First Draft of Report #15
Recommendations for Assault & Offensive Physical Contact Offenses

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. 15, *Recommendations for Assault Offenses*, 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. 15. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Chapter 12. Robbery, Assault, and Threat Offenses

Section 1201. Robbery
Section 1202. Assault
Section 1203. Criminal Menacing
Section 1204. Criminal Threats
Section 1205. Offensive Physical Contact

Section 1202. Assault

(a) *Aggravated Assault.* A person commits the offense of aggravated assault when that person:
  (1) Purposely causes serious and permanent disfigurement to another person;
  (2) Purposely destroys, amputates, or permanently disables a member or organ of another person's body;
  (3) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person by means of what, in fact, is a dangerous weapon; or
  (4) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; and
    (A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
    (B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
      (i) Law enforcement officer;
      (ii) Public safety employee;
      (iii) Participant in a citizen patrol;
      (iv) District official or employee; or
      (v) Family member of a District official or employee;

(b) *First Degree Assault*. A person commits the offense of first degree assault when that person:
  (1) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; or
  (2) Recklessly causes significant bodily injury to another person by means of what, in fact, is a dangerous weapon;

(c) *Second Degree Assault.* A person commits the offense of second degree assault when that person:
  (1) Recklessly causes bodily injury to another person by means of what, in fact, is a dangerous weapon;
  (2) Recklessly causes significant bodily injury to another person; and
    (A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
    (B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
      (i) Law enforcement officer;
      (ii) Public safety employee;
      (iii) Participant in a citizen patrol;
      (iv) District official or employee; or

(v) Family member of a District official or employee;

(d) *Third Degree Assault.* A person commits the offense of third degree assault when that person recklessly causes significant bodily injury to another person;

(e) *Fourth Degree Assault.* A person commits the offense of fourth degree assault when that person:

(1) Recklessly causes bodily injury to, or uses physical force that overpowers, another person; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or

(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

(v) Family member of a District official or employee;

(2) Negligently causes bodily injury to another person by means of what, in fact, is a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;

(f) *Fifth Degree Assault.* A person commits the offense of fifth degree assault when that person recklessly causes bodily injury to, or uses physical force that overpowers, another person.

(g) *Penalties.*

(1) *Aggravated Assault.* Aggravated assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *First Degree Assault.* First degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Second Degree Assault.* Second degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) *Third Degree Assault.* Third degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) *Fourth Degree Assault.* Fourth degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(6) *Fifth Degree Assault.* Fifth degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Definitions.* The terms "purposely," "recklessly, under circumstances manifesting extreme indifference to human life," "recklessly," and "negligently" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "serious bodily injury," "protected person," "law enforcement officer," "citizen patrol," "District official or employee," "significant bodily injury," "dangerous weapon" "bodily injury," "physical force," "public safety officer," "family member," and "effective consent" have the meanings specified in § 22A-1001.

(i) *Defenses.*

(1) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective

consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is an affirmative defense to prosecution under this section if:

(A) The conduct did not inflict significant bodily injury or serious bodily injury, or involve the use of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; or

(B) The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.

(2) *Burden of Proof for Effective Consent Defense.* If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

(3) *Limitation on Justification and Excuse Defenses To Assault on a Law Enforcement Officer*. For prosecutions brought under this section, it is neither a justification nor an excuse for a person to actively oppose the use of force by a law enforcement officer when:

(A) The person was reckless as to the fact that the complainant was a law enforcement officer;

(B) The use of force occurred during an arrest, stop, or detention for a legitimate police purpose; and

(C) The law enforcement officer used only the amount of physical force that appeared reasonably necessary.

(j) *Jury Demandable Offense.* When charged with a violation or inchoate violation of subsection (f) of this section and either the complainant is a law enforcement officer, while in the course of his or her official duties, or the conduct was committed with the purpose of harming the complainant because of his or her status as a law enforcement officer, the defendant may demand a jury trial. If the defendant demands a jury trial, then the court shall impanel a jury.

RCC § 22A-1202. Assault

Commentary

Explanatory Note. *The RCC assault offense proscribes a broad range of conduct in which there is harm to a person's bodily integrity. The penalty gradations are primarily based on the degree of bodily harm, with enhancements in the gradations for harms to special categories of persons or harms by means of a dangerous weapon or firearm. Along with the offensive physical contact offense,[1] the revised assault offense replaces eighteen distinct offenses in the current D.C. Code: assault with intent to kill,[2] assault with intent to commit first degree sexual abuse,[3] assault with intent to commit second degree sexual abuse,[4] assault with intent to commit child sexual abuse,[5] and assault with intent to commit robbery;[6] willfully poisoning any well, spring, or cistern of water;[7] assault with intent to commit mayhem;[8] assault with a dangerous weapon;[9] assault with intent to commit any other felony;[10] simple assault;[11] assault with significant bodily injury;[12] aggravated assault;[13] assault on a public vehicle inspection officer[14] and aggravated assault on a public vehicle inspection officer;[15] assault on a law enforcement officer[16] and assault with significant bodily injury to a law enforcement officer;[17] mayhem[18] and malicious disfigurement.[19] Insofar as they are applicable to current assault-type offenses, the revised assault offense also replaces the protection of District public officials statute[20] and five penalty enhancements: the enhancement for senior citizens;[21] the enhancement for citizen patrols;[22] the enhancement for minors;[23] the enhancement for taxicab drivers;[24] and the enhancement for transit operators and Metrorail station managers.[25]*

Subsection (a) specifies the various types of prohibited conduct in aggravated assault, the highest grade of the revised assault offense. Several types of aggravated assault require "serious bodily injury," a defined term in RCC § 22A-1001 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the

[1] RCC § 22A-2105.
[2] D.C. Code § 22-401.
[3] D.C. Code § 22-401.
[4] D.C. Code § 22-401.
[5] D.C. Code § 22-401.
[6] D.C. Code § 22-401.
[7] D.C. Code § 22-401.
[8] D.C. Code § 22-401.
[9] D.C. Code § 22-402.
[10] D.C. Code § 22-403.
[11] D.C. Code § 22-404(a)(1).
[12] D.C. Code § 22-401(a)(2).
[13] D.C. Code § 22-404.01.
[14] D.C. Code § 22-404.02.
[15] D.C. Code § 22-404.03.
[16] D.C. Code § 22-405.
[17] D.C. Code § 22-405.
[18] D.C. Code § 22-406.
[19] D.C. Code § 22-406.
[20] D.C. Code § 22-851.
[21] D.C. Code § 22-3601.
[22] D.C. Code § 22-3602.
[23] D.C. Code § 22-3611.
[24] D.C. Code §§ 22-3751; 22-3752.
[25] D.C. Code §§ 22-3751.01; 22-3752.

function of a bodily member, organ, or mental faculty. Subsection (a)(1) specifies one type of prohibited conduct—causing serious and permanent disfigurement to another person. Subsection (a)(2) specifies another type of prohibited conduct—destroying, amputating, or permanently disabling a member or organ of another person's body. Subsections (a)(1) and (a)(2) also specify the culpable mental states for subsections (a)(1) and (a)(2) to be "purposely," a term defined at RCC § 22A-206 to mean the accused must consciously desire that his or her conduct causes serious and permanent disfigurement to another person (subsection (a)(1)) or destroys, amputates, or permanently disables a member or organ of another person's body (subsection (a)(2)).

Subsection (a)(3) specifies another type of prohibited conduct for aggravated assault—causing serious bodily injury to another person by means of a dangerous weapon. Subsection (a)(3) specifies the culpable mental state for causing the serious bodily injury by means of a dangerous weapon to be "recklessly, under circumstances manifesting extreme indifference to the value of human life." This culpable mental state is defined in RCC § 22A-206 to mean "being aware of a substantial risk" that the accused's conduct will cause serious bodily injury by means of a dangerous weapon, where "the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation." Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly, under circumstances manifesting extreme indifference to the value of human life" applies to both causing serious bodily injury and the use of the dangerous weapon to cause such serious bodily injury. "Dangerous weapon" is a defined term in RCC § 22A-1001 that includes inherently dangerous weapons, such as firearms, as well as objects used in a manner likely to cause death or serious bodily. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to whether the item used in the offense is a "dangerous weapon."

Subsection (a)(4) specifies the final type of prohibited conduct for aggravated assault—causing serious bodily injury to specific categories of individuals. Subsection (a)(4) specifies the culpable mental state for causing the serious bodily injury to be "recklessly, under circumstances manifesting extreme indifference to the value of human life." This culpable mental state is defined in RCC § 22A-206 to mean "being aware of a substantial risk" that the accused's conduct will cause serious bodily injury, where "the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation." In subsection (a)(4)(A), the complainant must be an individual that satisfies one of the categories in the definition of a "protected person" in RCC § 22A-1001, such as being a law enforcement officer in the course of his or her duties.[26] The culpable mental state of recklessly applies in subsection (a)(4)(A) to the fact that the complainant is a "protected person." "Recklessly," a culpable mental state defined in RCC § 22A-206, means the accused must disregard a substantial and unjustifiable risk that the complainant is a "protected person." In subsection (a)(4)(B), the complainant must be a law enforcement officer (LEO) (subsection (i)), a "public safety employee" (subsection (ii)), a participant in a citizen patrol (subsection (iii)), a District official or employee (subsection (iii)), or a family member of a District official or employee (subsection v)). The serious bodily injury must be caused "with the purpose of" harming the complainant because of the complainant's status as a LEO, a public safety employee, a participant in a citizen patrol, a District official or employee, or a family member of a District official or employee. "Purposely," a term defined at RCC § 22A-206 means the

[26] The definition of a "protected person" includes, among others, "a law enforcement officer, while in the course of his or her official duties." RCC § 22A-1001(15).

accused must consciously desire that the individual be a LEO, a public safety employee, a participant in a citizen patrol, a District official or employee, or a family member of a District official or employee. "Law enforcement officer," "public safety employee," "citizen patrol," "District official or employee," and "family member" are all defined terms in RCC § 22A-1001.

Subsection (b) specifies the two types of conduct prohibited in first degree assault. Subsection (b)(1) specifies one type of prohibited conduct—causing serious bodily injury to another person. Subsection (b)(1) specifies the culpable mental state for this subsection to be "recklessly, under circumstances manifesting extreme indifference to the value of human life." This culpable mental state is defined in RCC § 22A-206 to mean "being aware of a substantial risk" that the accused's conduct will cause serious bodily injury, where "the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation." "Serious bodily injury" is a defined term in RCC § 22A-1001 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Subsection (b)(2) specifies the other type of prohibited conduct for first degree assault—causing significant bodily injury to another person by means of a dangerous weapon. "Significant bodily injury" is the intermediate level of bodily injury in the revised assault statute and is defined in RCC § 22A-1001 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. The culpable mental state of "recklessly" applies in subsection (b)(2) and is defined in RCC § 22A-206 to mean being aware of a substantial risk that one's conduct will cause significant bodily injury by means of a dangerous weapon. Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" applies to both causing significant bodily injury and the use of the dangerous weapon to cause such significant bodily injury. "Dangerous weapon" is a defined term in RCC § 22A-1001 that includes inherently dangerous weapons, such as firearms, as well as other objects that by their use are likely to cause death or serious bodily injury. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to whether the item used in the offense is a "dangerous weapon."

Subsection (c) specifies the various types of prohibited conduct for second degree assault. Subsection (c)(1) prohibits causing bodily injury to another person by means of a dangerous weapon. "Bodily injury" is the lowest level of bodily injury in the revised assault statute and is defined in RCC § 22A-1001 to require "physical pain, illness, or any impairment of condition." The culpable mental state of "recklessly" applies in subsection (c)(1) and is defined in RCC § 22A-206 to mean being aware of a substantial risk that one's conduct will cause bodily injury. Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" applies to both causing bodily injury and the use of the dangerous weapon to cause such bodily injury. "Dangerous weapon" is a defined term in RCC § 22A-1001 that includes inherently dangerous weapons, such as firearms, as well as other objects that by their use are likely to cause death or serious bodily injury. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to whether the item used in the offense is a "dangerous weapon."

Subsection (c)(2) specifies the other type of prohibited conduct for second degree assault—causing significant bodily injury to specific categories of individuals. The protected individuals and requirements in this type of second degree assault are identical to those in subsection (a)(4) of aggravated assault, with two exceptions. First, the required culpable mental state for causing the significant bodily injury in subsection (c)(2) is "recklessly," a defined term in RCC § 22A-206 to mean being aware of a substantial risk that one's conduct will cause

significant bodily injury. Second, the required bodily injury is "significant bodily injury," the intermediate level of bodily injury in the revised assault statute and defined in RCC § 22A-1001 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone.

Subsection (d) specifies the prohibited conduct for third degree assault—causing significant bodily injury to another person. The culpable mental state of "recklessly" applies and is defined in RCC § 22A-206 to mean being aware of a substantial risk that one's conduct will cause significant bodily injury. "Significant bodily injury" is the intermediate level of bodily injury in the revised assault statute and is defined in RCC § 22A-1001 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone.

Subsection (e) specifies the various types of prohibited conduct for fourth degree assault. Subsection (e)(1) prohibits causing bodily injury to or using physical force that overpowers specific categories of individuals. The protected individuals in this type of fourth degree assault are identical to those in subsection (a)(4) of aggravated assault and subsection (c)(2) of second degree assault, with two exceptions. First, the required culpable mental state for causing the bodily injury or using the physical force in subsection (e)(1) is "recklessly," a defined term in RCC § 22A-206 to mean being aware of a substantial risk that one's conduct will cause bodily injury or use physical force that overpowers. Second, this type of fourth degree assault requires either "bodily injury" or the use of physical force that overpowers another person. "Bodily injury" is the lowest level of bodily injury in the revised assault statute and is defined in RCC § 22A-1001 to mean "physical pain, illness, or any impairment of physical condition." "Physical force" is defined in RCC § 22A-1001 to mean "the application of physical strength."

Subsection (e)(2) specifies the other type of fourth degree assault—causing bodily injury by means of a firearm as defined in DC Code § 22-4501(2A), regardless of whether the firearm is loaded. The culpable mental state of "negligently" applies in subsection (e)(2) and is defined in RCC § 22A-206 to mean a person should be aware of a substantial risk that one's conduct will cause bodily injury by means of a firearm. Per the rule of construction in RCC § 22A-207, the culpable mental state of "negligently" applies to both causing bodily injury and the use of the firearm to cause such bodily injury. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to whether the item used in the offense is a firearm as defined in DC Code § 22-4501(2A), or whether the firearm is loaded or unloaded. "Bodily injury" is the lowest level of bodily injury in the revised assault statute and is defined in RCC § 22A-1001 to mean "physical pain, illness, or any impairment of physical condition."

Subsection (f) specifies the prohibited conduct for the lowest grade of the revised assault statute, fifth degree assault. Subsection (f) proscribes causing bodily injury to or using physical force that overpowers another person. The culpable mental state for subsection (f)(1) is "recklessly" and is defined in RCC § 22A-206 to mean being aware of a substantial risk that one's conduct will cause bodily injury to or use physical force that overpowers another person. "Bodily injury" is the lowest level of bodily injury in the revised assault statute and is defined in RCC § 22A-1001 to mean "physical pain, illness, or any impairment of physical condition." "Physical force" is defined in RCC § 22A-1001 to mean "the application of physical strength."

Subsection (g) specifies relevant penalties for the offense. [RESERVED]

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

Subsection (i) describes the defense of effective consent for assault, and a limitation on certain justification and excuse defenses for assault. Subsection (i)(1) specifies that the effective

consent defense is in addition to any defenses otherwise applicable to the conduct at issue.[27] The effective consent defense requires either proof of "effective consent," a defined term in RCC § 22A-2001 that excludes consent obtained by means coercion or deception, or the actor's reasonable belief that the complainant consented to the actor's conduct. Under subsection (i)(1)(A), the defense is available only for those grades of assault that do not result in "significant bodily injury" or "serious bodily injury" as those terms are defined in RCC § 22A-1001, or involve a firearm as defined at D.C. Code 22-4501(2A), regardless of whether the firearm is loaded.[28] Under subsection (i)(1)(B), the defense is also available if the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.[29] The effective consent defense is available per subsection (i)(1)(B) even if significant bodily injury or serious bodily injury results, or a firearm or other dangerous weapon is used. Subsection (i)(2) describes the burden of proof for the effective consent defense, clarifying that, where evidence supporting the defense is raised at trial by either the government or defense, the government then has the burden of proving the absence of such circumstances beyond a reasonable doubt.

Subsection (i)(3) limits any justification or excuse defense that may apply when an individual actively opposes a use of force by a law enforcement officer and, in doing so, allegedly assaults the law enforcement officer. No such defense exists where a person is reckless, as defined in RCC § 22A-206, as to the complainant's status as a law enforcement officer, the officer's use of force occurs for a legitimate police purpose during an arrest, stop or detention, and the officer's application of physical force appeared reasonably necessary. The limitation on justification defenses to assault on a law enforcement officer applies to all gradations of the revised assault statute, whether or not the gradation provides a penalty enhancement for the complainant being a law enforcement officer acting in the course of his or her duties.

Subsection (j) specifies that a prosecution for fifth degree assault in subsection (f) is jury demandable when the complainant is a law enforcement officer, while in the course of his or her official duties, or the conduct was committed with the purpose of harming the complainant because of his or her status as a law enforcement officer. This provision provides that a charge

[27] For example, a person who, to avoid greater harm, amputates the finger of a person caught in machinery on request of the victim may have available a general justification defense of necessity. *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982). The codification of this reference to general justification defenses in the preface to subsection (i)(1) clarifies that courts should not interpret the codification of these special defenses to abrogate the applicability of general defenses under an exp*ressio unius* canon of construction. *See, e.g., Bolz v. D.C.*, 149 A.3d 1130, 1140 (D.C. 2016).

[28] The grades of assault subject to the subsection (i)(1)(A) effective consent defense are second degree assault per subsection (c)(1) where no firearm is used, fourth degree assault in subsection (e)(1), and fifth degree assault in subsection (f). For example, the following activities would not give rise to assault liability where there is effective consent per subsection (i)(1)(A): piercing someone's ear for an earring, serving alcohol to a restaurant patron, or roughly pushing someone when playing football. Constitutionally protected activities, such as sexual activity involving consensual infliction of pain, also may be subject to criminal liability absent a defense. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

[29] For example, the following otherwise legal activities would not give rise to assault liability where there is effective consent per subsection (i)(1)(B): performing elective surgery that results in permanent and significant disfigurement, lowering a person on a rope from a rooftop as part of a movie stunt that results in a death, or adding chemicals to a highly combustible solution as part of a scientific experiment that explodes and causes death.

of assault on a law enforcement officer, under the stated conditions,[30] is always jury demandable, regardless of the maximum imprisonment time.

Relation to Current District Law. *The revised assault statute changes existing District assault law in twelve main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised assault statute does not criminalize (as a completed offense) conduct that falls short of inflicting bodily injury or the use of overpowering physical force. Under current District law, an assault[31] includes several types of conduct that are no longer included within the revised assault statute: 1) intent-to-frighten assaults, where the accused commits a threatening act that reasonably would create in another person the fear of immediate injury, and the accused has the apparent present ability to do so;[32] 2) non-violent sexual touching[33] that causes no pain or impairment to the person's body; and 3) any completed battery where the accused inflicts an unwanted touching on another person that causes no pain or impairment to the person's body.[34] The revised assault statute, in contrast, is limited to causing three types of bodily injury (serious bodily injury, significant bodily injury, and bodily injury, all defined terms in RCC § 22A-1001) and the use of physical force (a defined term in RCC § 22A-1001) that

[30] Assaultive conduct against a person who is a law enforcement officer and does not meet the conditions stated in subsection (j) is possible. For example the neighbor of an off-duty law enforcement officer who is charged with recklessly causing bodily injury to an off-duty law enforcement officer because of a dispute over a boundary fence would not be subject to the jury demandability provision in subsection (j).

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

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

[33] "Where the assault involves a nonviolent sexual touching the court has held that there is an assault within section 22–504 because 'the sexual nature [of the conduct] suppl[ies] the element of violence or threat of violence.'" *Matter of A.B.*, 556 A.2d 645, 646 (D.C. 1989) (quoting *Goudy v. United States*, 495 A.2d 744, 746 (D.C.1985), *modified*, 505 A.2d 461 (D.C.), *cert. denied*, 479 U.S. 832, 107 S.Ct. 120, 93 L.Ed.2d 66 (1986)). The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted).

