First Draft of Report #17
Recommendations for Criminal Menace & Criminal Threat 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. 17, *Recommendations for Criminal Menace & Criminal Threat 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. 17. 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 1203. Criminal Menace.

(a) *First Degree Criminal Menace.* A person commits first degree criminal menace when that person:
  (1) Knowingly communicates to another person physically present;
  (2) By displaying or making physical contact with a dangerous weapon or imitation dangerous weapon;
  (3) That the defendant or an accomplice immediately will engage in conduct against that person or a third person constituting one of the following offenses:
    (A) Homicide, as defined in RCC § 22A-1101;
    (B) Robbery, as defined in RCC § 22A-1201;
    (C) Sexual assault, as defined in RCC § 22A-13XX;
    (D) Kidnapping, as defined in RCC § 22A-14XX; or
    (E) Assault, as defined in RCC § 22A-1202;
  (4) With intent that the communication would be perceived as a threat; and
  (5) In fact, the communication would cause a reasonable recipient to believe that the harm would immediately take place.

(b) *Second Degree Criminal Menace.* A person commits criminal menace when that person:
  (1) Knowingly communicates to another person physically present;
  (2) That the defendant or an accomplice immediately will engage in conduct against that person or a third person constituting one of the following offenses:
    (A) Homicide, as defined in RCC § 22A-1101;
    (B) Robbery, as defined in RCC § 22A-1201;
    (C) Sexual assault, as defined in RCC § 22A-13XX;
    (D) Kidnapping, as defined in RCC § 22A-14XX; or
    (E) Assault, as defined in RCC § 22A-1202;
  (3) With intent that the communication would be perceived as a threat; and
  (4) In fact, the communication would cause a reasonable recipient to believe that the harm would immediately take place.

(c) *Penalties.*
  (1) *First Degree Criminal Menace.* First degree criminal menace is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Menace.* Second degree criminal menace is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* 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 "dangerous weapon" and "imitation weapon" have the meanings specified in § 22A-1001.

(e) *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 a defense to prosecution under this section. If evidence is present at trial of the complainant's effective consent or the defendant's reasonable mistake that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

RCC § 22A-1203. Criminal Menace

Commentary

Explanatory Note. *This section establishes the criminal menace offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits in-person conduct that threatens immediate personal violence. The offense proscribes communicating that a person will immediately kill, rob, assault, sexually assault, or kidnap another person who is at the same physical location as the defendant. The RCC criminal menace offense is similar to the revised criminal threat offense, but has the additional requirements that the complainant be at the same location and that the threatened harm will take place immediately. First degree criminal menace differs from criminal menace by requiring the use of a dangerous weapon or an imitation weapon as part of the communication. The RCC criminal menace offense replaces the intent-to-frighten form of simple assault,[1] the intent-to-frighten form of simple assault with a dangerous weapon,[2] and in-person threats[3] of immediate harm in the current D.C. Code.*

Subsections (a)(1) and (b)(1) state the prohibited conduct—that the defendant "communicates to another person." The verb "communicates" should be broadly construed, encompassing both written and oral communication, as well as gestures and symbolic kinds of speech.[4] Such communication not only requires the defendant to take action, but also requires that the communication was received and understood by another person.[5] The person who receives the communication must be "physically present" with the defendant. Subsections (a)(1) and (b)(1) also specify the culpable mental states to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct is communicating to another person physically present. The culpable mental state applies to the defendant's act of communicating, the fact that the recipient is physically present, and the fact that the communication was received and understood.

Subsection (a)(2) codifies the requirement that the communication occur "by displaying or making physical contact with a dangerous weapon or imitation weapon." The phrase "by displaying or making physical contact with a dangerous weapon or imitation weapon" should be broadly construed to include communications that only minimally display or involve contact with such a weapon.[6] The fact also must be proven that the weapon is a "dangerous weapon" or "imitation weapon," terms defined in RCC § 22-1001.[7] Also, subsection (a)(2), through use of

