internal quotation marks omitted).

[303] *See, e.g., Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016) ("In other words, there are two independent bases for a fact finder to conclude that a victim has suffered a significant bodily injury: (1) where the injury requires medical treatment to prevent "long-term physical damage" or "potentially permanent injuries"; or (2) where the injury requires medical treatment to abate the victim's "severe" pain."); *Wilson v. United States*, 140 A.3d 1212, 1218 (D.C. 2016) ("However bad the injuries, may seem, the government's combined evidence fails to show that immediate medical attention was required to prevent longterm [sic] physical damage and other potentially permanent injuries or abate pain that is severe instead of lesser, short-term hurts." (internal quotation marks omitted).

[304] *See, e.g., Quintanilla v. United States*, 62 A.3d 1261, 1265 (D.C. 2013) ("And we may infer, accordingly, that everyday remedies such as ice packs, bandages, and self-administered over-the-counter medications, are not sufficiently medical to qualify under the statute, whether administered by a medical professional or with self-help. Treatment of a higher order, requiring true medical expertise, is required.") (internal quotation marks omitted); *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("The focus here is not, however, whether [the complaining witness] needed to remove the glass to prevent long-term damage, but whether a medical professional was required to remove the glass because [the complaining witness] could not have safely removed it himself—for example, with tweezers or another self-administered remedy.").

[305] *Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016) ("The term "immediate medical attention" and the issue of whether the victim required hospitalization are objective inquiries.").

[306] *Belt v. United States*, 149 A.3d 1048, 1056 (D.C. 2016).

[307] *See Jackson v. United States*, 996 A.2d 796, 798 (D.C. 2010) (noting that in some cases, such as where the subject of proper medical treatment is not within the realm of common knowledge and everyday experience a medical opinion may be necessary to demonstrate criminal neglect).

[308] *See, e.g., In re R.S.*, 6 A.3d 854, 859 (D.C. 2010) ("[N]or is a decision by the injured party not to seek immediate medical attention determinative as to whether the injury in fact called for such attention.").

[309] *See, e.g., Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("Again, the standard is an objective one, and the fact that medical treatment occurred does not mean that medical treatment was required."); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) ("Even assuming [the complaining witness] did receive some form of treatment in the hospital, therefore, the fact that medical treatment occurred does not mean that medical treatment was required." (internal quotation marks omitted) (citing *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015)).

physical damage or to abate severe pain." DCCA case law has speculated that the reference to hospitalization in the current statutory definition of "significant bodily injury" for assault with significant bodily injury may be intended to cover "latent" injuries that are not immediately apparent.[310] DCCA case law has also said that the requirements for an injury that requires "hospitalization" may be different from an injury that requires "immediate medical attention."[311] This case law suggests that hospitalization for merely diagnostic purposes, and not treatment, may be sufficient to prove a significant bodily injury.[312] However, in each of the DCCA cases where hospitalization for diagnostic testing satisfied "significant bodily injury," the complaining witness sustained an injury.[313] Consequently, neither the current statute nor existing case law provides a clear standard to be used to determine when "hospitalization" satisfies the current definition of "significant bodily injury." The RCC definition of "significant bodily injury" fills this gap by specifying that the standard for whether an injury requires hospitalization at any point in time is whether the hospitalization is required to "prevent long-term physical damage or to abate severe pain." This is the same standard as has been used for injuries requiring "immediate medical attention," and precludes finding a "significant bodily injury" where there is hospitalization for merely diagnostic purposes.

Second, the RCC definition of "significant bodily injury" departs from the current statutory definition and DCCA case law by providing a bright-line list of specific types of

[310] *In re R.S.*, 6 A.3d 854, 859 n.3 (D.C. 2010) ("It is not easy to envision a situation in which an injury might require hospitalization and yet not also require immediate medical attention. Perhaps the hospitalization definition, which is presented as an alternative, is to cover a situation where an injury is only latent and manifests itself a considerable time after the fact; *e.g.*, an unrecognized internal injury or concussion.").

[311] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1264 n.17 ("One can conceive of injuries (for example, a head injury that may or may not have resulted in a concussion) where immediate medical 'attention' in the form of monitoring or even testing is required, but where no 'treatment' is ultimately necessary to preserve or improve the victim's health. On the other hand, situations can surely arise when immediate then prolonged monitoring, coupled with testing, will eventuate in treatment. The question as to where the line is drawn between monitoring or testing and treatment in these fluid situations, however, is likely to become moot, as such scrutiny will normally involve hospitalization, the alternative basis for finding 'significant' bodily injury."); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) ("Then in *Quintanilla*, the court left open the possibility that an injury could require hospitalization in fluid situations that involve immediate then prolonged monitoring, coupled with testing, regardless of whether such monitoring or testing eventuate[s] in treatment.") (citations and quotation marks omitted).