[34] *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).

overpowers another person. Depending on the facts of a given case, conduct removed from the current assault statute still may be criminalized as attempted assault under the general attempt provision (RCC § 22A-301), criminal menace (RCC § 22A-1203), criminal threat (RCC § 22A-1204), offensive physical contact (RCC § 22A-1205), or [revised offense for non-violent sexual touching assault]. The RCC improves the clarity and the proportionality of the by punishing separately the various types of conduct that currently constitute "assault."

Second, relying on the general attempt statute in RCC § 22A-301, the revised assault statute replaces the separate offenses of assault with intent to kill,[35] assault with intent to commit first degree sexual abuse,[36] assault with intent to commit second degree sexual abuse,[37] assault with intent to commit child sexual abuse,[38] assault with intent to commit robbery,[39] assault with intent to commit mayhem,[40] and assault with intent to commit any other felony[41]— collectively referred to as the "assault with intent to" or "AWI" offenses. In the RCC, liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22A-301 to the completed offenses.[42] Even though the *actus reus* of some criminal attempts and the comparable AWI offense will not always be the same,[43] any conduct which falls within the scope of an AWI offense also necessarily constitutes an attempt to commit the target of that AWI offense. Moreover, under current District law, both AWI offenses[44] and criminal attempts[45] require proof of a "specific intent" to commit the target offense.[46] Thus, the RCC general attempt provision provides for liability that is at least as expansive as that afforded

[35] D.C. Code § 22-401.
[36] D.C. Code § 22-401.
[37] D.C. Code § 22-401.
[38] D.C. Code § 22-401.
[39] D.C. Code § 22-401.
[40] D.C. Code § 22-402.
[41] D.C. Code § 22-403.
[42] For example, rather than having a separate offense of assault with intent to kill, as is codified in current D.C. Code § 22-401, the RCC criminalizes that conduct as an attempt to commit an offense such as murder or aggravated assault.
[43] For example, both case law and commentary indicate that, as a matter of current and historical practice, one can indeed be convicted of an attempt to commit an offense against the person without having necessarily committed a simple assault. Compare, R. PERKINS, *Criminal Law* 578 (2d ed. 1969) with *Hardy v. State*, 301 Md. 124, 129, 482 A.2d 474, 477 (1984).
[44] For District authority on the specific intent requirement in the context of AWI offenses, see *Nixon v. United States*, 730 A.2d 145, 148 (D.C. 1999); *Riddick v. United States*, 806 A.2d 631, 639 (D.C. 2002); *Di Snowden v. United States*, 52 A.3d 858, 868 (D.C. 2012); *Robinson v. United States*, 50 A.3d 508, 533 (D.C. 2012).
[45] For District authority on the specific intent requirement in the context of criminal attempts, see Judge Beckwith's concurring opinion in *Jones v. United States*, 124 A.3d 127, 132–34 (D.C. 2015) (discussing, among other cases, *Sellers v. United States*, 131 A.2d 300 (D.C.1957); *Wormsley v. United States*, 526 A.2d 1373 (D.C. 1987); and *Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975)).
[46] Notably, the DCCA has never clearly defined the meaning of the phrase "specific intent"—indeed, as one DCCA judge has observed, the phrase itself is little more than a "rote incantation[]" of "dubious value" which obscures "the different *mens rea* elements of a wide array of criminal offenses." *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring). Ambiguities aside, however, it seems relatively clear from District authority in the context of both AWI and attempt offenses that, first, the *mens rea* applicable to both categories of offenses—the intent to commit the ulterior or target offense—is the same. *Compare* D.C. Crim. Jur. Instr. § 4.110-12 (jury instructions on AWI offenses) *with* D.C. Crim. Jur. Instr. § 7.101 (jury instruction on criminal attempts). And second, it seems clear that this *mens rea* roughly translates to acting purposely or knowingly. *See* SECOND DRAFT OF REPORT NO. 2, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—BASIC REQUIREMENTS OF OFFENSE LIABILITY, pgs. 5-8 (May 5, 2017); FIRST DRAFT OF REPORT NO. 7, RECOMMENDATIONS FOR CHAPTER 3 OF THE REVISED CRIMINAL CODE—DEFINITION OF A CRIMINAL ATTEMPT, pgs. 8-11 (June 7, 2017).

by AWI offenses. The change improves the clarity of the revised assault statute, and eliminates unnecessary overlap between the AWI offenses and general attempt liability for assault-type offenses. In addition, the change improves the proportionality of the revised assault statute because attempts are punished based on the severity of the underlying offense.[47]

Third, the revised assault statute replaces the separate common law offenses of mayhem and malicious disfigurement. The D.C. Code currently specifies penalties for the crimes of mayhem and malicious disfigurement,[48] although the elements of these offenses are established wholly by case law. The DCCA has said that malicious disfigurement requires proof that a person caused a permanent disfigurement[49] and mayhem requires proof that someone caused a permanently disabling injury.[50] Both offenses require a mental state of malice[51] and proof of the absence of mitigating circumstances,[52] although the DCCA has said that malicious disfigurement requires a specific intent to injure that mayhem does not.[53] Yet, while such requirements are similar to, and for some fact patterns more demanding than, the current aggravated assault

[47] The District's varied AWI offenses, enacted in 1901, were originally "created to allow a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end." *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011). However, as provided in RCC § 22A-301(c) and described in the accompanying commentary, the penalty for general attempts in the RCC differs from existing law.

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

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

[50] *Edwards v. United States*, 583 A.2d at 668 & n.12 ("The elements of mayhem are: (1) that the defendant caused permanent disabling injury to another; (2) that he had the general intent to do the injurious act; and (3) that he did so willfully and maliciously.") (citing *Wynn v. United States*, 538 A.2d 1139, 1145 (D.C. 1988)); *see also Peoples v. United States*, 640 A.2d 1047, 1054 (D.C. 1994) ("The court has stated that '[t]he mayhem statute seeks to protect the preservation of the human body in its normal functioning and the and the integrity of the victim's person from permanent injury or disfigurement.'" (quoting *McFadden v. United States*, 395 A.2d 14, 18 (D.C. 1978)).

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

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

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

statute,[54] mayhem and malicious disfigurement have the same ten-year maximum penalty as the current aggravated assault statute. The revised assault statute has two new gradations in subsection (a)(1) and subsection (a)(2) that require purposeful, permanent injuries. These new gradations cover conduct currently prohibited by mayhem and malicious disfigurement. Conduct currently prohibited by mayhem and malicious disfigurement that does not satisfy the purposely culpable mental state or required injuries in subsection (a)(1) or subsection (a)(2) of the revised assault offense is covered by subsection (b)(1) as first degree assault. In addition, the culpable mental state of "malice" no longer applies to conduct currently prohibited by mayhem and maliciously disfiguring, nor does the special mitigating circumstances defense[55] that accompanies malice. Replacing the common law offenses of mayhem and malicious disfigurement reduces unnecessary overlap in the current D.C. Code.

Fourth, in combination with the aggravated criminal menace statute in RCC § 22A-1203, the revised assault statute's enhanced penalties for use of a dangerous weapon replace the current D.C. Code's offense of assault with a dangerous weapon (ADW). Current D.C. Code § 22-402 provides that ADW is a separate offense with a ten-year maximum penalty[56] for engaging in any conduct that constitutes at least a simple assault with a dangerous weapon.[57] Instead of having a single, separate ADW offense, the revised assault offense incorporates into its gradations enhanced penalties for causing different types of bodily injury "by means of" a dangerous weapon (serious bodily injury (subsection (a)(3)), significant bodily injury (subsection (b)(2)), or bodily injury (subsections (c)(1)) and (e)(2)). The dangerous weapon must actually cause the resulting bodily injury,[58] clarifying current District case law that the weapon must be used during

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

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

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

[57] *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011) ("Because there was no crime of "assault with a dangerous weapon" at common law, we have interpreted the statute to require no more than is required to prove the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon . . . .").

[58] If an individual merely possesses a deadly or dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the bodily injury as required in the revised assault statute, the individual may still be subject to liability for purposely possessing a dangerous weapon in furtherance of an assault per RCC § 22A-XXXX

the assault.[59] Threatening acts by means of a dangerous weapon that fall short of causing bodily injury are no longer criminalized as assault as they are under current District law.[60] Instead, such threatening acts are prohibited by the aggravated criminal menace statute in RCC § 22A-1203.[61] In addition, through the definition of "dangerous weapon" in RCC § 22A-1001, the use of objects that the complaining witness incorrectly perceives to be a dangerous weapon,[62] as well as imitation firearms,[63] no longer results in an enhanced penalty for assault as it does under current District law. Instead, use of these objects is covered by the aggravated criminal menace statute in RCC § 22A-1203.[64] Excluding these objects does not change District case law holding that circumstantial evidence may be sufficient to establish that a deadly or dangerous weapon was used.[65] The elimination of ADW as a separate offense reduces unnecessary overlap in the current D.C. Code between multiple means of enhancing assaults committed with a weapon.[66]

[revised PFCOV-equivalent offense]. A defendant may not, however, be convicted of both a gradation of assault based on the use of a deadly or dangerous weapon and RCC § 22A-XXXX [revised PFCOV-equivalent offense]. In addition, depending on the facts of a given case, the display of a deadly or dangerous weapon may be sufficient to establish liability for aggravated criminal menace per RCC § 22A-1203 or an attempt to commit a gradation of the revised assault statute requiring the harm be "by means of" such a weapon.

[59] *See, e.g.*, *Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) (noting that in *McCall v. United States*, 449 A.2d 1095 (D.C. 1982), the DCCA held that the "while armed" enhancement in D.C. Code § 22-4502(a)(1) "cannot be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense.") (emphasis in original)); *Perkins v. United States*, 446 A.2d 19, 26–27 (D.C. 1982) (stating in the context of a *Blockerburger* analysis for merger that "[a]ssault with a dangerous weapon requires proof that the weapon actually was used in the assault while malicious disfigurement, with the punishment enhancement element of being armed, requires only proof that the accused was armed or had a dangerous weapon readily available."); *Perry v. United States*, 36 A.3d 799, 812 (D.C. 2011) ("Because what warrants a higher penalty for ADW than for simple assault is the increased risk of injury that results from the use of a dangerous object, once an assault is proven, ADW requires a further inquiry to determine whether the object used to commit the assault is a 'dangerous weapon.'").

[60] *See, e.g.*, *Frye v. United States*, 926 A.2d 1085, 1094 (D.C. 2005) (finding that the evidence was sufficient for ADW when "appellant intended to and did try to injure or frighten [the complaining witness] by using his van as a weapon in a manner likely to cause [the complaining witness] to have a car accident" and listing as an element of ADW that there "was an attempt, with force or violence, to injure another person, or a menacing threat, which may or may not be accompanied by a specific intent to injure.").

[61] Note that, while the RCC does not provide a gradation for engaging in offensive physical contact per RCC § 22A-1205 with a dangerous weapon, likely fact patterns would almost certainly constitute an aggravated criminal menace.

[62] *See, e.g.*, *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon.").

[63] *See, e.g.*, *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) (finding that "an imitation or blank pistol used in an assault by pointing it at another is a 'dangerous weapon' in that it is likely to produce great bodily harm" in an ADW case); *Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016) ("An imitation firearm is a gun, which is an inherently dangerous weapon for purposes of ADW, and therefore, a defendant may be appropriately charged with ADW where the defendant commits an assault using an imitation firearm.").

[64] Note that, while the RCC does not provide a gradation for engaging in offensive physical contact per RCC § 22A-1205 with a dangerous weapon, likely fact patterns would almost certainly constitute an aggravated criminal menace.

[65] *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.").

[66] Under current District law, simple assault involving the use of a deadly or dangerous weapon may be enhanced by three different, largely overlapping, provisions. First, the assault may be charged as ADW under D.C. Code § 22-402, which is a felony with a ten year maximum prison sentence. Second, ADW is subject to further enhancement under D.C. Code § 22-4502 as a "crime of violence" if the offense is committed "when armed with or having readily available" any dangerous weapon. D.C. Code § 22-4502(a). ADW is not subject to the "while armed" enhancement under D.C. Code § 22-4501(a)(1), but the recidivist "while armed" enhancement does apply under D.C. Code § 22-

Incorporating graduated, enhanced penalties for use of a dangerous weapon that results in different levels of harm improves the proportionality of the revised offense.

Fifth, in combination with the aggravated criminal menace statute in RCC § 22A-1203, the revised assault statute's enhanced penalties for the use of a dangerous weapon replace the separate penalty enhancement for committing assault-type crimes "while armed" or "having readily available" a dangerous weapon. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of assault-type offenses[67] "while armed" or "having readily available" a dangerous weapon.[68] In contrast, the revised assault offense requires an individual to inflict the injury "by means of" a dangerous weapon, and merely being armed with or having the weapon readily available is not sufficient.[69] In addition, through the definition of "dangerous weapon" in RCC § 22A-1001, the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon,[70] as well as imitation firearms[71] no longer results in an enhanced penalty for assault as it does under current District law. Instead, use of these objects is covered by the aggravated

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4501(a)(2). *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982). Finally, if, while committing the assault, a person possessed a "pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm," he or she is guilty of the additional offense of possession of a firearm during a crime of violence (PFCOV). PFCOV is a felony with a maximum term of imprisonment of 15 years and a mandatory minimum term of imprisonment of five years. Despite the substantial overlap in prohibited conduct, the offenses of ADW and PFCOV do not merge. *Freeman v. United States*, 600 A.2d 1070, 1070 (D.C. 1991).

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

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

[69] If an individual merely possesses a deadly or dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the bodily injury as required in the revised assault statute, the individual may still be subject to liability for purposely possessing a dangerous weapon in furtherance of an assault per RCC § 22A-XXXX [revised PFCOV-equivalent offense]. A defendant may not, however, be convicted of both a gradation of assault based on the use of a deadly or dangerous weapon and RCC § 22A-XXXX [revised PFCOV-equivalent offense].
In addition, depending on the facts of a given case, the display of a deadly or dangerous weapon may be sufficient to establish liability for aggravated criminal menace per RCC § 22A-1203 or an attempt to commit a gradation of the revised assault statute requiring the harm be "by means of" such a weapon.

[70] *See, e.g., Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon.").

[71] D.C. Code Ann. § 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.").

criminal menace statute in RCC § 22A-1203.[72] Excluding these objects does not change District case law holding that circumstantial evidence may be sufficient to establish that a dangerous weapon was used.[73] In addition, because the revised assault statute incorporates enhancements for use of a weapon in the offense gradations, it is no longer possible to enhance an assault with both a weapon enhancement and an enhancement based on the identity of the complainant,[74] or to double-stack different weapon penalties and offenses.[75] Also, the revised assault statute caps the maximum penalty for an enhancement based on the use of weapons to never be greater than the most egregious type of actual harm inflicted—the purposeful infliction of a permanently disabling injury in subsections (a)(1) and (a)(2) of the revised assault statute.[76] Replacing the separate penalty enhancements for assault-type offenses in D.C. Code § 22-4502 with

[72] Note that, while the RCC does not provide a gradation for engaging in offensive physical contact per RCC § 22A-1205 with a dangerous weapon, likely fact patterns would almost certainly constitute an aggravated criminal menace.

[73] *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.").

[74] There are several penalty enhancements under current District law based upon the age or work status of the complaining witness. *See, e.g.*, D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens); 22-3611 (enhancement for specified crimes committed against minors); 22-3751 (enhancement for specified crimes committed against taxicab drives); 22-3751.01 (enhancement for specified crimes committed against a transit operator or Metrorail station manager). Nothing in current District law appears to prohibit enhancing an assault with one or more of these separate enhancements based on age or work status, in addition to the weapon enhancement in current D.C. Code § 22-4502. Indeed, the facts as discussed in several DCCA cases indicate that such stacking does occur with the weapon enhancement and senior citizen enhancement. *See, e.g.*, *McClain v. United States*, 871 A.2d 1185 (D.C. 2005) (determining "whether the trial court committed plain error when it instructed the jury regarding to lesser-included offenses of the crime of armed robbery of a senior citizen," charged under the enhancements in now D.C. Code §§ 22-4502 and 22-3601).

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

[76] The current mayhem and malicious disfigurement offenses in D.C. Code § 22-406 are deleted from the revised assault statute, but the conduct is covered under either aggravated assault (subsections (a)(1) and (a)(2)) or first degree assault (subsection (b)(1)). Due to the nature of the injuries required in subsections (a)(1) and (a)(2), there is no enhancement for using a dangerous weapon. However, use of a dangerous weapon would enhance conduct in subsection (b)(1), meaning it would fall under subsection (a)(2) of aggravated assault.

enhancements in the offense gradations clarifies and reduces unnecessary overlap between multiple means of enhancing assaults committed with a weapon.[77] The changes also improve the proportionality of the assault-type offenses in D.C. Code § 22-4502, which are currently punished without distinction as to whether a dangerous weapon was used to harm someone, and with such severity that the differences in actual harm to the complainant are minimal relative to the presence of a weapon.

Sixth, the revised assault statute criminalizes for the first time negligently causing bodily injury to another person by means of what is, in fact, a firearm as defined at 22-4501(2A), regardless of whether the firearm is loaded (subsection (e)(2)). Current District law does not criminalize such conduct. Current District case law establishes that a culpable mental state of at least recklessness is required for ADW[78] and suggests that it may suffice for simple assault.[79] In contrast, the revised assault statute requires a lower culpable mental state of negligence for the lowest grade of assault to which an enhanced penalty applies for the use of a firearm (subsection (e)(2)). The lower culpable mental state is justified because the grade is limited to "firearm," an inherently dangerous weapon that warrants heightened caution in any use. A gradation of assault for negligently causing bodily injury by means of a firearm fills a gap in existing District law for misuse of a firearm.

Seventh, the revised assault statute's enhanced penalties for harming a law enforcement officer (LEO) replace the separate assault on a police officer (APO) offenses. Under current District law, a simple assault against a LEO "on account of, or while that law enforcement officer is engaged in the performance of his or her official duties"[80] is a misdemeanor, with a maximum term of imprisonment of 6 months,[81] and an assault with significant bodily injury or

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

[78] *Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone.").

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

[80] D.C. Code § 22-405(b), (c).

[81] D.C. Code § 22-405(b).

committing "a violent act that creates a grave risk of causing significant bodily injury" carries a maximum penalty of ten years imprisonment.[82] In contrast, the revised assault statute provides enhanced penalties for injuries to LEOs for each type of harm prohibited by the statute: serious bodily injury (subsection (a)(4)), significant bodily injury (subsection (c)(2)), bodily injury (subsection (e)(1)), and the use of physical force that overpowers (subsection (e)(1)).[83]

Unlike current law, the revised assault statute provides no LEO enhancement for conduct that falls short of inflicting bodily injury or using overpowering physical force,[84] and does not provide a distinct punishment for "a violent act that creates a grave risk of causing significant bodily injury."[85] However, the revised assault statute does provide substantial penalty enhancements for assaults of LEOs as it does with other protected persons in the revised assault statute, including a LEO enhancement for inflicting serious bodily injury[86] and a penalty increase for causing bodily injury to a LEO,[87] both of which are absent in current District law. Per subsection (j), prosecutions for assaults against LEOs that satisfy the requirements of the enhanced gradations will be jury-demandable,[88] preserving the policy underlying recent legislation.[89] Perhaps changing current District law, the revised assault offense requires

[82] D.C. Code § 22-405(c).

[83] On January 28, 2016, the Office of the District of Columbia Auditor issued a report titled "The Durability of Police Reform: The Metropolitan Police Department and Use of Force, 2008-2015," available at http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf (Office of the District of Columbia Auditor Report). The report recommended that the APO misdemeanor statute "be amended so that the elements of the offense require an actual assault rather than mere resistance or interference with a [Metropolitan Police Department] officer." Office of the District of Columbia Auditor Report at 107. The Committee Report for recent District Council legislation that created the separate offense of resisting arrest and limited the APO statute to "assault[s]" cited the Office of the District of Columbia Auditor Report. Committee on the Judiciary, *Report on Bill 21-0360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016)* (January 27, 2016). Limiting enhanced penalties for assaulting a LEO to causing some type of bodily injury or using physical force that overpowers the LEO narrows the conduct subject to enhancement to use of force, in keeping with the Office of the District of Columbia Auditor report.

[84] However, depending on the facts of the case, unwanted physical contacts that fail to satisfy the revised assault statute may entail liability for RCC § 22A-1205, offensive physical contact, and intent-to-frighten assaults and incomplete batteries against LEOs may be punishable under the revised threat (RCC § 22A-1204) or menace (RCC § 22A-1203) statutes.