[1] D.C. Code § 22-404.
[2] D.C. Code § 22-402.
[3] D.C. Code §§ 22-407, 22-1810.
[4] As described below, however, subsection (a)(2) of the RCC criminal menacing statute limits the meaning of "communication" for first degree criminal menace, excluding oral and other non-specified means of communication.
[5] DCCA case law clarifies in *Evans v. United States*, 779 A.2d 891,894-95 (D.C. 2001), and the RCC criminal menace statute recognizes, that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.
[6] For example, assuming the other elements of the offense are proven, rearranging one's coat to provide a momentary glimpse of part of a knife may be sufficient for liability under subsection (a)(2). Similarly, holding a sharp object in someone's back may also be sufficient for liability under subsection (a)(2).
[7] Unlike the revised assault offense, the inclusion of an "imitation dangerous weapon" means that an object such as a finger in a pocket that protrudes outward, or a pipe pressed into someone's back, may constitute an "imitation dangerous weapon" depending on its use. See RCC § 22-1001(10) ("'Imitation dangerous weapon' means an object used or fashioned in a manner that would cause a reasonable person to believe that the article is a dangerous weapon.").

the word "by," requires the display or physical contact with the weapon to be a means of communication (in subsection (a)(1)) of the harmful conduct threatened (per subsection (a)(3)).[8] Per the rule of construction in RCC § 22A-207, the culpable mental state "knowingly" in subsection (a)(1) also applies to the elements in subsection (a)(2), requiring the accused to be practically certain or consciously desire the communication to be by displaying or making physical contact with a dangerous weapon or imitation weapon. Subsection (a)(2) differentiates aggravated criminal menacing from criminal menacing, reflecting the greater terror and perceived risk of physical harm accompanying a criminal menace where the defendant uses a weapon as part of the communication.

Subsections (a)(3) and (b)(2) codify requirements for the content of the defendant's communication. The subsections require the defendant to indicate in his or her communication that he or she immediately will engage in conduct against that person or a third person constituting homicide, robbery, sexual assault, kidnapping, or assault. Whether particular words, gestures, or symbols communicate such content is a question of fact that will often require judgment by a factfinder.[9] Per the rule of construction in RCC § 22A-207, the culpable mental state "knowingly" in subsections (a)(1) and (b)(1) also applies to the elements in subsection (a)(2) and (b)(2), requiring the accused to be practically certain or consciously desire the communication to convey such content.[10]

Subsections (a)(4) and (b)(3) require the defendant to make the communication with the intent that it be perceived as a threat, a serious expression of an intent to do harm. "Intent" is a defined term in RCC § 22A-206 meaning the defendant believed his or her communication was practically certain to be perceived as a threat. The communication and message need not actually be perceived as a threat by the recipient.[11]

Subsections (a)(5) and (b)(4) require proof that the accused's communication is objectively threatening. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement for subsections (a)(5) and (b)(4). All that is required to prove is that the defendant's message would cause a reasonable recipient of the message to believe the defendant would actually carry out the harm.[12] This standard evaluates events from the perspective of a reasonable recipient of the communication considering the particular facts and circumstances of a given case.

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

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

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[8] Other means of communication of communication may also be used, and may provide information as to the precise nature of the threatened conduct. For example a person may say "I'm going to cut off your nose" or "I am going to rape you" while brandishing a knife.

[9] For example, a jury may evaluate whether the accused's gesture of drawing a finger across his throat communicated that the accused would immediately kill the recipient of the communication.

[10] The accused need not have known that his or her conduct was criminal and need not have known the elements that constitute homicide, robbery, assault, sexual assault, or kidnapping. The accused also need not have acted knowingly with respect to the elements of a criminal menace where that offense specifies different culpable mental state requirements. The robbery offense's reference to a criminal menace imposes no additional culpable mental state requirements on the elements of a criminal menace, nor eliminates any such culpable mental state requirements.

[11] For example, a person might tell a stranger passing on the street that he will is going to beat them up, believing to a practical certainty that the stranger would perceive the communication as a threat. On such a charge, it is not necessary that the stranger, a boxing champion, actually perceive the person's words as a threat.

[12] This is also a requirement for proof of attempted criminal menace.