[312] *Blair v. United States*, 114 A.3d 960, 979 (D.C. 2015) ("We distinguished hospitalization, which we called the alternative basis for finding significant bodily injury, observing that it may be entailed in fluid situations, involving immediate than prolonged monitoring, coupled with testing, that may (or may not) 'eventuate in treatment.'") (citations and quotation marks omitted).

[313] *Blair v. United States*, 114 A.3d 960, 980 (D.C. 2015) ("While not every blow to the head in the course of an assault necessarily constitutes significant bodily injury, we conclude that where, as here, the defendant repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries, and also caused injuries all over the victim's body, the assault is sufficiently egregious to constitute significant bodily injury. Because the testimony and photographic evidence in this case showed that appellant 'kept banging [the complainant's] head against the ground' with the result that she felt disoriented; that the hospital emergency room physician ordered a CAT scan and X-ray of her head and neck to determine whether she sustained internal injuries; and that C.H. sustained multiple abrasions and bruising all over her body, including trauma around her eye, we hold that the evidence was sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that [the complainant's] injuries were significant and thus to support appellant's conviction of felony assault.") (internal citations omitted); *Brown v. United States*, 146 A.3d 110, 114-16 (D.C. 2016) (finding the evidence sufficient for significant bodily injury when the complainant went to the hospital five days after the assault due to lingering head pain and other symptoms, was given a CAT scan, was diagnosed with a concussion, and was instructed about what to do in order to avert worsened or prolonged symptoms).

injuries that per se (inherently) constitute at least a "significant bodily injury." Whether or not the listed injuries could also meet the standards described in the first sentence of the RCC definition of "significant bodily injury" or also provide a basis for liability under the standard for the RCC definition of "serious bodily injury,"[314] proof of the listed injuries suffices to establish at least "significant bodily injury." Specifically listing per se significant injuries clarifies the current state of law, fills possible gaps in District law,[315] and may improve the consistency of adjudication.

The listed injuries in part reflect current District case law, which has generally held that concussions[316] and lacerations requiring stitches[317] are sufficient proof of significant bodily injury. The other injuries listed in the definition may frequently be the subject of criminal prosecutions but their status as significant bodily injuries has not been clearly (or at all) established in District case law. No District case law addresses severity of burns, but second degree burns are typically recognized as requiring medical treatment.[318] Loss of consciousness is currently a part of the statutory definition of "serious bodily injury" for sexual abuse offenses, [319] however DCCA case law has questioned, without resolving, whether loss of consciousness constitutes a "serious bodily injury" for purposes of assault.[320] The inclusion of a traumatic brain

[314] For example, a laceration that is one inch in length and one quarter inch in depth would be a per se significant bodily injury, but may also be a serious bodily injury if it results in protracted and obvious disfigurement.

[315] Current District case law appears to exclude from the definition of significant bodily injury latent injuries that, although requiring medical treatment, do not require admittance to a hospital. *Quintanilla v. United States*, 62 A.3d 1261, 1264 n.17 (D.C. 2013) ("[T]here is no provision in the statute for latent injuries that do not require hospitalization, even if they do ultimately require medical attention. It follows that, for injuries not requiring immediate medical attention, the injury will not be significant unless it does eventually require hospitalization."); *Teneyck v. United States*, 112 A.3d 906, 909 n.4 ("'[H]ospitalization' under the statute requires more than being admitted for outpatient care."); However, latent injuries (such as a concussion) that are per se significant bodily injuries listed in the second sentence of the RCC definition would be covered, even without proof of admittance to a hospital.

[316] *See Brown v. United States*, 146 A.3d 110, 114-15 (finding the evidence sufficient for "significant bodily injury" even though the complaining witness did not go to the hospital until five days after the attack when the complaining witness sustained repeated blows to his head and leg and the complaining witness was diagnosed with a concussion).

[317] *See, e.g.*, *Rollerson v. United States*, 127 A.3d 1220, 1232 (D.C. 2015) (Upholding finding of significant bodily injury based on medical treatment that included nine stiches for "gashes to her face" going down to the "white meat."); *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010)(Upholding finding of significant bodily injury based on medical treatment that included four to six inches); *Flores v. United States*, 37 A.3d 866, 867 (D.C.2011)(Upholding finding of significant bodily injury based on medical treatment that included "eight to ten stitches and a tetanus shot.").