[85] Depending on the facts of the case, such a violent act against a LEO may constitute an attempt to commit second degree assault per RCC § 22A-1202(c)(2) or a fourth degree assault per RCC § 22A-1202(e)(1).

[86] It is unclear why the D.C. Code currently provides no enhancement for committing an aggravated assault against a police officer. The limited legislative history does not address the matter and the lack of an enhancement is inconsistent with other crime of violence penalty enhancements that do apply enhanced penalties to complainants with a special status.

[87] Under current District law, a simple assault against a police officer is punishable by 6 months maximum imprisonment, a trivial increase above the 180 day maximum penalty ordinarily applicable to a simple assault. By contrast, the revised assault statute treats causing bodily injury to a LEO [a] [class(es)] more severely than such conduct against an ordinary person.

[88] Assaultive conduct against a person who is a law enforcement officer and does not meet the conditions stated in subsection (j) is possible. For example the neighbor of an off-duty law enforcement officer who is charged with recklessly causing bodily injury to an off-duty law enforcement officer because of a dispute over a boundary fence would not be subject to the jury demandability provision in subsection (j).

[89] The current APO statute was amended in 2016 to make the penalty for misdemeanor APO six months and jury demandable. Committee Report at 16 ("Lastly, the Committee made [the misdemeanor APO offense] jury-demandable due to the overwhelming number of states that have attached significant jail time to their APO statute, in addition to testimony in favor of making APO a jury-demandable offense."). Despite this revision, however, it is possible to charge an assault that satisfies misdemeanor APO as simple assault, per D.C. Code § 22-404(a)(1), which is not jury demandable.

recklessness as to the circumstance that the person harmed is a law enforcement officer protected under the statute,[90] rather than negligence,[91] which makes the LEO gradation consistent with the requirements for other enhancements in the revised offense that are based on the complainant's status. Lastly, while the current statute criminalizing assaults on LEOs does not address assaults targeting their family members because of their relation to a LEO, the revised assault statute includes liability for such conduct consistent with the general provision regarding targeting family members of District employees in D.C. Code § 22-851.[92]

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

Eighth, through the definition of "protected person" in RCC § 22A-1001, the revised assault statute replaces the current offenses of assault and aggravated assault on a public vehicle inspection officer. Under current District law, "assault[ing]" a "public vehicle inspection officer" or "imped[ing], intimidate[ing], or interfer[ing] with" that officer while that officer "is engaged in or on account of the performance of his or her official duties" is a misdemeanor with a maximum term of imprisonment of 180 days.[93] If the accused causes "serious bodily injury," the offense is a felony with a maximum penalty of ten years imprisonment.[94] In the revised assault statute, assaults against public vehicle inspection officers[95] continue to receive enhanced

[90] Recklessness applies not only to the fact that the person assaulted is a "LEO," as defined by RCC § 22A-1001, but also the circumstances that the person was on duty or a family member of a LEO.

[91] *See, e.g., Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

[92] Many law enforcement officers, as "LEO" is defined in § 22A-1001, are District employees and therefore targeting of their families because of their relation to a LEO is already criminalized by D.C. Code § 22-851. However, there is no current provision in law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[93] D.C. Code § 22-404.02.

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

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

penalties because public vehicle inspection officers are included in the definition of "protected person" (RCC § 22A-1001) as District officials or employees. However, the conduct that receives an enhanced penalty is narrowed to causing bodily injury or using physical force that overpowers (subsection (e)(1)), causing significant bodily harm (subsection (c)(2)), or causing serious bodily harm (subsection (a)(4)). Conduct that falls short of these requirements no longer receives an enhanced penalty,[96] nor does conduct that consists merely of "imped[ing], intimidat[ing], or interfer[ing] with" a public vehicle inspection officer.

Replacing the offenses of assault and aggravated assault on a public vehicle inspection officer with the revised assault statute results in additional changes to District law. Under the revised assault statute, unlike current law, [97] there is no longer an automatic civil penalty of loss of a license to operate public vehicles-for-hire upon conviction of assault of a public vehicle inspection officer. In addition, assaults that target family members of public vehicle inspection officers because of their relation to the public vehicle inspection officers are specifically included in the revised assault statute, consistent with the general provision regarding targeting family members of District employees in D.C. Code § 22-851.[98] The current assault on public vehicle inspection officer offenses do not specifically include such protection of family members.[99] Lastly, the revised offense does not include a provision specifically barring justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority.[100] Replacing the separate statutory provisions for assaults of public vehicle inspection officers clarifies the statute and reduces unnecessary overlap with other provisions that specially penalize assaults on District officials.[101]

Ninth, through the definition of "protected person" in RCC § 22A-1001, the revised assault statute replaces separate penalty enhancements for assault-type offenses based on the complainant's age,[102] status as a specified transportation worker,[103] or status as a citizen patrol member.[104] The definition of "protected person" also extends enhanced penalties for assaulting drivers of private vehicles-for-hire, individuals that are "vulnerable adults," "public safety

[96] Depending on the facts of the case, unwanted touchings that fail to satisfy the revised assault statute may entail liability for RCC § 22A-1205, offensive physical contact, and intent-to-frighten assaults and incomplete batteries against LEOs may be punishable under the revised threat (RCC § 22A-1204) or menace (RCC § 22A-1203) statutes.

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

[98] Many law enforcement officers, as "LEO" is defined in § 22A-1001, are District employees and therefore targeting of their families because of their relation to a LEO is already criminalized by D.C. Code § 22-851. However, there is no current provision in law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[99] D.C. Code §§ 22-404.02, 22-404.03.

[100] D.C. Code §§ 22-404.02(c), 22-404.03(c) ("It is neither justifiable nor excusable for a person to use force to resist the civil enforcement authority exercised by an individual believed to be a public vehicle inspection officer, whether or not such enforcement action is lawful.").

[101] Notably, subsection (i)(3) of the revised assault statute preserves limitations to justification and excuse defenses in charges of assaulting a vehicle inspection officer, resulting in no significant change to current D.C. Code § 22-404.02(c) and D.C. Code § 22-404.03(c).

[102] D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens); 22-3611 (enhancement for specified crimes committed against minors).

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

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

employees," and District officials or employees. The enhancement for assaulting a "protected person" applies to each degree of assault that requires bodily injury (serious bodily injury (subsection (a)(4)), significant bodily injury (subsection (c)(2)), and bodily injury (subsection (e)(1)), as well as the use of overpowering physical force (subsection (e)(1)). By contrast, the penalty enhancements covered in the definition of "protected person"[105] that exist under current District law apply inconsistently to simple assault,[106] the "assault with intent to" offenses,[107] and the various felony assault offenses,[108] resulting in disproportionate penalties for similar conduct.[109] The "protected person" enhancement ensures that the enhanced penalty for assaulting a protected person consistently applies to the revised assault offense, creating a more proportionate application of all these penalty enhancements. The RCC assault statute also limits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the use of a weapon.[110]

As applied in the RCC assault offense gradations, the "protected person" enhancement results in several other changes to current District law. The revised assault statute applies a

[105] D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens); 22-3602 (enhancement for specified crimes committed against citizen patrol members); 22-3611 (enhancement for specified crimes committed against minors); 22-3751 (enhancement for specified crimes committed against taxicab drivers); 22-3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).

[106] Of the separate enhancements, only the enhancement for crimes against citizen patrol members applies to simple assault. D.C. Code § 22-3602(c). Simple assault is not enhanced in any of the other separate enhancements.

[107] Only the separate enhancements for crimes against senior citizens and crimes against minors apply to all the AWI offenses. D.C. Code §§ 22-3601(b); 22-3611(c)(2). No AWI offenses are covered in the separate enhancements for crimes against taxicab drives or crimes against transit operators and Metrorail station managers. D.C. Code § 22-3752. The separate enhancement for crimes against citizen patrol members, D.C. Code § 22-3602, only applies to assault with intent to commit "forcible rape," which is an offense that no longer exists after the District's sexual abuse laws were revised in 1995. D.C. Code § 22-4801 (repl.). It is unclear whether assault with intent to commit an offense such as first degree sexual abuse would be covered by the enhancement.

[108] The separate enhancements all apply to aggravated assault and ADW, D.C. Code §§ 22-3601(b); 22-3602(c); 22-3611(b)(2); 22-3752, but are not consistent with respect to other felony assault offenses. For example, only the separate enhancement for crimes against minors applies to assault with significant bodily injury. D.C. Code § 22-3611(c)(2). The separate enhancements also apply inconsistently to malicious disfigurement and mayhem, with the senior citizen patrol enhancement applying only to mayhem, D.C. Code § 22-3602), and the other separate enhancements applying to both offenses.

The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation); 22-3752 (statute enumerating offenses for taxicab driver enhancement in D.C. Code § 22-3751 and the enhancement for transit operators and Metrorail station managers in D.C. Code § 22-3751.01 applying to attempt or conspiracy).

[109] The District's current penalty enhancements for minors, senior citizens, taxicab drivers, transit operators, and citizen patrol members provide for an increase in the maximum term of imprisonment by 1 ½ times the amount otherwise authorized. While the penalty enhancements are the same, the enhancements apply inconsistently to the various assault-type offenses, resulting in disproportionate penalties for substantially similar conduct. For example, only the separate enhancement for crimes against minors applies to assault with significant bodily injury. D.C. Code § 22-3611(c)(2). Thus, a defendant who commits assault with significant bodily injury against a minor would face the 1 ½ times penalty enhancement, but would not if he or she committed the same assault against a senior citizen.

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

mental state of "recklessness" to whether the complaining witness is a "protected person." The basis for this culpable mental state requirement is discussed earlier in this commentary for the enhanced penalty for assaulting a LEO and in the commentary for the definition of "protected person" in RCC § 22A-1001. The revised assault statute extends enhanced penalties for assaulting operators of private-vehicles-for hire as "transportation worker[s]" in RCC § 22A-1001, individuals that are "vulnerable adults" as defined in RCC § 22A-1001, "public safety employees," as defined in RCC § 22A-1001, and "District officials or employees" as defined in RCC § 22A-1001. These enhanced penalties for assault are a change to current District law, but reflect the special status these individuals have elsewhere in current District law.[111]

Collectively, these changes provide a consistent enhanced penalty for assaulting the categories of individuals included in the definition of "protected person," removing gaps in the current patchwork of separate enhancements, clarifying the law, and improving the proportionality of offenses. Extending enhanced protection for assaulting individuals such as operators of private vehicles-for-hire, "vulnerable adults," "public safety employees," and District officials and employees, further reduces unnecessary gaps and improves the proportionality of the statutes.

Tenth, the revised assault statute enhances the penalty for assaults committed against LEOs, public safety employees, participants in citizen patrols, District officials or employees, and family members of District officials or employees when the assault is committed "with the purpose of harming the complainant because of the complainant's status." Current District law already enhances assaults on LEOs committed due to the complainant's status as a LEO[112] and the revised assault statute continues this enhancement in each grade of the offense that has a LEO enhancement (subsections (a)(4)), (c)(2), and (e)(1)). The enhanced penalties for assaults committed "with the purpose of harming the complainant because of the complainant's status as" a public safety employee, a participant in a citizen patrol, a District official or employee, and a family member of a District official or employee are a change to current District law, but reflect the special status these individuals have elsewhere in current District law.[113] Extending enhanced protection for assaulting individuals based on their status as LEOs, public safety

[111] Taxicab drivers are currently the subject of a separate enhancement in § 22-3751, but the enhancement was enacted in 2001, well before the ubiquity of private vehicles-for-hire. The Council recently amended certain laws applicable to taxicabs and taxicab drivers to include private vehicles-for-hire. Vehicle-for-Hire Accessibility Amendment Act of 2016. Current D.C. Code § 22-851 makes it a separate offense to assault a District official or employee "while the official or employee is engaged in the performance of his or her duties or on account of the performance of their duties." Current D.C. Code §§ 22-933 and 22-936 make it a separate offense to assault a "vulnerable adult," with penalties depending on the severity of the injury. The current murder of a law enforcement officer offense applies to "public safety employee[s] . . . engaged in . . . the performance of such . . . employee's official duties." D.C. Code § 22-2106. The definition of "public safety employee" in the murder of a law enforcement officer offense includes firefighters, which are specifically included in the APO statute. D.C. Code §§ 22-2106(b)(2), 22-405(a).

[112] In addition to enhancing assaults that occur while the LEO is engaged in his or her official duties, the current APO statute also applies to assaults committed "on account of . . . his or her official duties." D.C. Code § 22-405(a). No case law exists interpreting the "on account of" language.

[113] The current murder of a law enforcement officer offense applies to "public safety employee[s] . . . on account of, the performance of . . . such employee's official duties." D.C. Code § 22-2106(a). Specific assault-type offenses against citizen patrol members are enhanced under current D.C. Code § 22-3602. Current D.C. Code § 22-851 makes it a felony with a maximum term of imprisonment of three years to assault any District official or employee "while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties" or the family member of any District official or employee "on account of the performance of the official or employee's duties." D.C. Code § 22-851(c), (d).

employees, participants in citizen patrols, District officials or employees, and family members of District officials and employees removes gaps in the current laws enhancing assaults, clarifies the law, and improves the proportionality of offenses.

Eleventh, the revised assault statute eliminates the separate assault offense of "willfully poisoning any well, spring, or cistern of water."[114] Current D.C. Code § 22-401 contains a provision that appears to separately criminalize such poisoning of a water supply, regardless of whether the poisoning results in injury to a person or there was intent to injure a person. No case law exists interpreting this provision. By contrast, the revised assault statute does not criminalize such poisoning except insofar as such conduct may constitute an attempted assault. Another District felony currently criminalizes such a poisoning,[115] and, depending on the facts of the case such poisoning may constitute attempted murder under RCC § 22A-XXXX. Eliminating separate assault liability for "willfully poisoning any well, spring, or cistern of water" reduces unnecessary overlap and improves the proportionality of District offenses by punishing such conduct consistent with other inchoate attempts to harm persons.

Twelfth, under the revised assault statute the general culpability principles for self-induced intoxication in RCC § 22A-209 allow a defendant to claim he or she did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" due to his or her self-induced intoxication. The current assault statute is silent as to the effect of intoxication. However, District case law seems to have established that assault is a general intent offense,[116] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary culpable mental state requirement for the crime.[117] This DCCA case law would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[118]—the claim that, due to his or her self-induced intoxicated state, the defendant did not act "recklessly, under circumstances manifesting extreme indifference to human life," or

[114] D.C. Code § 22-401.

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

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

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

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

"purposely" as required for more serious forms of assault.[119] By contrast, under the revised assault offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the defendant from forming the culpable mental states of "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" as required to prove some types of assaults. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" at issue in assault.[120] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these twelve substantive changes to current District law, four other aspects of the revised assault statute may be viewed as a substantive change of law.

First, the revised assault statute requires a culpable mental state of recklessness for low-level[121] forms of assault, including: fourth degree assault (subsection (e)(1)) and fifth degree assault (subsection (f)). The current D.C. Code is silent as to the culpable mental states required for simple assault.[122] Current District case law suggests that recklessness may suffice,[123] however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient.[124] The revised assault statute clearly establishes that recklessness is sufficient for grades of assault similar to the District's current simple assault and ADW statutes. This change improves the clarity of the law, is consistent with prevailing District case law (including District case law on voluntary intoxication[125]), and is consistent with current District statutes and the RCC gradations for assaults resulting in significant bodily injury.

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

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

[121] Except, as discussed above, a culpable mental state of negligence is required for assaults that involve causing bodily injury by means of a firearm per RCC § 22A-1202 subsection (e)(2).

[122] D.C. Code § 22-404(a)(1).

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

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

[125] Under District law, voluntary intoxication cannot constitute a defense to a "general intent" crime. *Kyle v. United States*, 759 A.2d 192, 199-200 (D.C. 2000). In accordance with this rule, assault appears to be a general intent crime, to which an intoxication defense may not be raised. *Parker v. United States*, 359 F.2d 1009, 1013 n.4 (D.C.

Second, use of the definition of "bodily injury" in the revised assault statute, defined in RCC § 22A-1001 as "physical pain, illness, or any impairment of physical condition," clarifies the minimal harm that is ordinarily[126] necessary to constitute assault under the revised statute. Current District assault statutes do not address whether they cover any infliction of pain or causing illness or impairment of physical condition. District case law has established that any non-consensual touching, even without pain, is criminalized as simple assault.[127] However, whether recklessly causing illness or impairment of someone's physical condition constitutes simple assault under current law is not clearly established. Use of the defined term "bodily injury" clarifies that not only physical contacts that result in pain are criminal under the RCC assault statute, but also potentially painless harms such as sickness[128] or impaired physical conditions.[129] This change clarifies the scope of the revised assault offense and, to the extent it

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Cir. 1966) ("It seems clear that, regardless of the definition, voluntary intoxication is no defense to simple assault.") (citing *McGee v. State*, 4 Ala. App. 54, 58 So. 1008 (1912), and *State v. Truitt*, 21 Del. 466, 62 A. 790 (1904)); *see, e.g.*, *Smith v. United States*, 593 A.2d 205, 206–07 (D.C. 1991) (observing that assault is a general intent crime); *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011) (same); *see also Buchanan v. United States*, 32 A.3d 990, 996-98 (D.C. 2011) (Ruiz, J. concurring) (discussing the relationship between the law of intoxication and assault's status as a general intent crime). The Revised Criminal Code does not recognize the distinction between general and specific intent crimes for purposes of the law of intoxication; instead, it employs an imputation approach under which the culpable mental state of recklessness, as defined under RCC § 22A-206(c), may be imputed—notwithstanding the absence of awareness of a substantial risk—based upon the self-induced intoxication of the actor. *See* RCC § 209(c) ("When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if: (1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and (2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists."). Under this new approach, application of a recklessness (or negligence) culpable mental state to a revised offense roughly approximates District law governing general intent crimes. *See* FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 27-31 (March 13, 2017)

[126] The possible exception is conduct that involves physical force that overpowers a person per RCC § 22A-1202 subsections (e)(1) or (f). As discussed in Commentary above, the revised assault statute does not criminalize (as a completed offense) conduct that falls short of inflicting bodily injury or using physical force that overpowers , a significant change to current District law.

[127] *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).

[128] Recklessly engaging in nonconsensual physical contact that transmits a disease to another person may suffice for assault liability. However, particular care should be given to the gross deviation requirement in the definition of "recklessness," per RCC § 22A-206(c)(3), that: "In order to act recklessly as to a result or circumstance, the person's conduct must *grossly deviate from the standard of care that a reasonable person would observe in the person's situation*" (emphasis added). For example, a sneezy office worker who disregards a substantial risk that he will transmit a cold virus to others by working in proximity to them would not ordinarily satisfy the requirement of bodily injury, whereas, a sneezy surgeon who disregards a substantial risk that she will transmit a cold virus to a patient undergoing a procedure and having a compromised immune system may satisfy the requirement of bodily injury for assault liability. Note that effective consent, per subsection (i)(1), would remain a defense in any of these examples, however.

[129] For example, a person who surreptitiously adds alcohol to another's drink, disregarding a substantial risk that the alcohol will alter the drinker's physical condition, such as their sense of balance, may satisfy the requirement of bodily injury for assault liability if the gross deviation requirement in the definition of "recklessness," per RCC § 22A-206(c)(3).

changes existing law, fills a gap insofar as the infliction of potentially serious but painless harms may not be subject to assault liability.

Third, the revised statute in subsection (i)(1) clarifies that "effective consent," a defined term in RCC § 22A-1001 that excludes consent obtained by means of coercion or deception, is a defense to less serious forms of assault,[130] or any assault where the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law. The District's assault statutes do not address whether consent of the complainant is a defense to liability, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[131] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[132] The RCC assault statute clarifies that effective consent[133] by the complainant, or reasonable belief that the complainant gave effective consent, is a defense to assault in several circumstances. First, effective consent is always a defense to assaults that only result in bodily injury or using overpowering physical force.[134] Second, effective consent is a defense to any type of reasonably foreseeable assault that may occur in lawful sports, contests and other concerted activities,[135] even if significant bodily injury or serious bodily injury results, or a firearm or other dangerous weapon is used. The prefatory language in subsection (i)(1)[136] also clarifies that any general justification defense under District law continues to be available to a defendant in an assault prosecution. Absent such an effective consent defense, a broad swath of ordinary and legal activities potentially would fall within the scope of the current and revised assault offenses, and District practice[137] has long recognized the general existence of a consent defense that is consistent with the RCC effective consent defense for assault. Subsection (i)(2) further clarifies

[130] Per subsection (i)(1)(A), effective consent is a defense to charges under subsections (c)(1) (but only if not involving a dangerous weapon), (e)(1), (e)(2), and (f).