Subsection (e) describes the defense of effective consent for criminal menace, and provides guidance on the burden of proof. An effective consent defense is in addition to any defenses applicable to the conduct at issue.[13] 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 mistake that the complainant consented to the actor's conduct. Subsection (e) also 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.

Relation to current District law. *The RCC criminal menace statute changes existing District law in five ways that specify the culpable mental states applicable to an offense element and improve the proportionality of penalties.*

First, the RCC second degree criminal menace offense uses the word "communicates" to include not only gestures, but oral and symbolic kinds of speech, expanding the means by which a menace may be issued. The current District assault statutes are silent as to the type of conduct that may constitute an "intent-to-frighten" form of assault. However, District case law holds that "mere words do not constitute an assault."[14] Under centuries-old common law, non-verbal conduct is required for intent-to-frighten assault,[15] although case law does not specify what conduct is required. The current District threats statutes also are silent as to the type of conduct that may transmit a threat, simply referring to a person who "threatens"[16] or issues a "threat."[17] In case law, the DCCA has frequently described the element as having "uttered words,"[18] although in at least one case, the DCCA has stated that a threat "requires *words* to be communicated to another person," compared to intent-to-frighten assault which "requires threatening conduct."[19] By contrast, the RCC first degree criminal threat offense includes both

[13] 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 defenses in the preface to subsection (e) clarifies that courts should not interpret the codification of this special defense to abrogate the applicability of general defenses under an *expressio unius* canon of construction. *See, e.g., Bolz v. D.C.*, 149 A.3d 1130, 1140 (D.C. 2016).

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

[15] One of the District's oldest cases, from the very first volume of Cranch's Reports, turns on this issue. In *United States v. Myers*, the defendant "doubled his fist and ran it towards the witness, saying, 'If you say so again, I will knock you down.'" 1 Cranch C.C. 310, 310 (D.C. 1806). The guilty verdict was upheld.

[16] D.C. Code § 22-1810.

[17] D.C. Code § 22-407.

[18] *United States v. Baish*, 460 A.2d 38, 42 (D.C. 1983) ("[A] person 'threatens' when she utters words[.]"). However, the threats statute also has been explicitly construed to cover written threats. *Tolentino v. United States*, 636 A.2d 433, 434-35 (D.C. 1994) (rejecting defendant's argument that the threats offense only covers oral communications, and upholding conviction based on written threats); *Andrews v. United States*, 125 A.3d 316, 325 (D.C. 2015) (upholding conviction on the basis of threatening text messages).

[19] *Joiner-Die v. United States*, 899 A.2d 762, 766 (D.C. 2006). (emphasis in the original). However, although no reported threats case before the DCCA appear to have been based on gestures alone, symbolic or non-verbal threats have been considered by that Court in the broader context of threatening conduct. *See, e.g., Gray v. United States*, 100 A.3d 129, 136 (D.C. 2014) ("[T]he trial court found appellant guilty of threats based on Lowery's testimony that [the defendant] said 'I'm going to kill you,' and made 'a gun motion' with his fingers."). *See also*, D.C. Crim Jur. Instr. § 4.130 (including gestures and symbols as means of completing the offense); *Ebron v. United States*, 838 A.2d 1140, 1150-53 (D.C. 2016) (in context of threats evidence admissibility, hand being dragged across the throat constituted a "threatening action").

words (written or oral) and gestures, symbols, or other means of communication.[20] Assuming other elements of the offense are proven, the social harm of menace, the intentional infliction of credible fear upon a person present, appears to be equal whether gestures and symbols or words and letters are used.[21] The social harm of menace, worse than a general threat, is the *immediate* and intentional infliction of fear upon a person. This change fills a gap in District law to broadly encompass any communication, not just non-verbal communications