[318] *See, e.g.*, https://www.cdc.gov/masstrauma/factsheets/public/burns.pdf (last visited December 1, 2017)(stating that, in contrast to first degree burns which may be treatable by a layperson, medical treatment from a trained professional is required.

[319] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[320] *In re D.P.*, 122 A.3d 903, 908 n. 10 (D.C. 2015) ("In light of our conclusion that [appellant] lacked the requisite mens rea for aggravated assault, we do not determine whether the complainant's brief loss of unconsciousness—from which she fully recovered without medical treatment and which did not amount to significant bodily injury . . . amounted to serious bodily injury."); *Vaughn v. United States*, 93 A.3d 1237, 1269 n. 39 (D.C. 2014) ("We question whether the government presented evidence that [the complainant] suffered serious bodily injury at all. The government presented evidence that [the complainant] briefly lost consciousness following the attack, that the head injuries he incurred did not cause substantial pain, and that, although he sought medical care, he fully recovered from these injuries without medical intervention. This appears to fall well below the "high threshold of injury" . . . we have set to prove aggravated assault.") (internal citations omitted).

injury[321] requires proof of such an injury, and mere evidence of blows to the head or diagnostic medical activity will not suffice.[322] The inclusion of a contusion (bruise) or other bodily injury to the neck or head caused by strangulation or suffocation as defined in RCC § 22A-1001(19) reflects the heightened seriousness of such injuries, particularly in light of research indicating such injuries are often linked to more serious patterns of violence.[323]

Other than these changes, the revised definition does not change existing District law on the meaning of "significant bodily injury."

Relation to National Legal Trends. Only seven[324] of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[325] (reformed jurisdictions) have an intermediate level of bodily injury like "significant bodily injury" in current District law. In addition, at least one non-reformed jurisdiction has a similar intermediate level of bodily injury.[326] The MPC does not have an intermediate level of bodily injury.

These jurisdictions take a variety of approaches in defining the intermediate level of bodily injury. None of them define the injury in terms of whether it requires immediate medical attention or hospitalization like the District's current and revised definitions of "significant bodily injury" do, although one jurisdiction does require "medical treatment when the treatment

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[321] For example, a concussion. *See* https://www.cdc.gov/headsup/basics/concussion_whatis.html (last visited Dec. 1, 2017).

[322] In one case, the DCCA upheld a conviction for felony assault based on injuries that chiefly, though not solely, consisted of head trauma which was subjected to diagnostic testing but apparently was not specifically diagnosed as a concussion. *See Blair v. United States*, 114 A.3d 960, 980 (D.C. 2015) ("While not every blow to the head in the course of an assault necessarily constitutes significant bodily injury, we conclude that where, as here, the defendant repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries, and also caused injuries all over the victim's body, the assault is sufficiently egregious to constitute significant bodily injury.") (internal citations omitted). The RCC definition of significant bodily injury calls the *Blair* ruling into question to the extent that there may not have been sufficient evidence that the injury caused by the defendant was a traumatic brain injury or that the injury otherwise required, to prevent long-term physical damage or to abate severe pain, hospitalization or immediate medical treatment beyond what a layperson can personally administer. The DCCA avoided reliance on the need for a medical diagnosis in a subsequent case involving head trauma. *Brown v. United States*, 146 A.3d 110, 116 (D.C. 2016) ("At the hospital, [the complaining witness] did not receive mere diagnosis, but was instructed [by the doctor] about what he needed to do to avert worsened or prolonged head pain or other symptoms. Thus [the complaining witness's] injury was one that, to preserve his well-being, necessitated that he be taken to the hospital shortly after the injury was inflicted."). To the extent the *Brown* court relied upon the doctor's diagnosis of a traumatic brain injury of the need for medical advice to avoid longer term damage, the decision is consistent with the RCC definition of "significant bodily injury."

[323] *See, e.g.*, Nancy Glass et al., Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women, Journal of Emergency Medicine, 35.3 (2008) (available online at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2573025/) (last visited December 1, 2017).