[131] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

[133] I.e., consent not obtained by coercion or deception. This limitation on consent may address the *Woods* court's *dicta* concerning "absurd realities" of providing a defense to significant bodily injury in some situations. *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013)("such as a loan shark lending money on the condition that non-payment authorizes a beating or gang members who agree to settle old scores by a shootout").

[134] Except where such a bodily injury was caused by a firearm, per RCC § 22A-1202(c)(1).

[135] Note that such a defense is not categorically applicable to conduct in a legal sporting event or other concerted activity—the assault must be a reasonably foreseeable hazard of participation. This means that, for example, a hockey player could not claim a defense for assaulting a player during an intermission. Similarly, infliction of a significant bodily injury pursuant to illegal activity such as a disturbance of the peace—per the facts in *Woods v. U.S.*, 65 A.3d 667 (D.C. 2013)—would not be able to raise a defense under subsection (i)(1)(B).

[136] "In addition to any justification defenses applicable to the defendant's conduct under District law…."

[137] D.C. Crim. Jur. Instr. § 9-320 ("If [name of complainant] voluntarily consented to [the act] [insert description of the act], or [name of defendant] reasonably believed [name of complainant] was consenting, the crime of [insert offense] has not been committed.").

the burden of proof for the defense, consistent with current District practice.[138] This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised assault statute limits excuse and justification defenses to assaulting a law enforcement officer to circumstances where the defendant is at least reckless as to the complainant's status as a law enforcement officer, and the amount of force appeared reasonably necessary. The District's current assault on a police officer (APO) statute prohibits excuse and justification defenses where the complainant "knew or should have known" that the complainant was a law enforcement officer.[139] Case law repeats this language,[140] without clarifying whether there is any requirement of subjective awareness on the defendant's part as to the complainant's status.[141] Resolving this ambiguity as to the required culpable mental state, the revised assault offense requires the defendant's recklessness as to the circumstance that the person harmed is a law enforcement officer, which makes the defense consistent with the assault gradations that have an enhancement for "protected persons" (which include law enforcement officers in the course of their duties, as a category in the definition of "protected person"). The revised defense in subsection (i)(3) also codifies existing District practice[142] and case law which states the limitation on a defense extends to stops or other detention (not just arrest) for a legitimate police purpose,[143] and that the law enforcement officer's use of force must have appeared reasonably necessary.[144] These changes clarify the defense, using definitions and requirements consistent with the revised assault offense and existing District law.

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[138] D.C. Crim. Jur. Instr. § 9-320 ("The government must prove beyond a reasonable doubt that [name of complainant] did not voluntarily consent to the acts [or that [name of defendant] did not reasonably believe [name of complainant] was consenting].").

[139] D.C. Code § 22-405 ("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.").

[140] *See, e.g., Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

[141] *See Speed v. United States*, 562 A.2d 124, 129 (D.C.1989) (finding an exception to the defense where "the defendant did know or had reason to know that the complainant was a member of such force, and the officer was engaged in official police duties…"). The DCCA has held that similar language in the receiving stolen property offense, "knowing or having reason to believe that the property was stolen," requires a defendant's subjective awareness, not mere negligence. *Owens v. United States*, 90 A.3d 1118, 1122 (D.C. 2014). *But see* Dean v. United States, 938 A.2d 751, 762 (D.C. 2007) (holding that "reason to know" language in the murder of a law enforcement officer statute does not require actual knowledge that decedent was an officer).

[142] D.C. Crim. Jur. Instr. § 4-114 ("A police officer may stop or detain someone for a legitimate police purpose. And the officer may use the amount of force that appears reasonably necessary to make or maintain the stop. This is the amount of force that an ordinarily careful and intelligent person in the officer's position would think necessary. If the officer uses only the force that appears reasonably necessary, the person stopped may not interfere with the officer, even if the stop later turns out to have been unlawful. If s/he does interfere, s/he acts without justification or excuse. If the officer uses more force than appears reasonably necessary, the person stopped may defend against the excessive force, using only the amount of force that appears reasonably necessary for his/her protection. If that person uses more force than is reasonably necessary for protection, s/he acts without justification.").

[143] *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989).

[144] *Nelson v. United States*, 580 A.2d 114, 117 (D.C.1990) *(on rehearing)*.

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

First, the revised assault statute codifies the culpable mental state in the current aggravated assault statute as "recklessly, under circumstances manifesting extreme indifference to human life" (subsections (a)(3), (a)(4), and (b)(1)). The District's current aggravated assault statute lists two different culpable mental states: "knowingly or purposely causes serious bodily injury" in D.C. Code § 22-404(a)(1) and "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury" in D.C. Code § 22-404(a)(2). The DCCA, however, has stated that "[i]n order to give effect to the [aggravated assault] statute as a whole, subsection (a)(2) must be read as requiring a different type of mental element—gross recklessness."[145] The DCCA has also stated that the lower culpable mental state in the current aggravated assault statute "can be proven by evidence of 'conscious disregard of an extreme risk of death or serious bodily injury'"[146] and that it is "substantively indistinguishable from the minimum state of mind required for conviction of second-degree murder,"[147] in that it, too, requires "'extreme recklessness' regarding risk of death or serious bodily injury.'"[148] In the RCC it is only necessary to specify the latter culpable mental state because the higher culpable mental states "knowingly" or "purposely" satisfy the lower culpable mental state under RCC § 22A-206. The revised assault statute's use of the culpable mental state "recklessly, under circumstances manifesting extreme indifference to human life" in subsections (a)(3), (a)(4), and (b)(1) is intended to clarify without change[149] existing law on the "gross recklessness" in the current aggravated assault statute.

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

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

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

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

[149] *See, e.g., Perry v. United States*, 36 A.3d 799, 817, 818 (stating that the required mental state in subsection (a)(2) of the aggravated assault statute (D.C. Code § 22-404.01) was "gross recklessness" and that this mental state was "substantively indistinguishable" from the required mental state for second degree murder); *In re D.P.*, 122 A.3d 903, 908-910 (holding that evidence was insufficient to prove depraved heart malice as required for aggravated assault under D.C. Code § 22-404.01(a)(2) when appellant was unarmed, engaged in assaultive conduct for approximately fourteen seconds on a public bus, and ceased the assault when the complainant was no longer fighting back); *Vaughn v. United States*, 93 A.3d 1237, 1268, 1270 (D.C. 2014) (deeming the enhanced recklessness of aggravated assault to "set [such] a high bar" that a jury instruction which suggested the mens rea of the offense was only was one of normal recklessness—i.e. the "awareness of and disregard [of a risk]" at issue in felony assault—constituted plain error that was prejudicial, "affect[ed] the integrity of th[e] proceeding," and "impugn[ed] the public reputation of judicial proceedings in general.").

It should be noted that the revised second degree murder statute in RCC § 22A-XXXX also requires the culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life," which will not change DCCA case law interpreting depraved heart murder. *See, e.g., Comber v. United States*, 584 A.2d 26, 39 (D.C.1990) (en banc) (noting that "depraved heart malice exists only where the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury, but engaged in that conduct nonetheless); *Powell v. United States*, 485 A.2d 596 (D.C.1984) (affirming second degree murder conviction on depraved heart malice theory when defendant led police in a high speed chase at speeds of up to ninety miles an

Second, the revised assault statute, by the use of the phrase, "in fact," clarifies that no culpable mental state is required as to whether the object at issue is a "dangerous weapon" (subsections (a)(3), (b)(2), and (c)(1)), as that term is defined in RCC § 22A-1001, or a "a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded" (subsection (e)(2)). As discussed above, the revised assault statute's gradations replace the current offense of assault with a dangerous weapon (ADW), as well as the separate penalty enhancement for committing certain assault offenses "when armed with or having readily available" a deadly or dangerous weapon.[150] The current ADW statute is silent as to what culpable mental state applies to the whether the object at issue is a dangerous weapon.[151] However, District case law provides that whether an object qualifies as a "dangerous weapon" hinges upon a purely objective analysis of the nature of the object rather than on the accused's understanding of the object.[152] District case law for the "while armed" enhancement in D.C. Code § 22-4502 similarly supports applying strict liability to whether the object at issue is a dangerous weapon.[153] Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[154] Clarifying that whether the object at issue is a dangerous weapon or firearm is a matter of strict liability in the revised assault gradations clarifies, and potentially fills a gap in, District law.

Third, use of the phrase "physical force that overpowers another person" further clarifies the minimal harms[155] that may constitute assault under the revised statute. Under current District case law, simple assault criminalizes any non-consensual contact,[156] including "physical force

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hour); *Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (affirming second degree murder conviction on depraved heart malice theory when defendant handed a knife to co-defendant whom he knew wanted to harm the victim, and the co-defendant used the knife to fatally wound the victim).

[150] D.C. Code § 22-4502(a).

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

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

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

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

[155] The other possible means of committing such minimal harms are infliction of bodily injury per RCC § 22A-1202 subsections (f) or (e)(1). As discussed in Commentary above, the revised assault statute does not criminalize (as a completed offense) conduct that falls short of inflicting bodily injury or using physical force, a significant change to current District law.

[156] *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).

that overpowers another person." The RCC assault statute clarifies that physical contacts that overpower another person[157] will continue to be a possible basis for assault liability. To provide the basis for assault liability, overpowering physical contacts need not be painful or otherwise constitute a "bodily injury" as defined in RCC § 22A-1001. The revised statute's inclusion of physical force that overpowers another person ensures that the infliction of many of the most offensive physical contacts, contact which commonly are involved in other crimes such as robbery,[158] are subject to assault liability.

Fourth, the revised assault statute makes minor changes to the wording of one of the enhancements for assaulting a law enforcement officer. The comparable current District offense in D.C. Code § 22-405 requires, in relevant part, that the "law enforcement officer is engaged in the performance of his or her official duties."[159] The revised assault statute, through the definition of "protected person" in RCC § 22A-100, requires the assaultive conduct to occur "while in the course of his or her official duties."[160] The revised wording simplifies the requirement and is not intended to change District law.

Lastly, per subsection (i)(3), the revised assault offense makes no substantive[161] changes with respect to the justification and excuse defense codified in the District's current statute on resisting arrest by an individual reasonably believed to be law enforcement officer, D.C. Code § 22-405.01.

Relation to National Legal Trends. *The revised assault offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[162]

First, limiting the revised assault statute to inflicting bodily injury or using overpowering physical force is well-supported by national legal trends. A majority of the 28 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[163] limit their assault statutes to causing physical injury[164] or include intent-to-

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[157] Examples may include pushes, shoves, holds, and hugs if the facts of the case show that such conduct overpowered the complainant.

[158] RCC § 22A-1201.

[159] D.C. Code § 22-405(b).

[160] RCC § 22A-1001.

[161] The RCC language in (i)(3) is identical to that in current D.C. Code § 22-405(d), however the definition of "law enforcement officer" as used in the RCC offense is slightly expanded as compared to the current definition in D.C. Code § 22-405(d). See commentary to RCC § 22A-1001(11) regarding changes to the definition of "law enforcement officer."

[162] It should be noted that several jurisdictions label their physical assault offenses as "battery." In addition, this commentary considers statutes with "attempt" to cause injury as still being limited to causing injury because that remains the focus of the offense and it is unclear if "attempt" in a jurisdiction is meant to encompass intent-to-frighten assault.

[163] *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.

[164] Ala. Code §§ 13A-6-20, 13A-6-21(a)(1), (a)(2), (a)(3), 13A-6-22(a)(1), (a)(2), (a)(3); Ark. Code §§ 5-13-201(a)(1), (a)(2), (a)(3), (a)(8), 5-13-202(1), (2), (3), 5-13-203; Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), (1)(b), (1)(c), 18-3-203(1)(b), (1)(d), (1)(g); Conn. Gen. Stat. Ann. §§ 53a-59(a), 53a-60, 53a-60a, 53a-61; Del. Code Ann. tit. 11, §§ 611, 612(a)(1), (a)(2), 613(a)(1), (a)(2), (a)(3); Haw. Rev. Stat. Ann. §§ 707-710, 707-711(1)(a), (1)(b), (1)(d), 707-712; Ky. Rev. Stat. Ann. §§ 508.010, 508.020, 508.030; N.H. Rev. Stat. Ann. §§ 631:1(I)(a), (I)(b), 631:2(I)(a), (I)(b), (I)(c); N.J. Stat. Ann. § 2C:12-1(b)(1), (b)(2), (b)(3), (b)(7); N.Y. Penal Law §§ 120.00, 120.05(1), (2), (4), 120.10; N.D. Cent. Code Ann. §§ 12.1-17-01(1)(a), (1)(b), 12.1-17-01.1, 12.1-17-02(1)(a), (1)(b), (1)(c); Ohio Rev. Code Ann. §§ 2903.11(A)(1), (A)(2), 2903.13(A), (B), 2903.14; Or. Rev. Stat. Ann. §§

frighten assault or offensive physical contact in the lower grades of assault.[165] Similarly the MPC aggravated assault offense is limited to bodily injury, with intent-to-frighten assault included in simple assault.[166] Of these 28 reformed code jurisdictions, only six have assault statutes that include intent-to-frighten assault or offensive physical contact in the higher grades of assault.[167] An additional three states include offensive physical contact in a higher grade of assault, but only when a weapon is used.[168]

Second, the revised assault statute no longer includes "assault with intent to" or "AWI" offenses, such as assault with intent to kill.[169] Instead, liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22A-301 to the completed offenses. None of the reformed jurisdictions or the MPC have specific offenses for assault with-intent-to commit other offenses.

Third, the revised assault statute replaces the separate common law offenses of mayhem and malicious disfigurement. Instead of mayhem and malicious disfigurement, the revised

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163.160, 163.165(1)(a), (b), (c), 163.175, 163.185(1)(a); 18 Pa. Stat. Ann. § 2702(a)(1), (a)(4); Wis. Stat. Ann. §§ 940.19, 940.21, 940.23, 940.24.

[165] Alaska Stat. Ann. § 11.41.220(a)(3) (fourth degree assault prohibiting, in part, "by words or other conduct that person recklessly places another person in fear of imminent physical injury."); Me. Rev. Stat. tit. 17-A, § 207(1)(A) (defining assault as "causes bodily injury or offensive physical contact."); Mo. Ann. Stat. § 565.056(1)(3) (fourth degree assault statute prohibiting, in part, "places another person in apprehension of immediate physical injury" and "causes physical contact with another person knowing the other person will regard the contact as offensive or provocative."); S.D. Codified Laws § 22-18-1(4) (assault offense prohibiting, in part, "attempts by physical menace or credible threat to put another in fear of imminent bodily harm, with or without the actual ability to harm the other person.").

[166] MPC § 211.1.

[167] Ariz. Rev. Stat. Ann. § 13-1203 (assault statute prohibiting, in part, "causing any physical injury to another person," "placing another person in reasonable apprehension of imminent physical injury," or "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(1), (2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "causes serious physical injury to another" or "uses a deadly weapon or dangerous instrument."); 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 various assault offenses in §§ 609.221(1), 609.222, 609.223(1), 609.224(1)(1), (1)(2); Mont. Code Ann. § 45-5-202 (defining aggravated assault, in part, as "causes serious bodily injury to another or purposely or knowingly, with the use of physical force or contact, causes reasonable apprehension of serious bodily injury or death in another."); Tenn. Code Ann. § 39-13-101 (defining assault in part as "causes another to reasonably fear imminent bodily injury" or "causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and § 39-13-102(a)(1)(A) (aggravated assault offense requiring that a person commits an assault "as defined in § 39-13-101, and the assault" results in serious bodily injury or death to another, involved a deadly weapon, or involved strangulation or attempted strangulation); Tex. Penal Code Ann. § 22.01(a) (requiring that a person causes bodily injury to another, threatens another with imminent bodily injury, or causes offensive physical contact with another person) and § 22.02(a) (requiring a person to "commit[] assault as defined in § 22.01" and cause serious bodily injury or use or exhibit a deadly weapon); Utah Code Ann. § 76-5-103(1)(a)(ii), (1)(b) (defining aggravated assault, in part, as "a threat, accompanied by a show of immediate force or violence, to do bodily harm to another" that includes the use of a dangerous weapon, impeding the breathing or blood circulation of another person, or other means or force likely to produce death or serious bodily injury).

[168] 720 Ill. Comp. Stat. Ann. 5/12-3(a) and 5/12-3.05(f)(1) (defining battery as "causes bodily to an individual" or "makes physical contact of an insulting or provoking nature with an individual" and defining aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. §35-42-2-1(c)(1), (g)(2) (defining battery, in part, as "touches another person in a rude, insolent, or angry manner" and punishing it as a Level 5 felony when committed with a "deadly weapon."); Kan. Stat. Ann. § 21-5413(b)(1)(C) (aggravated battery offense punishing, in part, "causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted.").

[169] D.C. Code § 22-401.

assault statute has two new gradations in subsection (a)(1) and subsection (a)(2) that require purposeful, permanent injuries. Subsection (b)(1) of first degree assault also includes injuries that are currently covered by mayhem and malicious disfigurement. National legal trends support deleting mayhem and malicious disfigurement. Only two of the reformed jurisdictions have specific offenses for mayhem or malicious disfigurement,[170] although several reformed jurisdictions specifically include in the higher grades of assault purposely or intentionally disfiguring or maiming another person[171] like the revised aggravated assault statute (subsections (a)(1) and (a)(2)). The MPC does not have separate offenses for mayhem and malicious disfigurement, but does include purposely or knowingly causing serious bodily injury in aggravated assault.[172]

Fourth, in combination with the aggravated criminal menace statute in RCC § 22A-1203, the revised assault statute's enhanced penalties for use of a dangerous weapon replace the separate offense of assault with a dangerous weapon (ADW). Instead of a separate ADW offense, the revised assault statute incorporates into its gradations enhanced penalties for causing different types of bodily injury "by means of" a dangerous weapon. At least 24 of the 28 reformed jurisdictions and the MPC[173] use "by means of" or similar language in the weapons gradations of their assault statutes.[174] In addition, most reformed jurisdictions do not penalize in their assault statutes use of a weapon with intent-to-frighten or use of a weapon with the use of physical force that overpowers, nor does the MPC,[175] in contrast to the District's current ADW offense. A majority of the reformed jurisdictions either limit the weapon gradations in assault to causing bodily injury[176] or include intent-to-frighten assault, with or without a weapon, in the

[170] Utah Code Ann. § 76-5-107; Wis. Stat. Ann. § 940.21.

[171] Ala. Code Ann. § 13A-6-20(a)(2); Ark. Code Ann. § 5-13-201(a)(2); Colo. Rev. Stat. Ann. § 18-3-202(1)(b); Conn. Gen. Stat. Ann. § 53a-59(a)(2); Del. Code Ann. tit. 11, § 613(a)(2); Ill. Comp. Stat. Ann. 5/12-3.05(a)(1); Kan. Stat. Ann. § 21-5413(b)(1)(B); Me. Rev. Stat. tit. 17-A, § 208(A-1); N.Y. Penal Law § 120.10(2); N.D. Cent. Code Ann. § 12.1-17-02(2).

[172] MPC § 211.1(2)(a).

[173] MPC § 211.1(1)(b) ("with a deadly weapon") and (2)(b) ("with a deadly weapon.").

[174] 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)(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. 5/12-3.05 (e)(1), (f)(1); Kan. Stat. Ann. §§ 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); 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), 2903.14(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); Wis. Stat. Ann. § 940.24.

[175] Aggravated assault in the MPC requires, in part, "attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon." MPC § 211.1(2)(b). As noted previously, this commentary considers statutes with "attempt" to cause injury as still being limited to causing injury because that remains the focus of the offense and it is unclear if "attempt" in a jurisdiction is meant to encompass intent-to-frighten assault.

[176] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Ark. Code §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(a); Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. 11, §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); Ky. Rev. Stat. Ann. §§ 508.010(1)(a),

lower grades.[177] Six reformed jurisdictions include offensive physical contact with a weapon in the higher grades of assault[178] and five have assault statutes that include intent-to frighten assault, with or without a weapon, in the higher grades of assault.[179]

In addition, through the definition of "dangerous weapon" in RCC § 22A-1001, the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon,[180] as well as imitation firearms,[181] no longer results in an enhanced penalty for assault

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508.020(1)(b), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(1)(C), 208-B(1)(A), (1)(B); Mo Ann. Stat. § 565.052(1)(2); 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. §§ 2903.11(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(a)(4); Wis. Stat. Ann. § 940.24.