[324] Haw. Rev. Stat. Ann. § 707-700 ("substantial bodily injury."); Ind. Code Ann. § 35-31.5-2-204.5 ("moderate bodily injury."); Minn. Stat. Ann. § 609.02(7a) ("substantial bodily injury."); N.D. Cent. Code Ann. § 12.1-01-04(29) ("substantial bodily injury."); Utah Code Ann. § 76-1-601(12) ("substantial bodily injury."); Wash. Rev. Code Ann. § 9A.04.110(4)(b) ("substantial bodily harm."); Wis. Stat. Ann. § 939.22(38) ("substantial bodily harm.").

[325] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[326] S.C. Code Ann. § 16-3-600(A)(2) ("moderate bodily injury.").

requires the use of regional or general anesthesia."[327] The jurisdictions typically define the intermediate level of injury in relation to the impairment or disfigurement required in the highest level of bodily injury.[328] Many of the jurisdictions also include in their definitions specific injuries that will satisfy the intermediate level of bodily injury like the RCC does, including a fracture of bone,[329] certain lacerations,[330] burns,[331] temporary loss consciousness,[332] and concussions.[333] None of the definitions directly address injuries caused by strangulation or suffocation, although one jurisdiction does specifically list petechiae.[334]

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

Explanatory Note. "Strangulation or suffocation" is not statutorily defined in Title 22 of the current D.C. Code. The RCC definition is used in the definition of "significant bodily injury"[335] and [other revised offenses against persons statutes].

Relation to Current District Law. The RCC definition of "strangulation or suffocation" is new to District law.

(20) "Transportation worker" means:

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

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

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[327] S.C. Code Ann. § 16-3-600(A)(2) ("moderate bodily injury.").

[328] *See, e.g.*, Minn. Stat. Ann. § 609.02(7a) (defining "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member") and 609.02(7b) (defining "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.); N.D. Cent. Code Ann. § 12.1-01-04(29) (defining "substantial bodily injury" as a "substantial temporary disfigurement, loss, or impairment of the function of any bodily member or organ") and § 12.1-01-04(27) (defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs.").

[329] Haw. Rev. Stat. Ann. § 707-700 ("a bone fracture."); Minn. Stat. Ann. § 609.02(7a) ("causes a fracture of any bodily member."); Wash. Rev. Code Ann. § 9A.04.110(b) ("causes a fracture of any bodily part."); Wis. Stat. Ann. § 939.22(38) ("any fracture of a bone."); S.C. Code Ann. § 16-3-600(A)(2) ("injury that results in a fracture.").

[330] Haw. Rev. Stat. Ann. § 707-700 ("a major . . . laceration, or penetration of the skin."); Wis. Stat. Ann. § 939.22(38) ("a laceration that requires stiches.").

[331] Haw. Rev. Stat. Ann. § 707-700 ("a burn of at least second degree severity."); Wis. Stat. Ann. § 939.22(38) ("a burn.").

[332] Wis. Stat. Ann. § 939.22(38) ("temporary loss of consciousness.").

[333] Haw. Rev. Stat. Ann. § 707-700 ("concussion."); Wis. Stat. Ann. § 939.22(38) ("a concussion.").

[334] Wis. Stat. Ann. § 939.22(38).

[335] RCC § 22A-1001(18).

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

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

Explanatory Note. The definition of "transportation worker" encompasses categories of individuals involved in both public and private transportation.

"Transportation worker" is not statutorily defined in Title 22 of the current D.C. Code. However, the related terms of "mass transit vehicle,"[336] "Metrorail station manager,"[337] "transit operator,"[338] "private vehicle-for-hire operator,"[339] and the requirements for a taxicab driver as specified in current D.C. Code § 22-3751[340] are statutorily defined. The RCC definition of "transportation worker" is used in the definition of a "protected person,"[341] and [other revised offenses against persons statutes].

Relation to Current District Law. The revised definition provides a discrete name for various defined terms and requirements in existing District statutes. Except as noted below, the items in the RCC definition are substantively identical to those currently listed in the D.C. Code.

Subsection (A) of the definition of "transportation worker" is substantively identical to the definitions of "mass transit vehicle" and "transit operator" in current D.C. Code § 22-3751.01. Subsection (A) does not require, as in current D.C. Code § 22-3751.01, that the transit operator be "authorized" to operate the mass transit vehicle. Instead, the definition of "protected person" in RCC § 22A-1001(15), which includes a transportation worker, requires that the transportation worker be "in the course of his or her official duties."

Subsection (B) of the definition of "transportation worker" codifies the definition of a "Metrorail station manager" in current D.C. Code § 22-3751.01. Subsection (B) does not require, as in current D.C. Code § 22-3751.01, that the Metrorail station manager be "on duty." Instead the definition of "protected person" in RCC § 22A-1001(15), which includes a transportation worker, requires that the transportation worker be "in the course of his or her official duties."