[177] Alaska Stat. Ann. §§ 11.41.220(a)(1)(A), 11.41.230(a)(3); Mo. Ann. Stat. § 565.056(1)(2); 18 Pa. Stat. Ann. § 270(a)(3); S.D. Codified Laws § 22-18-1(4).

[178] Ariz. Rev. Stat. Ann. § 13-1203(A)(3) (assault statute prohibiting, in part, "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/12-3(a)(2) and 5/12-3.05(f)(1) (defining battery, in part, as "makes physical contact of an insulting or provoking nature with an individual" and defining aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. § 35-42-2-1(c)(1), (g)(1), (g)(2) (battery offense prohibiting, in part, "touches another person in a rude, insolent, or angry manner" and making it aggravated battery if committed with a "deadly weapon."); Kan. Stat. Ann. § 21-5413(b)(1)(B, (b)(1)(C) (aggravated battery offense prohibiting, in part, "causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon"); Tenn. Code Ann. §§ 39-13-101(a)(3) (assault offense prohibiting, in part, causing "physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and 39-13-102(a)(1)(A)(iii) (making "assault as defined in § 39-13-101" aggravated assault if it "involved the use or display of a deadly weapon."); Tex. Penal Code Ann. § 22.01(a)(3) (offense prohibiting, in part, causing "physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2), (b) (making "assault as defined in § 22.01" a felony of the second degree in most situations if the defendant "uses or exhibits a deadly weapon during the commission of the assault.").

[179] Ariz. Rev. Stat. Ann. § 13-1203(A)(2), (A)(3) (assault statute prohibiting, in part, "placing another person in reasonable apprehension of imminent physical injury" and "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); 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 § 609.221(1) (prohibiting assault with a dangerous weapon); Mont. Code Ann. § 45-5-213(1)(b) (making it a felony with a 20 year maximum term of imprisonment to cause "reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon."); Tenn. Code Ann. § 39-13-101(a)(2), (a)(3) (defining assault, in part, as "causes another to reasonably fear imminent bodily injury" and "causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and § 39-13-102(a)(1)(A)(iii) (aggravated assault offense requiring that a person commits an assault "as defined in § 39-13-101, and the assault . . . involved the use or display of deadly weapon."); Tex. Penal Code Ann. § 22.01(a)(2), (a)(3) (requiring, in part, that a person "threatens another with imminent bodily injury" and "causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2) (requiring a person to "commit[] assault as defined in § 22.01" and use or exhibit a deadly weapon); Utah Code Ann. § 76-5-103(1)(a)(ii), (1)(b)(i) (defining aggravated assault, in part, as "a threat, accompanied by a show of immediate force or violence, to do bodily harm to another . . . that includes the use of a dangerous weapon.").

[180] *See, e.g., Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon.").

[181] *See, e.g., Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) (finding that "an imitation or blank pistol used in an assault by pointing it at another is a 'dangerous weapon' in that it is likely to produce great bodily harm" in an ADW case); *Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016) ("An imitation firearm is a gun, which is

as it does under current District law. The MPC and reformed jurisdictions' statutes generally do not address whether a complaining witness's perception is sufficient for constituting a "dangerous weapon, presumably leaving the matter to case law, although at least one state statutorily defines "dangerous 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."[182] Similarly, two reformed jurisdictions include gradations in their assault statutes for the use of imitation weapons or a complaining witness's perception of an object.[183]

The elimination of ADW as a separate offense reduces unnecessary overlap in the current D.C. Code between multiple means of enhancing assaults committed with a weapon. Due to the complexity of weapons offenses, it is impossible to generalize about overlap between similar offenses in reformed jurisdictions. The MPC does not include weapons offenses. However, as is discussed below, a significant number of reformed jurisdictions limit or eliminate overlap between a separate weapons enhancement or offense and the weapons gradations in their assault statutes.

Fifth, in combination with the aggravated criminal menace statute in RCC § 22A-1203, the revised assault statute's enhanced penalties for the use of a dangerous weapon replace the separate "while armed" penalty enhancement in current District law. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of assault-type offenses[184] "when armed with" or "having readily available" a dangerous weapon, including firearms. Instead of having a separate "while armed" enhancement, the revised assault offense incorporates into its gradations enhanced penalties for causing different types of bodily injury "by means of" the weapon. An individual who merely possesses a firearm would still have potential liability for purposely possessing a dangerous weapon in furtherance of an assault per RCC § 22A-XXXX [revised PFCOV-type offense].

Limiting the weapons gradations in the revised assault statute to use of the weapon is well-supported by national legal trends. The requirements for the involvement of the weapon in reformed jurisdictions' assault statutes depend on whether the weapon at issue is a firearm or other weapon. The MPC does not have weapons enhancements or offenses. Seventeen of the 28 reformed jurisdictions include weapons or dangerous weapons in their weapons enhancements or separate offenses.[185] Only one of these jurisdictions has a standard that is similar to the "readily available" available standard under current District law, although it is arguably narrower,

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an inherently dangerous weapon for purposes of ADW, and therefore, a defendant may be appropriately charged with ADW where the defendant commits an assault using an imitation firearm.").

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

[183] 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.").

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

[185] Ala. Code § 13A-5-6; Alaska Stat. Ann. § 12.55.125(c); Ariz. Rev. Stat. Ann. § 13-3102(A)(1); Colo. Rev. Stat. Ann. § 18-1.3-406(7); Del. Code Ann. tit. 11, § 1447; Haw. Rev. Stat. Ann. §§ 134-51, 134-52, 134-53; 720 Ill. Comp. Stat. Ann. 5/33A-2; Me. Rev. Stat. tit. 17-A, § 1252(4), (5); Mo. Ann. Stat. § 571.015; Mont. Code Ann. § 45-18-221; N.H. Rev. Stat. Ann. §§ 650-A:1, 159:15; N. Y. Penal Law §§ 265.08, 265.09; Wash. Rev. Code Ann. §§ 9.94A.535(3), (4); Wis. Stat. Ann. § 939.63; Utah Code Ann. § 76-3-203.8; Minn. Stat. Ann. § 609.11; N.D. Cent. Code Ann. § 12.1-32-09(1)(a).

requiring the weapon be "within [the person's] immediate control."[186] Six of these jurisdictions include possessing the weapon or being "armed" with the weapon.[187] The remaining 10 states, however, require use of the weapon.[188] Eighteen of the 28 states limit their weapons enhancements or offenses to firearms or specifically include firearms.[189] Three of these reformed jurisdictions have a standard that is similar to "readily available" under current District law, although they are arguably narrower, requiring "within the person's immediate control"[190] or "on or about" an offender's person.[191] Eight of these jurisdictions include possessing the firearm or being "armed" with the firearm.[192] In the remaining states, six require the use of the firearm,[193] and one prohibits both possession and use, but punishes use more severely.[194] Limiting the weapons gradations in the revised assault statute to use of the weapon is well-supported by national legal trends. In addition, most of the reformed jurisdictions use "by means of" a weapon or similar language[195] as does the revised assault statute.

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[186] Ariz. Rev. Stat. Ann. § 13-3102(A)(1).

[187] Del. Code Ann. tit. 11, § 1447 ("in possession of a deadly weapon."); Haw. Rev. Stat. Ann. §§ 134-51; ("possesses . . . or uses or threatens to use a deadly or dangerous weapon."); 720 Ill. Comp. Stat. Ann. 5/33A-2(a) ("while armed with a dangerous weapon."); N. Y. Penal Law §§ 265.08(1), 265.09(1)(a) ("possesses a deadly weapon."); Wash. Rev. Code Ann. §§ 9.94A.535(4) ("was armed with a deadly weapon other than a firearm."); Wis. Stat. Ann. § 939.63(a) ("in possession of a deadly weapon.").

[188] Ala. Code § 13A-5-6(a)(5), (a)(6) ("deadly weapon was used or attempted to be used."); Alaska Stat. Ann. § 12.55.125(c)(2) ("used a dangerous instrument."); Colo. Rev. Stat. Ann. § 18-1.3-406(7) ("use of a dangerous weapon."); Me. Rev. Stat. tit. 17-A, § 1252(4) ("with the use of a dangerous weapon."); Mo. Ann. Stat. § 571.015(1) ("by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon."); Mont. Code Ann. § 45-18-221(1) ("displayed, brandished, or otherwise used . . . or other dangerous weapon."); N.H. Rev. Stat. Ann. § 159:15(I) ("uses or employs . . . or other deadly weapon."); Utah Code Ann. § 76-3-203.8(2) ("a dangerous weapon was used."); Minn. Stat. Ann. § 609.11(4) ("used . . . a dangerous weapon other than a firearm."; N.D. Cent. Code Ann. § 12.1-32-09(1)(a) ("inflicts or attempts to inflict bodily injury upon another, threatens or menaces another with imminent bodily injury with a dangerous weapon.").

[189] Alaska Stat. Ann. § 12.55.125(c)(2); Conn. Gen. Stat. Ann. § 53a-216; Del. Code Ann. tit. 11, § 1447A; Haw. Rev. Stat. Ann. §§ 706-660.1, 134-21; Ind. Code Ann. § 35-50-2-11; Kan. Stat. Ann. § 21-6804; Me. Rev. Stat. tit. 17-A, § 1252(5); N. H. Rev. Stat. Ann. § 650-A:1; N. J. Stat. Ann. § 2C:43-6(c); N. Y. Penal Law §§ 265.08, 265.09; 42 Pa. Stat. Ann. § 9712; Tenn. Code Ann. § 39-17-1324; Tex. Penal Code § 46.02; Wash. Rev. Code Ann. § 9.94A.553(3); Or. Rev. Stat. Ann. § 161.610; Minn. Stat. Ann. § 609.111(5); Ohio Rev. Code Ann. §§ 2929.14(B)(1)(a)(ii), (B)(1)(a)(iii), 2941.141, 2941.145; Ark. Code Ann. § 16-90-120.

[190] Haw. Rev. Stat. Ann. § 134-21.

[191] Ohio Rev. Code Ann. §§ 2929.14(B)(ii), (B)(iii), 2941.141, 2941.145; Tex. Penal Code § 46.02(a-1).

[192] Alaska Stat. Ann. § 12.55.125(c)(2) ("possessed a firearm."); Del. Code Ann. tit. 11, § 1447A(a) ("in possession of a firearm."); N. H. Rev. Stat. Ann. § 650-A:1 ("was armed with a pistol."); N. J. Stat. Ann. § 2C:43-6(c) ("used or was in possession of a firearm."); 42 Pa. Stat. Ann. § 9712(a) ("visibly possessed a firearm."); Wash. Rev. Code Ann. § 9.94A.553(3) ("was armed with a firearm."); Minn. Stat. Ann. § 609.111(5) ("had in possession or used . . . a firearm."); N. Y. Penal Law §§ 265.19, 265.03 (offense of aggravated criminal possession of a weapon referring to an offense that prohibits "possess[ing]" certain firearms, including loaded firearms).

[193] Conn. Gen. Stat. Ann. § 53a-216(a) ("uses or threatens the use of a pistol . . . or other firearm."); Ind. Code Ann. § 35-50-2-11(d) ("used a firearm."); Kan. Stat. Ann. § 21-6804(h) ("when a firearm is used."); Me. Rev. Stat. tit. 17-A, § 1252(5) ("with the use of a firearm."); Or. Rev. Stat. Ann. § 161.610(2) ("use or threatened use of a firearm."); Ark. Code Ann. § 16-90-120(a) ("employed any firearm.").

[194] Tenn. Code Ann. § 39-17-1324(a), (g)(1) (enhancement making it a class D felony with a three year mandatory minimum sentence if a person "possess[es] a firearm with the intent to go armed during the commission of or attempt to commit a dangerous felony") and § 39-17-1324(b), (h)(1) (enhancement making it a class C felony with a six year mandatory minimum sentence if a person "employ[s] a firearm . . . during the commission of a dangerous felony . . . or an attempt to commit a dangerous felony.").

[195] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Ark. Code §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(a);

By incorporating the use of a weapon into the gradations of the revised assault statute, the RCC reduces unnecessary overlap between multiple means of enhancing assaults committed with a weapon under current District law. The reduction in overlap is well-supported by national legal trends. The MPC does not have weapons enhancements or offenses. However, a majority of the 28 reformed jurisdictions with enhancements or separate offenses for the involvement of weapons or firearms in offenses prohibit or largely limit overlap between the weapons gradations of assault and the separate enhancements or offenses. First, five of the reformed jurisdictions statutorily prohibit applying a weapons or firearm enhancement to an offense that requires as an element or mandatory sentencing factor a weapon or firearm.[196] An additional two reformed states limit overlap to a certain class of felony[197] or to assaults where the weapon is a firearm.[198] The remaining states appear to statutorily permit overlap between the assault gradations and the weapons enhancements or offenses only for inherently dangerous weapons and not for substances and articles that are capable of causing or likely to cause death or serious bodily injury. Nine jurisdictions have assault statutes that prohibit the use of a weapon,[199] but the jurisdictions' weapons enhancement or offense is limited to firearm.[200] In these states, it appears that the use of any dangerous weapon in an assault, other than a firearm, receives no penalty beyond the assault statute. Similarly, seven jurisdictions have assault statutes that prohibit the use of both inherently dangerous weapons, as well as substances and articles that are capable of causing or likely to cause death or serious bodily injury,[201] but the weapons enhancement or

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Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. 11, §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(b), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(1)(C), 208-B(1)(A), (1)(B); Mo Ann. Stat. § 565.052(1)(2); 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. §§ 2903.11(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(a)(4); Wis. Stat. Ann. § 940.24.

[196] Ill. Comp. Stat. ann. 5/33A-2(a) (stating the enhancement applies to any felony except specified crimes against persons and "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."); Mont. Code Ann. § 46-18-221(a) (stating the enhancement applies to "any offense other than an offense in which the use of a weapon is an element of the offense."); Tenn. Code Ann. § 39-17-1324(c) (excluding offenses "if possessing or employing a firearm is an essential element of the underlying dangerous felony as charged."); Wis. Stat. Ann. § 939.63(2) ("The increased penalty provided in this section does not apply if possessing, using or threatening to use a dangerous weapon is an essential element of the crime charged."); S.D. Codified Laws § 22-14-14 ("No offense may be charged . . . if the use of a dangerous weapon is a necessary element of the principal felony alleged to have been committed or attempted.").

[197] Alaska Stat. Ann. § 12.55.125(b), (c), (d).

[198] Me. Rev. Stat. Ann. tit. 17-A, § 1252(4), (5).

[199] Conn. Gen. Stat. Ann. §§ 53a-59(a), 53a-60, 53a-60a, 53a-61; Ind. Code Ann. § 35-42-2-1(g)(2); Kan. Stat. Ann. § 21-5413(b)(1)(B), (b)(1)(C), (b)(2)(B); N.J. Stat. Ann. § 2C: 12-1(a)(2), (b)(2), (b)(3); 18 Pa. Stat. Ann. §§ 2701(a)(2), 2702(a)(4); Tex. Penal Code Ann. § 22.02(a)(2); Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(10(a), (1)(c), 163.175(1)(b), (1)(c), Ohio Rev. Code Ann. §§ 2903.11(A)(2), 2903.14; Ark. Code Ann. §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3), 5-13-203(a)(3).

[200] Conn. Gen. Stat. Ann. § 53a-216; Ind. Code Ann. § 35-50-2-11; Kan. Stat. Ann. § 21-6904; N.J. Stat. Ann. § 2C:43-6(c); 42 Pa. Stat. Ann. § 9712; Tex. Penal Code Ann. § 46.02; Or. Rev. Stat. Ann. § 161.610; Ohio Rev. Code Ann. §§ 2929.14(B)(ii), (B)(iii), 2941.141, 2941.145; Ark. Code Ann. § 16-90-120.

[201] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(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)(c), 18-3-204(a); Del. Code Ann. tit. 11, §§ 611(1), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); N.Y. Penal Law §§120.00(3), 120.05(2), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(b), 12.1-17-01.1(2), 12.1-17-02(1)(b).

offense is limited to firearms or other inherently dangerous weapons.[202] In these states, it appears that the use of an inherently dangerous weapon in an assault is subject to additional penalty enhancement, but any other weapon is not. In total, there are only five states, like D.C., with no statutory limitation on overlap between the weapons gradations in assault and the weapons enhancements or separate offenses.[203]

In addition, because the revised assault statute incorporates enhancements for use of a weapon in the offense gradations, it is no longer possible to enhance an assault with both a weapon enhancement and an enhancement based on the identity of the complainant,[204] or to double-stack different weapon penalties and offenses.[205] Reformed jurisdictions generally do not statutorily address stacking a weapon enhancement with another enhancement, although at least one jurisdiction explicitly permits stacking.[206]

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[202] Ala. Code § 13A-5-6(a)(5), (a)(6); Ariz. Rev. Stat. Ann. § 13-3102(A)(1); Colo. Rev. Stat. Ann. § 18-1.3-406(7); Del. Code Ann. tit. 11, §§ 1447, 1447A; Haw. Rev. Stat. Ann. §§ 706-660.1, 134-51, 134-52, 134-53, 134-21; N.Y. Penal Law §§ 265.08, 265.09; N.D. Cent. Code Ann. § 12.1-32-02.1.

[203] N.H. Sat. Ann. §§ 650-A:1, 159:15; Wash. Rev. Code Ann. § 9.94A.533; Utah Code Ann. § 76-3-203.8; Minn. Sta. Ann. § 609.11; Mo. Ann. Stat. § 571.017.

[204] There are several penalty enhancements under current District law based upon the age or work status of the complaining witness. *See, e.g.*, D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens); 22-3611 (enhancement for specified crimes committed against minors); 22-3751 (enhancement for specified crimes committed against taxicab drives); 22-3751.01 (enhancement for specified crimes committed against a transit operator or Metrorail station manager). Nothing in current District law appears to prohibit enhancing an assault with one or more of these separate enhancements based on age or work status, in addition to the weapon enhancement in current D.C. Code § 22-4502. Indeed, the facts as discussed in several DCCA cases indicate that such stacking does occur with the weapon enhancement and senior citizen enhancement. *See, e.g.*, *McClain v. United States*, 871 A.2d 1185 (D.C. 2005) (determining "whether the trial court committed plain error when it instructed the jury regarding to lesser-included offenses of the crime of armed robbery of a senior citizen," charged under the enhancements in now D.C. Code §§ 22-4502 and 22-3601).

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

[206] Me. Rev. Stat. tit. 17-A, § 1252 ("Subsections in this section that make the sentencing class for a crime one class higher than it would otherwise be when pled and proved may be applied successively if the subsections to be applied successively contain different class enhancement factors.").

Also, the revised assault statute caps the maximum penalty for an enhancement based on the use of weapons to never be greater than the most egregious type of actual harm inflicted—the purposeful infliction of a permanently disabling injury.[207] At least nine of the 28 reformed jurisdictions similarly include causing serious bodily injury by use of a weapon in the highest grades of assault with other serious harms,[208] although weapons enhancements and offenses outside of the assault statute may change the actual penalty imposed. At least an additional six reformed jurisdictions include causing bodily injury with a weapon in the same grade of assault as the most serious physical injuries.[209] At least five states make the most serious type of physical injury the highest grade of assault, and reserve the use of weapons in lower grades[210] and two states make causing serious bodily injury with a weapon the highest grade of assault.[211]

In addition, through the definition of "dangerous weapon" in RCC § 22A-1001, the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon,[212] as well as imitation firearms,[213] no longer results in an enhanced penalty for assault as it does under current District law. The MPC and reformed jurisdictions' statutes generally do not address whether a complaining witness's perception is sufficient for constituting a "dangerous weapon, presumably leaving the matter to case law. However, at least one state defines "dangerous 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."[214] Similarly, two reformed jurisdictions include gradations in their assault statutes for the use of imitation weapons or a complaining witness's perception of an object as a weapon.[215]

Sixth, the revised assault statute criminalizes for the first time negligently causing bodily injury to another person by means of a what is, in fact, a "firearm, as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded" (subsection (e)(2)). At least 18 of the 28

[207] The current mayhem and malicious disfigurement offenses in D.C. Code § 22-406 are deleted from the revised assault statute, but the conduct is covered under either aggravated assault (subsections (a)(1) and (a)(2)) or first degree assault (subsection (b)(1)). Due to the nature of the injuries required in subsections (a)(1) and (a)(2), there is no enhancement for using a dangerous weapon. However, use of a dangerous weapon would enhance conduct in subsection (b)(1), meaning it would fall under subsection (a)(2) of aggravated assault.

[208] *See, e.g.*, Ala. Code § 13A-6-20; Alaska Stat. Ann. § 11.41.200; Ark. Code Ann. § 5-13-201; Colo. Rev. Stat. Ann. § 18-3-202; Conn. Gen. Stat. Ann. § 53a-59; Del. Code Ann. tit. 11, § 613; Ky. Rev. Stat. Ann. § 508.010; N.H. Rev. Stat. Ann. § 631:1; N.Y. Penal Law § 120.10.

[209] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1204(A)(1), (A)(2), (E); Ind. Code Ann. § 35-42-2-1(g)(1), (g)(2); Ohio Rev. Code Ann. § 2903.12(A)(1), (A)(2); S.D. Codified Laws § 22-18-1.1; Tenn. Code Ann. § 39-13-102; Tex. Penal Code Ann. § 22.02.

[210] *See, e.g.*, Haw. Rev. Stat. Ann. §§ 707-710, 707-711, 707-712; Kan. Stat. Ann. § 21-5413(b)(1)(A), (b)(1)(B), (b)(2)(A), (b)(2)(B), (g)(2); Mo. Ann. Stat. §§ 565.050, 565.052, 565.054, 565.056; N.J. Stat. Ann. § 2C:12-1(b)(1), (b)(2), (b)(3); 18 Pa. Stat. Ann. § 2702(a)(1), (a)(2), (a)(4), (b).

[211] Me. Rev. Stat. tit. 17-A, § 208-B; Or. Rev. Stat. Ann. § 163.185; Utah Code Ann. § 76-5-103.

[212] *See, e.g., Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon.").

[213] *See, e.g., Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) (finding that "an imitation or blank pistol used in an assault by pointing it at another is a 'dangerous weapon' in that it is likely to produce great bodily harm" in an ADW case); *Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016) ("An imitation firearm is a gun, which is an inherently dangerous weapon for purposes of ADW, and therefore, a defendant may be appropriately charged with ADW where the defendant commits an assault using an imitation firearm.").

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

[215] 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.").

reformed jurisdictions have assault gradations or offenses that prohibit negligently causing injury to another by negligent handling of some kind of weapon,[216] as does the MPC.[217] Of these 18 jurisdictions, two limit the category of weapons for the negligent gradation as does the RCC. One jurisdiction limits the gradation to firearms[218] and the other jurisdiction limits the negligent gradation to inherently dangerous weapons.[219] Broader categories of weapons are permitted for the other weapons gradations in these jurisdictions.[220]

Seventh, the revised assault statute's enhanced penalties for harming a law enforcement officer (LEO) replace the separate assault on a police officer (APO) offenses. The scope of conduct that receives a LEO enhancement in the revised assault statute is narrower than the current APO offenses, which include conduct that falls short of inflicting bodily injury or using overpowering physical force. The narrower scope of the revised LEO enhancement reflects national trends. The MPC does not have an APO offense or enhance assault on the basis of the identity of the complainant. Most reformed jurisdictions limit their LEO enhancements and APO offenses to bodily harm,[221] or include intent-to-frighten or offensive physical contact APO in a lower grade or separate, lower offense.[222] Only one jurisdiction appears to punish equally

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[216] Ala. Code § 13A-6-23(a)(3); Alaska Stat. Ann. § 11.41.230(a)(2); Ark. Code Ann. § 5-13-203; Colo. Rev. Stat. Ann. § 18-3-206; Conn. Gen. Stat. Ann. § 53a-61(a)(3); Del. Code Ann. tit. 11 § 611(2); Haw. Rev. Stat. Ann. § 707-712(1)(b); Mo. Ann. Stat. § 565.056(1)(2); Mont. Code Ann. § 45-5-210(1)(b); N.H. Rev. Stat. Ann. § 631:2-a(I)(c); N.J. Stat. Ann. § 2C:12-1(a)(2); N.Y. Penal Law § 120.00(3); N.D. Cent. Code Ann. § 12.1-17-01(b); Ohio Rev. Code Ann. § 2903.14; Or. Rev. Stat. Ann. § 163.160(1)(b); Pa. Stat. Ann. § 2701(a)(2); S.D. Codified Laws § 22-18-1(3); Wis. Stat. Ann. § 940.24.

[217] MPC § 211.1(1)(b).

[218] Mo. Ann. Stat. § 565.056(1)(2).

[219] Or. Rev. Stat. Ann. §§ 163.60(1)(b), 161.015(2) (fourth degree assault offense requiring, in part, "with criminal negligence causes physical injury to another by means of a deadly weapon" and defining deadly weapon as "any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.").

[220] Mo. Ann. Stat. §§ 565.052(1)(2), 556.061(20), (22) (gradation of assault requiring a "deadly weapon or dangerous instrument" and defining a "dangerous instrument" as "any instrument, article, or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury" and "deadly weapon" as specific inherently dangerous weapons, such as firearms, and black jacks); Or. Rev. Stat. Ann. §§ 163.165(1)(a)(, (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a) 161.015(1), (2) (several gradations of assault requiring a "deadly or dangerous weapon" and defining "dangerous weapon" as "any weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury" and "deadly weapon" as any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.").

[221] Some of these jurisdictions include attempting to cause bodily harm, in addition to causing bodily harm. They were still included because the focus of the offense is bodily harm. 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.

[222] Del. Code Ann. ti. 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 (c), (battery offense prohibiting touching another person or placing bodily fluid or waste on another "in a rude, insolent, or angry manner") and 35-42-2-1(e)(2), (g)(5) (aggravated battery offense making it a Level 6 felony to commit battery against a public safety official and a Level 5 felony if it results in "bodily injury" to a public safety official).

assaults on LEOs resulting in bodily injury, intent-to-frighten assaults, and offensive physical contact.[223] A few jurisdictions punish intent-to-frighten APO equally with assaults resulting in bodily injury only if the intent-to-frighten assault involves a weapon.[224] The MPC does not have an APO offense, nor does it enhance the assault offense when the complainant is a LEO.

Unlike current District law, the RCC LEO enhancement applies to each type of bodily injury (bodily injury, significant bodily injury, and serious bodily injury), as well as the use of physical force that overpowers. It is difficult to generalize about the organization of the 2 reformed jurisdictions' APO offenses. However, while several states appear to apply a LEO enhancement to limited grades of the assault offense,[225] many states apply a LEO enhancement to multiple gradations of assault.[226]

Contrary to current District law, the revised assault offense requires recklessness as to the circumstance that the complainant is a law enforcement officer protected under the statute,[227] rather than negligence.[228] Due to the varying rules of construction, it is difficult to determine

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[223] Arizona makes it a Class 5 felony to cause physical injury to a LEO, place a LEO in reasonable apprehension of imminent physical injury, or make offensive physical contact on a LEO. If physical injury results, however, it is a Class 4 felony. Ariz. Rev. Stat. Ann. §§ 13-1203 (assault statute prohibiting, in part, "causing any physical injury to another person," "placing another person in reasonable apprehension of imminent physical injury," or "touching another person with the intent to injure, insult or provoke such person") and 13-1204(A)(8)(a), (F) (aggravated assault statute making it a class 5 felony to "commit assault as prescribed by § 13-1203" if the person knows or has reason to know that the complaining witness is a "peace officer" unless "physical injury" results, in which case it is a class 4 felony).

It should be noted that Wisconsin's APO statute prohibits causing bodily harm as well as "threat[ening]" to cause bodily harm. Based upon the statute, it is unclear whether threats covers intent-to-frighten assault, and Wisconsin was not considered as punishing intent-to-frighten assault the same as physical harm. A review of reformed jurisdictions' threats statutes was not part of this assault commentary.

[224] Ark. Code Ann. §§ 5-13-211(a)(2), (b)(2) (aggravated assault upon a LEO offense making it a class Y felony "discharge[ing] a firearm with a purpose to cause serious physical injury or death to a law enforcement officer" under certain circumstances) and 5-13-201(c)(3) (battery in the first degree making it a Class Y felony if the person injured is a LEO "acting in the line of duty."); Colo. Rev. Stat. Ann. § 18-3-202(1)(e) (assault in the first degree prohibiting, in part, "[w]ith intent to cause serious bodily injury upon the person of a peace officer . . . he or she threatens with a deadly weapon a peace officer."); Kan. Stat. Ann. §§ 21-5412(a), (d)(1) (defining assault as "placing another person in reasonable apprehension of immediate bodily harm" and making it a severity level 7 person felony if committed against a LEO "with a deadly weapon") and 21-5413(c)(2), (g)(3)(B) (making battery against a LEO a ; N.Y. Penal Law §§ 120.18 (making it Class D felony to place or attempt to place a "police officer . . . in reasonable fear of physical injury or death by displaying a deadly weapon, knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm, whether operable or not") and 120.05(3) (making it a Class D felony to cause physical injury to a peace officer or police officer with intent to prevent that officer from performing a lawful duty).

[225] *See, e.g.*, Ala. Code § 13A-6-21(a)(4); Ariz. Rev. Stat. Ann. § 13-1204(A)(8), (F); Haw. Rev. Stat. Ann. §§ 707-712.5, 707-712.6; Ky. Rev. Stat. Ann. § 508.025(1)(a)(1); N.D. Cent. Code Ann. § 12.1-17-01(2)(a).

[226] *See, e.g.*, Ark. Code Ann. §§ Ark. Code Ann. §§ 5-13-201(a), (c)(3), 5-13-202(4); Del. Code Ann. tit. 11, §§ 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. Ann. 5/12-3.05(a)(3), (d)(4), (e)(2), (e)(6), (h); Minn. Stat. Ann. § 609.2231(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); N.Y. Penal Law §§ 120.05(3), 120.08, 120.011; Ohio Rev. Code Ann. §§ 2903.11(D), 2903.13(D)(5), (D)(6); S.D.C Codified Laws § 22-18-1.05.

[227] Recklessness applies not only to the fact that the person assaulted is a "LEO" as defined by RCC § 22A-1001, but also the circumstances that the person was in the course of his or her official duties.

[228] *See, e.g., Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

what culpable mental state, if any, the reformed jurisdictions apply to the fact that the complainant was a LEO. In the reformed jurisdictions that clearly specify a culpable mental state for this element, at least five require knowledge[229] and at least three require knowledge or "should know" or other similar language.[230]

Lastly, while the current statute criminalizing assaults on LEOs does not address assaults targeting their family members because of their relation to a LEO, the revised assault statute includes liability for such conduct consistent with the general provision regarding targeting family members of District employees in D.C. Code § 22-851.[231] At least one reformed jurisdiction similarly includes family members of LEOs in its APO offense.[232]

Eighth, the revised assault statute replaces the offenses of assault and aggravated assault on a public vehicle inspection officer. Public vehicle inspection officers are covered in the revised assault statute as District officials or employees in the definition of "protected person" (RCC § 22A-1001). However, the scope of conduct that receives an enhanced penalty for public vehicle inspection officers is significantly narrowed as compared to current District law. The revised assault offense requires some type of bodily injury or using physical force that overpowers. By contrast, the current assault on public vehicle inspection officers offenses include conduct that falls short of these requirements, as well as conduct that consists merely of "imped[ing], intimidate[ing], or interfer[ing] with" a public vehicle inspection officer.

The narrowed scope of assaultive conduct for public vehicle inspection officers is well-supported by national legal trends. A few reformed jurisdictions' assault statutes specifically include code enforcement officers[233] and one reformed jurisdiction includes motor vehicle inspectors.[234] Jurisdictions' definitions of law enforcement officer, peace officer, and similar terms also may include public vehicle inspection officers. The MPC does not have an APO offense, nor does it enhance the assault offense based on the identity of the complainant. In the reformed jurisdictions' assault statutes that specifically include code enforcement officers or motor vehicle inspectors, all[235] but one[236] are limited to physical harm. As is discussed in the above entry for the revised LEO enhancement, the majority of LEO enhancements and APO

[229] Ark. Code Ann. § 5-13-202(4)(A)(i); 720 Ill. Comp. Stat. Ann. 5/12-3.05(a)(3); N.D. Cent. Code Ann. § 12.1-1701(2)(a); Or. Rev. Stat. Ann. § 163.208(1); Utah Code Ann. § 76-5-102.4(2);

[230] Ariz. Rev. Stat. Ann. § 13-1204(A)(8)(a) ("knowing or having reason to know."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (1)(c.5), 18-3-204(b) ("knows or reasonably should know" or "knows or should know."); Wis. Stat. Ann. § 940.203(2)(a).

[231] Many law enforcement officers, as "LEO" is defined in § 22A-1001, are District employees and therefore targeting of their families because of their relation to a LEO is already criminalized by D.C. Code § 22-851. However, there is no current provision in law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[232] Wis. Stat. Ann. § 943.203(2).

[233] *See, e.g.*, Ark. Code Ann. § 5-13-202(4); Ariz. Rev. Stat. Ann. § 13-12-4(A)(8)(g); Del. Code Ann. tit. 11, §§ 612(a)(3), (a)(5).

[234] Conn. Gen. Stat. Ann. §53a-167c.

[235] *See, e.g.*, Ark. Code Ann. § 5-13-202(4); Del. Code Ann. tit. 11, §§ 612(a)(3), (a)(5).

[236] Ariz. Rev. Stat. Ann. §§ 13-1203 (assault statute prohibiting, in part, "causing any physical injury to another person," "placing another person in reasonable apprehension of imminent physical injury," or "touching another person with the intent to injure, insult or provoke such person") and 13-1204(A)(8)(g), (F) (aggravated assault statute making it a class 5 felony to "commit assault as prescribed by § 13-1203" if the person knows or has reason to know that the complaining witness is a "peace officer" unless "physical injury" results, in which case it is a class 4 felony).

offenses in reformed jurisdictions are limited to bodily harm,[237] or include intent-to-frighten or offensive physical contact APO in a lower grade or separate, lower offense.[238] These national trends support limiting assault on a public vehicle inspection to some type of bodily injury or use of physical force that overpowers.

In addition, none of the reformed jurisdictions' assault statutes include an automatic civil penalty of loss of license to operate public vehicles-for-hire as do the current assault on public vehicle inspection officer statutes, nor do they include any similar civil penalties. Deleting the automatic loss of license provision is supported by national legal trends. Similarly, the revised assault offense no longer includes a provision specifically barring justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority, as in current District law.[239] None of the reformed jurisdictions' assault statutes appear to statutorily include prohibitions on justification and excuse defenses for civil enforcement authority.

Lastly, while the current statutes criminalizing assaults on a public vehicle inspection officer do not address assaults targeting their family members because of their relation to a public vehicle inspection officer, the revised assault statute includes liability for such conduct consistent with the general provision regarding targeting family members of District employees in D.C. Code § 22-851.[240] At least one reformed jurisdiction similarly includes family members of LEOs in its APO offense.[241]

Ninth, the "protected person" enhancement results in several changes to current District law regarding penalty enhancements for harming certain groups of people. First, through the definition of "protected person" in RCC § 22A-1001, the revised assault statute also extends enhanced penalties for assaults of drivers of private vehicles-for-hire, public safety employees, individuals that are "vulnerable adults," and District officials or employees. The MPC does not enhance assault based on the identity of the complainant, but many reformed jurisdictions do. A significant number of the 28 reformed jurisdictions enhance assaults against individuals with

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[237] Some of these jurisdictions include attempting to cause bodily harm, in addition to causing bodily harm. They were still included because the focus of the offense is bodily harm. 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.

[238] Del. Code Ann. ti. 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 (c), (battery offense prohibiting touching another person or placing bodily fluid or waste on another "in a rude, insolent, or angry manner") and 35-42-2-1(e)(2), (g)(5) (aggravated battery offense making it a Level 6 felony to commit battery against a public safety official and a Level 5 felony if it results in "bodily injury" to a public safety official).

[239] D.C. Code §§ 22-404.02(c), 22-404.03(c) ("It is neither justifiable nor excusable for a person to use force to resist the civil enforcement authority exercised by an individual believed to be a public vehicle inspection officer, whether or not such enforcement action is lawful.").

[240] Many law enforcement officers, as "LEO" is defined in § 22A-1001, are District employees and therefore targeting of their families because of their relation to a LEO is already criminalized by D.C. Code § 22-851. However, there is no current provision in law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[241] Wis. Stat. Ann. § 943.203(2).

physical or mental disabilities that limit their ability to care for themselves.[242] Many reformed jurisdictions enhance assaults to emergency medical first responders,[243] either in the same enhanced gradation for assaults against LEOs,[244] or in a lesser gradation than an assault on a LEO.[245] At least one reformed jurisdiction, New York, enhances assaults against the drivers of private vehicles for hire.[246] Several reformed jurisdictions enhance assaults against state officials or employees.[247]

The revised assault statute applies a mental state of "recklessness" to whether the complaining witness is a "protected person." Due to the varying rules of construction, it is difficult to determine what culpable mental state, if any, the reformed jurisdictions apply to the fact that the complainant was a special category of individual, such as LEO, or vulnerable adult. However, in looking at the LEO enhancements, in the reformed jurisdictions that clearly specify a culpable mental state, at least five require knowledge[248] and at least three require knowledge or "should know" or other similar language.[249]

Tenth, in keeping with the special status certain categories of individuals have under current District law, the revised assault statute enhances the penalty for assaults committed

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[242] *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; Haw. Rev. Stat. Ann. § 707-660.2(1)(a)(ii) (authorizing an extended term of imprisonment if "in the course of committing or attempting to commit a felony" a person "causes the death or inflicts serious or substantial bodily injury upon another person who is . . . blind, a paraplegic, or a quadriplegic."); N.H. Rev. Stat. Ann. § 651:6(I)(d) (authorizing an extended term of imprisonment if a jury finds beyond a reasonable doubt that a person "committed an offense involving the use of force against a person with the intention of taking advantage of the victim's age or physical disability."); 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.

[243] The current APO statute already enhances assaults against firefighters, which is included in the definition of "public safety employee." D.C. Code § 22-405(a).

[244] *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.").

[245] *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).

[246] N.Y. Penal Law § 60.07.

[247] *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(4).

[248] Ark. Code Ann. § 5-13-202(4)(A)(i); 720 Ill. Comp. Stat. Ann. 5/12-3.05(a)(3); N.D. Cent. Code Ann. § 12.1-1701(2)(a); Or. Rev. Stat. Ann. § 163.208(1); Utah Code Ann. § 76-5-102.4(2);

[249] Ariz. Rev. Stat. Ann. § 13-1204(A)(8)(a) ("knowing or having reason to know."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (1)(c.5), 18-3-204(b) ("knows or reasonably should know" or "knows or should know."); Wis. Stat. Ann. § 940.203(2)(a).

against LEOs, public safety employees, participants in citizen patrols, District officials or employees, and family members of District officials or employees when the assault is committed "with the purpose of harming the complainant because of the complainant's status." Several of the 28 reformed jurisdictions enhance assaults committed against LEOs because of their status as LEOs, regardless of whether the LEO was acting in the course of official duties at the time of the offense,[250] and a few of these reformed jurisdictions extend this enhancement to fire fighters[251] or medical first responders.[252] As previously noted, several reformed jurisdictions enhance assaults against state officials or employees.[253] Two of these jurisdictions expand the enhancement to assaults on the basis of the complainant's status as a state official or employee,[254] but none appear to extend the enhancement to family members of the state official or employee. At least two reformed jurisdictions specifically enhance assaults on citizen patrol groups,[255] and one of these specifically addresses targeting a person for their work performing citizen patrol duties.[256]

Eleventh, the revised assault statute eliminates the separate assault offense of "willfully poisoning any well, spring, or cistern of water."[257] None of the reformed jurisdictions appears to specifically include poison specifically in their assault statutes, nor does the MPC.

Twelfth, regarding the defendant's ability to claim he or she did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[258] In practical effect, this means

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[250] *See, e.g.*, Del. Code Ann. tit 11, § 612(a)(3) ("For the purposes of this subsection, if a law-enforcement officer is off duty and the nature of the assault is related to that law-enforcement officer's official position, then it shall fall within the meaning of 'official duties' of a law-enforcement officer."); 720 Ill. Comp. Stat. Ann. 12-3.05(a)(3) ("battered in retaliation for performing his or her duties."); Ky. Rev. Stat. Ann. § 508.025(a)(1) ("peace officer."); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3), 565.002 (several gradations of assault specific to a "special victim" and defining "special victim" to include "[a] law enforcement officer assaulted . . . as a direct result of such official duties."); N.J. Stat. Ann. § 2C:12-1(5)(a) ("Any law enforcement officer . . . or because of his status as a law enforcement officer."); Wis. Stat. Ann. § 940.203 ("The act or threat is in response to any action taken by . . . a law enforcement officer.").