Subsection (C) of the definition of "transportation worker" codifies the requirements for a taxicab driver as specified in current D.C. Code § 22-3751.

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[336] D.C. Code § 22-3751.01(b)(1) ("'Mass transit vehicle' means any publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia.").

[337] D.C. Code § 22-3751.01(b)(2) ("Metrorail station manager" means any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station.").

[338] D.C. Code § 22-3751.01(b)(3) ("'Transit operator' means a person who is licensed to operate a mass transit vehicle.").

[339] D.C. Code § 50-301.03(16C) ("'Private vehicle-for-hire operator' means an individual who operates a personal motor vehicle to provide private vehicle-for-hire service in contract with a private vehicle-for-hire company.").

[340] D.C. Code § 22-3751 ("Any person who commits an offense listed in § 22-3752 against a taxicab driver who, at the time of the offense, has a current license to operate a taxicab in the District of Columbia or any United States jurisdiction and is operating a taxicab in the District of Columbia may be punished by a fine of up to one and 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[341] RCC § 22A-1001(15).

Subsection (D) of the definition of "transportation worker" codifies the requirements for a private vehicle-for-hire operator in contract with a private vehicle-for-hire company as defined by D.C. Code § 50-301.03(16B). In addition to the requirements in D.C. Code 50-301.03(16B), subsection (D) requires the operator to be registered and operating the vehicle within the District of Columbia, requirements parallel to those in subsection (C).

It should be noted, however, that while the definition of a "transportation worker" may reflect no substantive change to current District statutory language, the use of this definition in particular offenses may result in substantive changes. For example, the RCC's robbery and assault statutes provide more severe penalties for harms inflicted on protected persons, including transportation workers. While a penalty enhancement for robbery and assault already applies under current District law to commercial vehicle operators,[342] specified WMATA employees,[343] and taxicab drivers, [344] such penalty enhancements do not apply to private vehicle-for-hire operators. Consequently, subsection (D) effectively changes District law as applied to the RCC robbery and assault statutes, through their reference to "protected persons" and "transportation workers." Inclusion of these drivers in the same category as other transportation workers improves the proportionality of the revised offenses against persons and removes a gap in current District law.

None of the subsections of the definition of "transportation worker" specify that the complainant must satisfy the requirements of the definition "at the time of the offense" as the current sentencing enhancements for certain transportation workers do.[345] The language is unnecessary when the revised offenses incorporate the transportation worker enhancement into the gradations of the revised offense as the RCC does.

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

Explanatory Note. The RCC definition of "vulnerable adult" specifies the requirements for proving a person is a "vulnerable adult" in the revised offenses against persons. Under this definition, the mental or physical limitation must substantially impair that person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests. Minor impairments, e.g. imperfect vision that can be remedied with prescription glasses, will not suffice.

The term "vulnerable adult" is statutorily defined in D.C. Code § 22-932 for offenses concerning abuse and neglect of adults.[346] The RCC definition of "vulnerable adult" is used in the definition of a "protected person,"[347] and [other revised offenses against persons statutes].

Relation to Current District Law. The RCC definition of "vulnerable adult" is identical to the current definition of "vulnerable adult" in D.C. Code § 22-932.

[342] D.C. Code § 22-3751.
[343] D.C. Code § 22-3751.
[344] D.C. Code § 22-3751.
[345] D.C. Code § 22-3751; D.C. Code § 22-3751.01(a).
[346] D.C. Code § 22-932 ("'Vulnerable adult' means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests.").
[347] RCC § 22A-1001(15).

The RCC "vulnerable adult" definition does not itself change current District law, but may result in changes of law as applied to particular offenses. For example, the RCC robbery and assault gradations are based in part on whether the victim was a "protected person,"[348] and a "vulnerable adult" is defined as one kind of "protected person."[349] Consequently, the RCC provides enhanced penalties for assaults and robberies of vulnerable adults whereas, under current law, committing robbery or assault against a vulnerable adult does not change the grade of either offense, or otherwise authorize more severe penalties. Inclusion of vulnerable adults in the same category as seniors, minors, and others improves the proportionality of the revised offenses against persons and removes a gap in current District law.

Relation to National Legal Trends. The Model Penal Code (MPC) does not provide a definition for "vulnerable adult."

[348] RCC §§ 22A-1201, 1202.
[349] RCC § 22A-1001(15).