[251] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 12-3.05(a)(3) ("battered in retaliation for performing his or her duties."); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3), 565.002(14)(b) (several gradations of assault specific to a "special victim" and defining "special victim" to include "any paid or volunteer firefighter . . . assaulted . . . as a direct result of such official duties.").

[252] *See, e.g.*, Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3), 565.002(14)(b) (several gradations of assault specific to a "special victim" and defining "special victim" to include "emergency room, hospital, or trauma center personnel, or emergency medical technician, assaulted as a direct result of such official duties.").

[253] *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.

[254] Tex. Penal Code §§ 22.01(b)(1), 22.02(b)(2)(B) ("in retaliation or on account of an exercise of official power or performance of an official duty as a public servant"; Wis. Stat. Ann. § 940.20(4) ("or as a result of any action taken within an official capacity.").

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

[256] 720 Ill. Comp. Stat. Ann. 12-3.05(d)(4) ("battered in retaliation for performing his or her official duties.").

[257] D.C. Code § 22-401.

[258] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the

that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[259] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[260]

Finally, national legal trends support the recognition of a defense for assaultive conduct carried out with effective consent of the complainant under various circumstances. At least twelve recently revised criminal codes codify such a defense in their general part.[261] Such codification follows the approach of the Model Penal Code, which specifically addresses consent to bodily injury within a general provision on consent as a defense.[262] Model Penal Code § 2.11(2),[263] which the RCC assault subsection (i)(1) closely tracks, provides a broad exception for minor harms and serious harms resulting from consensual social interactions in legal activities.[264] Most jurisdictions similarly limit an effective consent-type defense to assaults involving injury less than serious bodily injury,[265] although this does not necessarily mean that most jurisdictions allow for a consent defense to significant bodily injury.[266] Many jurisdictions specifically

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extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[259] LAFAVE AT 2 SUBST. CRIM. L. § 9.5.

[260] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[261] *See, e.g.*, Ala. Code § 13A-2-7(b) (1982); Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Del. Code Ann. tit. 11, § 452 (1979); Haw. Rev. Stat. Ann. § 702-234 (1976); Me. Rev. Stat. Ann. tit. 17-A, § 109(2) (1983); Mo. Ann. Stat. § 565.010 (2017); Mont. Code Ann. § 45-2-211(1) (1983); N.D. Cent. Code § 12.1-17-08 (1976); N.H. Rev. Stat. Ann. § 626:6(II) (1974); N.J. Stat. Ann. § 2C:2-10(b) (West 1982); 18 Pa. Stat. Ann. § 311(b) (Purdon 1983); Tex. Penal Code Ann. tit. 5, § 22.06 (Vernon 1974).

[262] Model Penal Code § 2.11(2).

[263] Model Penal Code § 2.11(2) ("Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
(a) the bodily injury consented to or threatened by the conduct consented to is not serious; or
(b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or
(c) the consent establishes a justification for the conduct under Article 3 of the Code.").

[264] *But see* Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 Geo. Wash. L. Rev. 165, 179 (2007) (Arguing that it is unclear "whether nonhostile consensual private encounters, such as religious mortification or sadomasochistic sex, may be entitled to legal protection under the MPC."). Notwithstanding other jurisdictions' occasional practice of narrowly construing the defense for behavior considered morally questionable, the RCC assault subsection (i)(1)(B) provision should be broadly construed to include such activities.

[265] *See, e.g.*, Ala. Code § 13A-2-7(b)(1) (1982); Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Del. Code Ann. tit. 11, § 452 (1979); Me. Rev. Stat. Ann. tit. 17-A, § 109(2)(A) (1983); Mo. Ann. Stat. § 565.010(1)(1) (Vernon 1979); N.H. Rev. Stat. § 626:6(II) (1974); N.J. Stat. Ann. § 2C:2-10(b)(1) (West 1982); N.D. Cent. Code § 12.1-17-08(1)(a) (1976); Tex. Penal Code Ann. tit. 5, § 22.06(1) (Vernon 1974).

[266] As noted above, only eight states appear to provide for an intermediate gradation of assault that requires an injury similar to the District's "significant bodily injury." Ind. Code Ann. § 35-31.5-2-204.5 ("Moderate bodily injury" means any impairment of physical condition that includes substantial pain."); Haw. Rev. Stat. Ann. 707-700; Minn. Stat. Ann. 609.02; N.D. Cent. Code Ann. 12.1-01-04; Utah Code Ann. 76-1-601; Wash. Rev. Code Ann. 9A.04.110; Wis. Stat. Ann. 939.22; S.C. Code Ann. § 16-25-10. While Commission staff did not research case law in these jurisdictions, in at least one instance the statutory statement of an effective consent defense to assault is limited to

exclude injuries resulting from legal sporting events,[267] and some extend the defense to all concerted activity.[268] Legal experts have also summarized national legal practice in a manner consistent with the RCC assault defense provisions.[269] Only two jurisdictions' statutes appear to characterize their consent to bodily injury defenses as "affirmative" defenses,[270] while others simply refer to it as a "defense." The precise burdens of production and persuasion are not statutorily specified in either "defenses" or "affirmative defenses" of consent to bodily injury.[271]

assaults that do "bodily harm" (not the intermediate level of "substantial bodily injury" in that jurisdiction). *See* N.D. Cent. Code Ann. § 12.1-17-08.

[267] *See, e.g.*, Ala. Code § 13A-2-7(b)(2) (2015); Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Del. Code Ann. tit. 11, § 452 (1979); Haw. Rev. Stat. Ann. § 702-234 (2015); Mo. Ann. Stat. § 565.080 (2015); and Tenn. Code Ann. § 39-13-104 (2017).

[268] *See, e.g.*, Del. Code Ann. tit. 11, § 452 (1979); N.J. Stat. Ann. § 2C:2-10(b) (West 1982).

[269] *See, e.g.*, Paul H. Robinson, 1 Criminal Law Defenses § 66, § 106 (1984) ("The general rule is that consent is ordinarily a defense to the charge of battery in cases: (1) involving sexual overtones, (2) involving reasonably foreseeable and known hazards of lawful athletic contests or competitions, lawful sports or professions, or occupations, (3) where consent establishes justification for the serious harm, (4) involving reasonable corporal punishment by a teacher upon a pupil for disobedience and where reasonably necessary for the proper education and discipline of the pupil, and (5) where the battery is not atrocious, aggravated, or fatal and does not include a breach of the public peace."). *See also* 58 A.L.R.3d 662 (1974) ("Although the cases are replete with broad general statements that consent is a defense in a prosecution for assault,2 most of these statements are drawn from cases involving sexual assaults of one kind or another,3 and in the few cases which have involved an actual battery, without sexual overtones, the courts have usually taken the view that since the offense in question involved a breach of the public peace as well as an invasion of the victim's physical security, the victim's consent would not be recognized as a defense, at least where the battery is a severe one.").

[270] Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Mo. Ann. Stat. § 565.010(1)(1) (Vernon 1979).

[271] Staff has not researched, at this time, other statutory provisions (e.g. on defenses generally) or case law in these jurisdictions to analyze trends in how the burdens of production and persuasion are allocated.

Chapter 12. Robbery, Assault, and Threat Offenses

Section 1201. Robbery
Section 1202. Assault
Section 1203. Criminal Menacing
Section 1204. Criminal Threats
Section 1205. Offensive Physical Contact

RCC § 22A-1205. Offensive Physical Contact

(a) *First Degree Offensive Physical Contact.* A person commits the offense of first degree offensive physical contact when that person:

(1) Knowingly causes physical contact with another person;

(2) With bodily fluid or excrement;

(3) With intent that the physical contact be offensive to that other person; and

(4) In fact, a reasonable person in the situation of the recipient of the physical contact would regard it as offensive.

(b) *Second Degree Offensive Physical Contact.* A person commits the offense of second degree offensive physical contact when that person:

(1) Knowingly causes physical contact with another person;

(2) With intent that the physical contact be offensive to that other person; and

(3) In fact, a reasonable person in the situation of the recipient of the physical contact would regard it as offensive.

(c) *Penalty.*

(1) *First Degree Offensive Physical Contact.* First degree offensive physical contact is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Offensive Physical Contact.* First degree offensive physical contact is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definition*s. The terms "knowingly" and "intent" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "law enforcement officer" and "effective consent" have the meaning specified in § 22A-1001.

(e) *Defenses.*

(1) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is an defense to prosecution under this section.

(2) *Burden of Proof for Effective Consent Defense.* If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

(3) *Limitation on Justification and Excuse Defenses to Offensive Physical Contact Against a Law Enforcement Officer.* For prosecutions brought under this section, it is neither a justification nor an excuse for a person to actively oppose the use of force by a law enforcement officer when:

(A) The person was reckless as to the fact that the complainant was a law enforcement officer;

(B) The use of force occurred during an arrest, stop, or detention for a legitimate law enforcement purpose; and

(C) The law enforcement officer used only the amount of physical force that appeared reasonably necessary.

(f) *Jury Demandable Offense.* When charged with a violation or inchoate violation of subsection (b) of this section and either the complainant is a law enforcement officer, while-in the course of his or her official duties, or the conduct was committed with the purpose of harming the complainant because of his or her status as a law enforcement officer, the defendant may demand a jury trial. If the defendant demands a jury trial, then the court shall impanel a jury.

RCC § 22A-1205. Offensive Physical Contact

Commentary

Explanatory Note. *This section establishes the offensive physical contact offense and penalty for the Revised Criminal Code (RCC). The offense proscribes a narrow range of conduct in which the accused knowingly causes offensive physical contact with another person. Offensive physical contact criminalizes behavior that does not rise to the level of causing bodily injury or overpowering physical force as the revised assault offense requires.*[272] *The offense has two gradations. First degree offensive physical contact is distinguished from second degree by requiring the contact be made with bodily fluid or excrement. Along with the offensive physical contact offense,*[273] *the revised assault offense replaces eighteen distinct offenses in the current D.C. Code: assault with intent to kill,*[274] *assault with intent to commit first degree sexual abuse,*[275] *assault with intent to commit second degree sexual abuse,*[276] *assault with intent to commit child sexual abuse,*[277] *and assault with intent to commit robbery;*[278] *willfully poisoning any well, spring, or cistern of water;*[279] *assault with intent to commit mayhem;*[280] *assault with a dangerous weapon;*[281] *assault with intent to commit any other felony;*[282] *simple assault;*[283] *assault with significant bodily injury;*[284] *aggravated assault;*[285] *assault on a public vehicle inspection officer*[286] *and aggravated assault on a public vehicle inspection officer;*[287] *assault on a law enforcement officer*[288] *and assault with significant bodily injury to a law enforcement officer;*[289] *mayhem*[290] *and maliciously disfiguring.*[291]

Subsection (a) establishes the first degree offensive physical contact offense. Subsection (a)(1) specifies the prohibited conduct—causing physical contact with another person. Subsection (a)(1) also specifies that the culpable mental state for causing physical contact with another person to be "knowingly," a defined term in RCC § 22A-206 to mean the accused must be practically certain that his or her conduct will cause physical contact with another person. Subsection (a)(2) requires that the physical contact be made with bodily fluid or excrement. Per the rule of construction in RCC § 22A-207, the culpable mental state "knowingly" in subsection

[272] RCC § 22A-1202.
[273] RCC § 22A-2105.
[274] D.C. Code § 22-401.
[275] D.C. Code § 22-401.
[276] D.C. Code § 22-401.
[277] D.C. Code § 22-401.
[278] D.C. Code § 22-401.
[279] D.C. Code § 22-401.
[280] D.C. Code § 22-401.
[281] D.C. Code § 22-402.
[282] D.C. Code § 22-403.
[283] D.C. Code § 22-404(a)(1).
[284] D.C. Code § 22-401(a)(2).
[285] D.C. Code § 22-404.01.
[286] D.C. Code § 22-404.02.
[287] D.C. Code § 22-404.03.
[288] D.C. Code § 22-405.
[289] D.C. Code § 22-405.
[290] D.C. Code § 22-406.
[291] D.C. Code § 22-406.

(a)(1) also applies to the contact being made with bodily fluid or excrement. Subsection (a)(3) further requires that the accused act with "intent" that the physical contact be offensive to that other person. "Intent" is a defined term in RCC § 22A-206 meaning that the accused consciously desired, or believed to a practical certainty, that the physical contact was offensive to that other person. It is not necessary to prove that the physical contact actually offended the other person.[292] Subsection (a)(4) requires that a reasonable person in the situation of the recipient of the physical contact would regard it as offensive. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to whether a reasonable person in the situation of the recipient of the physical contact would regard it as offensive.

Subsection (b) establishes the second degree offensive physical contact offense, and is identical except for the omission of the (a)(2) requirement that the contact be made with bodily fluid or excrement.

Subsection (c) specifies relevant penalties for the offense. [RESERVED]

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

Subsection (e) describes the defense of effective consent for offensive physical contact, and a limitation on certain justification and excuse defenses for offensive physical contact. Subsection (e)(1) specifies that the effective consent defense is in addition to any defenses applicable to the conduct at issue.[293] The effective consent defense eliminates liability where it is proven there was "effective consent," a defined term in RCC § 22A-1001 that excludes consent obtained by means coercion or deception, or the actor's reasonable belief that the complainant consented to the actor's conduct. Subsection (e)(2) describes the burden of proof for the effective consent defense, clarifying that, where evidence supporting the defense is raised at trial by either the government or defense, the government then has the burden of proving the absence of such circumstances beyond a reasonable doubt.

Subsection (e)(3) limits any justification or excuse defense that may apply when an individual actively opposes a use of force by a law enforcement officer and, in doing so, allegedly assaults the law enforcement officer. No such defense exists where a person is reckless, as defined in RCC § 22A-206, as to the complainant's status as a law enforcement officer, the officer's use of force occurs for a legitimate police purpose during an arrest, stop or detention, and the officer's application of physical force appeared reasonably necessary.

Subsection (f) specifies that a prosecution for offensive physical contact offense under subsection (b) is jury demandable when either the complainant is a law enforcement officer, while in the course of his or her official duties, or the conduct was committed with the purpose of harming the complainant because of his or her status as a law enforcement officer.

Relation to Current District Law. *The offensive physical contact statute changes existing District law in four main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including culpable mental states.*

[292] In this regard, the offensive physical contact offense is similar to the revised threats offense in RCC § 22A-1204, which does not require that the complainant perceive the communication as a threat.

[293] For example, a person who, to avoid greater harm, amputates the finger of a person caught in machinery on request of the victim may have available a general justification defense of necessity. *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982). The codification of this reference to general justification defenses in the preface to subsection (e)(1) clarifies that courts should not interpret the codification of these special defenses to abrogate the applicability of general defenses under an exp*ressio unius* canon of construction. *See, e.g., Bolz v. D.C.*, 149 A.3d 1130, 1140 (D.C. 2016).

First, the offensive physical contact offense punishes as a separate offense, with a distinct name, low-level conduct that previously was not distinguished from more serious assaultive conduct in current law. Current District assault statutes are silent as to whether physical contacts that are merely offensive to another person are sufficient for liability. However, under DCCA case law, a simple assault[294] includes two[295] types of conduct that fall short of inflicting bodily injury or using overpowering physical force: 1) non-violent sexual touching[296] that causes no pain or impairment to the person's body; and 2) any completed battery where the accused inflicts an unwanted touching on another person[297] that causes no pain or impairment to the person's body. Instead of punishing offensive contact the same as more serious assaultive conduct, the RCC offensive physical conduct statute and RCC § 22A-XXXX [revised offense for non-violent sexual touching assault] separately criminalize such conduct. The [revised offense for non-violent sexual touching assault] is limited to sexual touching, whereas the RCC offensive physical conduct statute broadly applies to any non-consensual touching that is offensive in nature, including non-consensual sexual touching. Criminalizing offensive physical contact as a separate offense improves the proportionality of the District's current law on assaults, by distinguishing harms of different severity.[298]

Second, offensive physical contact is not subject to a penalty enhancement for the involvement of a deadly or dangerous weapon. The District's assault with a dangerous weapon

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

[295] A third type of conduct that the DCCA has recognized as within the scope of the District's simple assault statute and other assault-type statutes is "intent to frighten" types of assault. In the RCC, conduct criminalized under current District law as "intent to frighten" types of assault is criminalized by RCC § 22A-1203 Criminal Menace. See Commentary to RCC § 22A-1203 for further details.

[296] "Where the assault involves a nonviolent sexual touching the court has held that there is an assault within section 22–504 because 'the sexual nature [of the conduct] suppl[ies] the element of violence or threat of violence.'" *Matter of A.B.*, 556 A.2d 645, 646 (D.C. 1989) (quoting *Goudy v. United States*, 495 A.2d 744, 746 (D.C.1985), *modified*, 505 A.2d 461 (D.C.), *cert. denied*, 479 U.S. 832, 107 S.Ct. 120, 93 L.Ed.2d 66 (1986)). The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted).

[297] *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).

[298] The RCC offensive physical contact statute provides criminal liability for conduct that clearly is not inherently dangerous. *See Comber v. United States*, 584 A.2d 26, 50 (D.C. 1990) ("Although some misdemeanors, at least when viewed in the abstract, prohibit activity which seems inherently dangerous, they may also reach conduct which might not pose such danger. A special difficulty arises in the case of simple assault, as presented here, because that misdemeanor is designed to protect not only against physical injury, but against all forms of offensive touching….").
While some types of conduct that is within the scope of the RCC assault statute also may not be inherently dangerous, punishing offensive physical contacts as a separate offense more clearly distinguishes levels of harm than existing District law.

(ADW) statute is a separate offense with a ten-year maximum penalty.[299] Although the statute is silent as to what level of conduct suffices as a predicate for liability, District case law specifies that engaging in any conduct that constitutes a simple assault, with a dangerous weapon, is sufficient.[300] In contrast, the RCC offensive physical contact offense makes no provision for enhancement due to use of a deadly or dangerous weapon. Instead, there may be liability under aggravated criminal menace (RCC § 22A-1203) for displaying or making physical contact with a dangerous weapon or imitation weapon, regardless of whether physical contact occurred. Or, where there is any physical injury from the use of the dangerous weapon, there may be liability under the revised assault statute (RCC § 22A-1202). Simple possession of a dangerous weapon during a crime may also entail liability.[301] The elimination of a weapon enhancement for offensive physical contact improves the law's clarity and proportionality by distinguishing harms of different severity.

Third, the conduct in the revised offensive physical contact offense no longer is a predicate for liability when an assault occurs with intent to commit another crime. Current District law recognizes as separate offenses assault with intent to kill,[302] assault with intent to commit first degree sexual abuse,[303] assault with intent to commit second degree sexual abuse,[304] assault with intent to commit child sexual abuse,[305] assault with intent to commit robbery,[306] assault with intent to commit mayhem,[307] and assault with intent to commit any other felony,[308] collectively referred to as the "assault with intent to" or "AWI" offenses. Current District case law generally indicates that conduct constituting a simple assault, with the appropriate intent, is sufficient for liability for the AWI offenses[309]—and insofar as the conduct in the RCC offensive

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

[300] *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011) ("Because there was no crime of "assault with a dangerous weapon" at common law, we have interpreted the statute to require no more than is required to prove the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon . . . .").

[301] [RCC § 22A-XXXX Possession of Deadly or Dangerous Weapon During Crime].

[302] D.C. Code § 22-401.

[303] D.C. Code § 22-401.

[304] D.C. Code § 22-401.

[305] D.C. Code § 22-401.

[306] D.C. Code § 22-401.

[307] D.C. Code § 22-402.

[308] D.C. Code § 22-403.

[309] For example, rather than having a separate offense of assault with intent to kill, as is codified in current D.C. Code § 22-401, the RCC criminalizes that conduct as an attempt to commit an offense such as murder or aggravated assault. Even though the *actus reus* of some criminal attempts and the comparable AWI offense will not always be the same, any conduct which falls within the scope of an AWI offense also necessarily constitutes an attempt to commit the target of that AWI offense. Moreover, under current District law, both AWI offenses and criminal attempts require proof of a "specific intent" to commit the target offense. Notably, the DCCA has never clearly defined the meaning of the phrase "specific intent"—indeed, as one DCCA judge has observed, the phrase itself is little more than a "rote incantation[]" of "dubious value" which obscures "the different *mens rea* elements of a wide array of criminal offenses." *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring). Ambiguities aside, however, it seems relatively clear from District authority in the context of both AWI and attempt offenses that, first, the *mens rea* applicable to both categories of offenses—the intent to commit the ulterior or target

physical contact offense constitutes simple assault in current law, such conduct also would be a predicate for liability under existing AWI offenses. By contrast, in the RCC, the AWI offenses no longer exist and liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22A-301 to the completed offenses.[310] The RCC general attempt provision provides for liability that is *at least as expansive* as that afforded by AWI offenses.[311] The change improves the clarity of the revised offensive physical contact statute, and eliminates unnecessary overlap between the AWI offenses and general attempt liability for assault-type offenses. In addition, the change improves the proportionality of the revised offensive physical contact statute because attempts are punished based on the severity of the underlying offense.[312]

Fourth, under the revised offensive physical contact statute the general culpability principles for self-induced intoxication in RCC § 22A-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current assault statute from which the offense of offensive physical contact is derived is silent as to the effect of intoxication. However, District law seems to have established that assault is a general intent offense,[313] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary culpable mental state requirement for the crime.[314] This DCCA case law would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[315]—the claim that, due to his or her self-induced intoxicated state, the defendant did not

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offense—is the same. *Compare* D.C. Crim. Jur. Instr. § 4.110-12 (jury instructions on AWI offenses) *with* D.C. Crim. Jur. Instr. § 7.101 (jury instruction on criminal attempts). And second, it seems clear that this *mens rea* roughly translates to acting purposely or knowingly. *See* SECOND DRAFT OF REPORT NO. 2, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—BASIC REQUIREMENTS OF OFFENSE LIABILITY, pgs. 5-8 (May 5, 2017); FIRST DRAFT OF REPORT NO. 7, RECOMMENDATIONS FOR CHAPTER 3 OF THE REVISED CRIMINAL CODE—DEFINITION OF A CRIMINAL ATTEMPT, pgs. 8-11 (June 7, 2017).

[310] For example, rather than having a separate offense of assault with intent to kill, as is codified in current D.C. Code § 22-401, the RCC criminalizes that conduct as an attempt to commit an offense such as murder or aggravated assault.

[311] For more details, see Commentary to the revised assault statute (RCC § 22A-1202).

[312] The District's varied AWI offenses, enacted in 1901, were originally "created to allow a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end." *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011). However, as provided in RCC § 22A-301(c) and described in the accompanying commentary, the penalty for general attempts in the RCC differs from existing law.

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

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

[315] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996);

possess the knowledge or intent required for any element of offensive physical contact.[316] By contrast, under the revised offensive physical contact offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove offensive physical contact. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue in offensive physical contact.[317] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these four substantive changes to current District law, four other aspects of the offensive physical contact statute may be viewed as substantive changes of law.

First, the revised offensive physical contact offense limits liability to contacts that are intended to be, per subsections (a)(3) and (b)(2), and objectively are, per subsections (a)(4) and (b)(3), "offensive." Current District assault statutes are silent as to whether physical contacts that are merely offensive to another person are sufficient for liability, let alone whether non-offensive, non-consensual physical contacts constitute assault or how to determine what is "offensive." District case law contains conflicting statements as to whether there is any requirement that a battery be objectively "offensive."[318] However, under DCCA case law, a simple assault consisting of conduct undertaken with intent to frighten another person has been held to require proof that the defendant's conduct would induce fear in "a person of reasonable sensibility."[319] Following this case law for intent to frighten assault, District practice appears to require that for assault liability, physical contact must be "offensive to a person of reasonable sensibility."[320] The RCC offensive physical contact statute clearly establishes that the contact in question must be "offensive" as evaluated from the perspective of a reasonable person in the recipient's position, and that the defendant must have consciously desired, or believed to a practical certainty, that the contact was "offensive." This change improves the clarity of the law

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Parker v. United States, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan*, 32 A.3d at 996 (Ruiz, J., concurring) (discussing *Parker*).

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

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

[318] *Compare, e.g., Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990) *with* Ray v. United States, 575 A.2d 1196, 1198–99 (D.C. 1990) ("What we distill from these cases, particularly *Harris*, is that an assault conviction will be upheld when the assaultive act is merely offensive, even though it causes or threatens no actual physical harm to the victim.") *and Comber v. United States*, 584 A.2d 26, 50 (D.C. 1990) ("Although some misdemeanors, at least when viewed in the abstract, prohibit activity which seems inherently dangerous, they may also reach conduct which might not pose such danger. A special difficulty arises in the case of simple assault, as presented here, because that misdemeanor is designed to protect not only against physical injury, but against all forms of offensive touching….").

[319] *Antony v. United States*, 361 A.2d 202, 206 (D.C. 1976).

[320] D.C. Crim. Jur. Instr. § 4.100. See also, *id.*, cmt. 4-5 ("The instruction explains that 'injury' includes an offensive touching. [citations omitted] To ensure the jury uses an objective standard of judging "offensive," the Committee borrowed the "reasonable sensibility" standard from *Anthony v. U.S.*, [citation omitted], where it was used in a related context.").

by specifying the requisite culpable mental state, and improves the proportionality of the statute by excluding conduct that is ordinarily considered non-criminal.[321]

Second, the revised offensive physical contact statute requires a culpable mental state of "knowingly" as to causing the physical contact in subsections (a)(1) and (b)(1) and the fact that bodily fluid or excrement is used in (a)(2), and "intent" in subsections (a)(3) and (b)(2) as to the offensive nature of the contact. The current D.C. Code is silent as to the culpable mental states required for simple assault.[322] Current District case law suggests that recklessness may suffice for simple assault,[323] however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient.[324] The RCC offensive physical contact statute clearly establishes that knowledge is required as to causing the physical contact, and "intent" as to the offensive quality of the contact. This change improves the clarity of the law by specifying the requisite culpable mental states, and improves the proportionality of the statute by excluding conduct that is ordinarily considered non-criminal.[325]

Third, the revised statute in subsection (e)(1) clarifies that "effective consent," a defined term in RCC § 22A-2001 that excludes consent obtained by means of coercion or deception, is a defense to offensive physical contact. The District's assault statutes do not address whether consent of the complainant is a defense to liability, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[326] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to

[321] Without requiring that a non-consensual physical contact be "offensive," even the most casual touching of another person—e.g., brushing elbows on a bus or a pat on a colleague's back—could be potentially be subject to criminal liability.

[322] D.C. Code § 22-404(a)(1).

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

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

[325] A culpable mental state of recklessness as to the physical contact and its offensive nature may, for instance, criminalize a person's efforts to pass through a crowded Metro car in which it is likely the person will brush against other passengers in a way they would find offensive. While such conduct may be rude, it is not ordinarily considered criminal absent some intent to cause offense by such action.

[326] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

rule on the effect of consent in other circumstances.[327] The RCC offensive physical contact statute clarifies that effective consent[328] by the complainant, or reasonable belief that the complainant gave effective consent, is a defense to offensive physical contact liability The prefatory language in subsection (e)(1)[329] also clarifies that any general justification defense under District law continues to be available to a defendant in an offensive physical contact prosecution. Absent such an effective consent defense, a broad swath of ordinary and legal activities potentially would fall within the scope of the current and revised assault offenses, and District practice[330] has long recognized the general existence of a consent defense that is consistent with the RCC effective consent defense for offensive physical contact. Subsection (e)(2) further clarifies the burden of proof for the defense, consistent with current District practice.[331] This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised offensive physical contact statute limits excuse and justification defenses for causing offensive physical contact with law enforcement officer to circumstances where the defendant is at least reckless as to the complainant's status as a law enforcement officer, and the amount of force appeared reasonably necessary. The District's current assault on a police officer (APO) statute prohibits excuse and justification defenses where the complainant "knew or should have known" that the complainant was a law enforcement officer.[332] Case law repeats this language,[333] without clarifying whether there is any requirement of subjective awareness on the defendant's part as to the complainant's status.[334] Resolving this ambiguity as to the required culpable mental state, the revised offensive physical contact offense requires the

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

[328] *I.e.*, consent not obtained by coercion or deception. This limitation on consent may address the *Woods* court's *dicta* concerning "absurd realities" of providing a defense to significant bodily injury in some situations. *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013)("such as a loan shark lending money on the condition that non-payment authorizes a beating or gang members who agree to settle old scores by a shootout").

[329] "In addition to any justification defenses applicable to the defendant's conduct under District law…."

[330] D.C. Crim. Jur. Instr. § 9-320 ("If [name of complainant] voluntarily consented to [the act] [insert description of the act], or [name of defendant] reasonably believed [name of complainant] was consenting, the crime of [insert offense] has not been committed.").

[331] D.C. Crim. Jur. Instr. § 9-320 ("The government must prove beyond a reasonable doubt that [name of complainant] did not voluntarily consent to the acts [or that [name of defendant] did not reasonably believe [name of complainant] was consenting].").

[332] D.C. Code § 22-405 ("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.").

[333] *See, e.g., Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

[334] *See Speed v. United States*, 562 A.2d 124, 129 (D.C.1989) (finding an exception to the defense where "the defendant did know or had reason to know that the complainant was a member of such force, and the officer was engaged in official police duties…"). The DCCA has held that similar language in the receiving stolen property offense, "knowing or having reason to believe that the property was stolen," requires a defendant's subjective awareness, not mere negligence. *Owens v. United States*, 90 A.3d 1118, 1122 (D.C. 2014). *But see* Dean v. United States, 938 A.2d 751, 762 (D.C. 2007) (holding that "reason to know" language in the murder of a law enforcement officer statute does not require actual knowledge that decedent was an officer).

defendant's recklessness as to the circumstance that the person harmed is a law enforcement officer, which makes the defense consistent with the requirements for assault enhancements (including those for harms to law enforcement officers in the course of their duties, a category in the definition of "protected person") that are based on the complainant's status. The revised defense in subsection (e)(3) also codifies existing District practice[335] and case law which states the limitation on a defense extends to stops or other detention (not just arrest) for a legitimate police purpose,[336] and that the law enforcement officer's use of force must have appeared reasonably necessary.[337] These changes clarify the defense, using definitions and requirements consistent with the revised assault offense and existing District law.

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

For example, the offensive physical contact offense makes no substantive[338] changes with respect to the District's current statute on resisting arrest by an individual reasonably believed to be law enforcement officer, D.C. Code § 22-405.01. Similarly, per subsection (f), prosecutions for offensive physical contact against LEOs when either the LEO is in the course of his or her official duties, or the conduct was committed with the purpose of harming the complainant because of his or her status as a LEO are jury demandable,[339] preserving the policy underlying recent legislation.[340]

Relation to National Legal Trends. *The offensive physical contact offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, the offensive physical contact offense punishes as a separate offense low-level conduct that previously was not distinguished from more serious assaultive conduct. Of the 29

[335] D.C. Crim. Jur. Instr. § 4-114 ("A police officer may stop or detain someone for a legitimate police purpose. And the officer may use the amount of force that appears reasonably necessary to make or maintain the stop. This is the amount of force that an ordinarily careful and intelligent person in the officer's position would think necessary. If the officer uses only the force that appears reasonably necessary, the person stopped may not interfere with the officer, even if the stop later turns out to have been unlawful. If s/he does interfere, s/he acts without justification or excuse. If the officer uses more force than appears reasonably necessary, the person stopped may defend against the excessive force, using only the amount of force that appears reasonably necessary for his/her protection. If that person uses more force than is reasonably necessary for protection, s/he acts without justification.").

[336] *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989).

[337] *Nelson v. United States*, 580 A.2d 114, 117 (D.C.1990) *(on rehearing).*

[338] The RCC language in (i)(3) is identical to that in current D.C. Code § 22-405(d), however the definition of "law enforcement officer" as used in the RCC offense is slightly expanded as compared to the current definition in D.C. Code § 22-405(d). See commentary to RCC § 22A-1001(11) regarding changes to the definition of "law enforcement officer."

[339] Assaultive conduct against a person who is a law enforcement officer that does not meet the conditions stated in subsection (f) is possible. For example the neighbor of an off-duty law enforcement officer who is charged with knowingly spitting on an off-duty law enforcement officer because of a dispute over a boundary fence would not be subject to the jury demandability provision in subsection (f).

[340] The current APO statute was amended in 2016 to make the penalty for misdemeanor APO six months and jury demandable. Committee Report at 16 ("Lastly, the Committee made [the misdemeanor APO offense] jury-demandable due to the overwhelming number of states that have attached significant jail time to their APO statute, in addition to testimony in favor of making APO a jury-demandable offense."). Despite this revision, however, it is possible to charge an assault that satisfies misdemeanor APO as simple assault, per D.C. Code § 22-404(a)(1), which is not jury demandable,

states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC), 11 have an offense that prohibits offensive physical contact.[341] Of these 11 jurisdictions, six grade the offensive physical contact offense less severely than assault resulting in bodily injury,[342] like the RCC. In addition, one of these reformed jurisdictions specifically includes causing contact with bodily fluid or excrement[343] and punishes it more severely than other offensive physical contact.[344] Several reformed jurisdictions also have assault offenses or gradations that specifically prohibit causing LEOs to come into contact with bodily fluids.[345]

Second, offensive physical contact is no longer subject to a penalty enhancement for the involvement of a deadly or dangerous weapon as it is under the District's current assault with a dangerous weapon (ADW) offense. Of the 11 reformed jurisdictions that have offensive physical contact offenses or include offensive physical contact in assault, six specifically penalize the conduct if a weapon is involved.[346] In these jurisdictions, offensive physical contact

[341] Ariz. Rev. Stat. Ann. § 13-1203(A)(3) ("touching another person with the intent to injure, insult, or provoke such person."); Del Code Ann. tit. 11, § 601(a)(1) ("touches another person either with a member of his or her body or with any instrument, knowing that the person is likely to cause offense or alarm to such other person."); 720 Ill. Comp. Stat. Ann. 5/12-3(a)(2) ("makes physical contact of an insulting or provoking nature with an individual."); Ind. Code Ann. § 35-42-2-1(c)(1) ("touches another person in a rude, insolent, or angry manner."); Kan. Stat. Ann. § 21-5413(a)(2) ("causing physical contact with another person when done in a rude, insulting, or angry manner."); Me. Rev. Stat. tit. 17-A, § 207(1)(A) ("causes . . offensive physical contact."); Mo. Ann. Stat. § 565.056(1)(6) ("causes physical contact with another person knowing the other person will regard the contact as offensive or provocative."); Mont. Code Ann. § 45-5-201(1)(c) ("makes physical contact of an insulting or provoking nature with any individual."); N.H. Rev. Stat. Ann. § 631:2-a(I)("cause . . . unprivileged physical contact to another."); Tenn. Code Ann. § 39-13-101(a)(3) ("causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative."); Tex. Penal Code § 22.01(a)(3) ("causes physical contact with another when the person knows or should reasonably believe that the other person will regard the contact as offensive or provocative.").

[342] Ariz. Rev. Stat. Ann. § 13-1203(A)(B) (making an assault that causes physical injury in subsection (A)(1) either a Class 1 or Class 2 misdemeanor, depending on the defendant's culpable mental state, and making offensive physical contact in subsection (A)(3) a Class 3 misdemeanor); Del Code Ann. tit. 11, §§ 601(c) (making offensive physical contact in subsection (a)(1) an unclassified misdemeanor) and 611(1) (making an assault that causes physical injury a Class A misdemeanor); Ind. Code Ann. § 35-42-2-1(c), (d)(1) (making a battery that results in offensive physical contact under subsection (c)(1) a Class B misdemeanor, but a Class A misdemeanor if it results in bodily injury); Mo. Ann. Stat. § 565.056(2), (3) (making an assault that results in "physical injury, physical pain, or illness" a Class A misdemeanor and an assault that results in offensive physical contact a Class C misdemeanor in most situations); ."); Tenn. Code Ann. § 39-13-101(b)(1)(A) (making an assault that results in bodily injury under subsection (a)(1) a Class A misdemeanor, and an assault that results in offensive contact under subsection (a)(3) a Class B misdemeanor in most situations); Tex. Penal Code § 22.01(b), (c) (making an assault that results in bodily injury under subsection (a)(1) a Class A misdemeanor in most situations, and an assault that results in offensive contact under subsection (a)(3) a Class C misdemeanor in most situations).

[343] Del Code Ann. tit. 11, § 601(a)(2) ("strikes another person with saliva, urine, feces or any other bodily fluid, knowing that the person is likely to cause offense or alarm to such other person.").

[344] Del Code Ann. tit. 11, § 601(c) (making offensive physical contact an unclassified misdemeanor under subsection (a)(1), but causing contact with bodily fluid a Class A misdemeanor).

[345] *See, e.g.*, Ark. Code Ann. § 5-13-211(a)(1); Colo. Rev. Stat. Ann. §§ 18-3-203(h), 18-3-204(b); Conn. Gen. Stat. Ann. § 53a-167c(5); N.J. Stat. Ann. § 2C:12-13; Mont. Code Ann. § 45-5-214; Minn. Stat. Ann. § 609.2231(1)(c)(2).

[346] Ariz. Rev. Stat. Ann. § 13-1203(A)(3) (assault statute prohibiting, in part, "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/12-3(a)(2) and 5/12-3.05(f)(1) (defining battery, in part, as "makes physical contact of an insulting or provoking nature with an individual" and defining aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. § 35-42-2-1(c)(1), (g)(1), (g)(2) (battery offense prohibiting, in

that involves a weapon is punished the same as bodily injury that is caused by a weapon.[347] In the RCC, however, offensive physical contact that involves a deadly or dangerous weapon is still criminalized as offensive physical contact. However, if injury results, or physical force that overpowers is used, there may be liability under the revised assault statute that corresponds with the resulting harm.

Third, the conduct in the revised offensive physical contact offense no longer is a predicate for liability when an assault occurs with intent to commit another crime. In the RCC, liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22A-301 to the completed offenses. None of the reformed jurisdictions have specific offenses for assault with-intent-to commit other offenses. The national legal trends support deleting the AWI offenses.

Fourth, regarding the defendant's ability to claim he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[348] In practical effect, this means that intoxication may "serve as a defense to a

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part, "touches another person in a rude, insolent, or angry manner" and making it aggravated battery if committed with a "deadly weapon."); Kan. Stat. Ann. § 21-5413(b)(1)(B, (b)(1)(C) (aggravated battery offense prohibiting, in part, "causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon"); Tenn. Code Ann. §§ 39-13-101(a)(3) (assault offense prohibiting, in part, causing "physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and 39-13-102(a)(1)(A)(iii) (making "assault as defined in § 39-13-101" aggravated assault if it "involved the use or display of a deadly weapon."); Tex. Penal Code Ann. § 22.01(a)(3) (offense prohibiting, in part, causing "physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2), (b) (making "assault as defined in § 22.01" a felony of the second degree in most situations if the defendant "uses or exhibits a deadly weapon during the commission of the assault.").

[347] Ariz. Rev. Stat. Ann. § 13-1203(A)(1), (A)(3) (assault statute prohibiting, in part, "causing any physical injury to another person" and "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/12-3(a) (defining battery as "causes bodily harm to an individual" and "makes physical contact of an insulting or provoking nature with an individual") and 5/12-3.05(f)(1) (defining aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. § 35-42-2-1(c)(1) (c)(2), (g)(2) (battery offense prohibiting, in part, "touches another person in a rude, insolent, or angry manner" and making it aggravated battery if committed with a "deadly weapon); Kan. Stat. Ann. § 21-5413(b)(1)(B), (b)(1)(C), (g)(1)(B) (making it a severity level 7 person felony to cause "bodily harm to another person with a deadly weapon" and cause "physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon"); Tenn. Code Ann. §§ 39-13-101(a)(1), (a)(3) (assault offense prohibiting, in part, causing "bodily injury to another" and "physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and 39-13-102(a)(1)(A)(iii) (making "assault as defined in § 39-13-101" aggravated assault if it "involved the use or display of a deadly weapon."); Tex. Penal Code Ann. §§ 22.01(a)(1), (a)(3) (offense prohibiting, in part, causing "bodily injury to another" and causing "physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2), (b) (making "assault as defined in § 22.01" a felony of the second degree in most situations if the defendant "uses or exhibits a deadly weapon during the commission of the assault.").

[348] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an

crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[349] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[350]

element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[349] LAFAVE AT 2 SUBST. CRIM. L. § 9.5.

[350] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).