Second, the RCC criminal menace offense requires the content of the threat to be conduct constituting a homicide, robbery, assault, sex assault, or kidnapping. The current District assault statutes are silent as to the type of conduct that may constitute an "intent-to-frighten" form of assault. However, District case law holds that intent-to-frighten assault covers a defendant's "conduct as could induce in the victim a well-founded apprehension of peril."[22] District case law concerning intent-to-frighten assault has upheld convictions for placing a person in fear of "immediate injury."[23] However, there is no District case law on point as to whether placing someone in fear of an offensive physical contact, the lowest level of assault recognized under current District law on assault,[24] would suffice for intent-to-frighten assault liability.[25] Current District threats statutes refer to a few types of conduct: to "kidnap," "injure the person of another," "physically damage the property of any person," or "do bodily harm."[26] Neither current statutes nor case law define the precise meaning of terms like "injure" or "do bodily harm," and it is unclear if the phrases are equivalent to the harm described in case law for simple assault.[27] In contrast, the RCC criminal menace statute specifies the relevant harms that may be the basis for a criminal menace prosecution, including harms such as death and sexual assaults,

[20] E.g., transmitting an image or sound to a recipient.

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

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

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

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

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

[26] D.C. Code §§ 22-407, 1810.

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

as well all conduct that constitutes an assault under the RCC.[28] The RCC criminal menace statute changes current District law insofar as it includes some kidnapping conduct that does not involve a bodily harm,[29] and may expand the covered conduct in other ways too.[30] The RCC criminal menace offense also clearly excludes threatened offensive physical contact as an insufficient basis for liability, which may constitute a change in law.[31] These changes clarify the limits of the threatened conduct that is the content of the communication in a criminal menace.

Third, the RCC criminal menace offense eliminates liability based on an "intent to injure." The current District assault statutes are silent as to the types of intent that may constitute an "intent-to-frighten" form of assault. However, District case law has indicated that, in addition to an intent to scare a victim, intent-to-frighten assault liability also may exist where there is an intent to cause bodily injury to the victim.[32] This "intent to cause injury" form of intent-to-frighten assault appears to be distinct from criminal liability for an attempted battery form of simple assault in District case law.[33] By contrast, the RCC criminal menace offense requires, per subsections (a)(4) and (b)(3) only that the defendant intend that communication be perceived as a threat. A person who engages in conduct with an intent to inflict bodily injury may be liable under the RCC assault statute,[34] but unless the person has an intent that the communication be perceived as a threat and meets the other offense elements, such a person is not liable under the revised criminal menace offense. This new division of criminal liability between the revised assault and revised criminal menace statutes may limit punishment for some conduct currently recognized as a complete form of intent-to-frighten assault to an attempted assault in the revised statute.[35] The change clarifies the revised offenses of assault and a criminal menace and eliminates unnecessary overlap in current District law between attempted battery forms of assault and intent-to-frighten forms of assault.

Fourth, the RCC criminal menace offense eliminates penalty enhancements based on the victim's status as a minor, a senior citizen, a transportation worker, a District official or employee, or a citizen patrol member. Under current District statutes, certain penalty

[28] RCC § 22A-1202.

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

[30] It may be that a criminal menace to sexually assault someone or commit any form of kidnapping involving overpowering an individual is already subject to liability under the current District threats statutes insofar as those appear to involve a threat to "injure the person of another." D.C. Code § 22-1810.

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

[32] *Robinson*, 506 A.2d at 574.

[33] The attempted battery form of assault requires proof that the defendant committed an "actual attempt, with force or violence, to injure another." *Williamson*, 445 A.2d at 978; accord *Patterson v. Pillans*, 43 App.D.C. 505, 506-07 (C.C.D.C.) ("attempt to cause a physical injury, which may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person.").

[34] RCC § 22A-1202.

[35] I.e., to the extent that intent-to-frighten assault in current DCCA case law recognizes liability for an intent to cause bodily harm without an intent to frighten, there is no corresponding liability for a completed offense in the revised criminal menace statute—even though liability would exist in the revised assault statute.

enhancements apply to simple assault (including intent-to-frighten assault) [36] and assault with a deadly weapon.[37] By contrast, under the RCC, the only means of increasing a criminal menace penalty is to prove the defendant used a dangerous or imitation weapon, making the offense a first degree criminal menace. Enhancements based on the status of the complainant no longer apply. This change simplifies current law and improves proportionality by limiting these complainant-based penalty enhancements to offenses involving bodily injury.

Fifth, under the RCC criminal menace 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 intent-to-frighten form of assault statute from which the offense of criminal menace is largely[38] derived is silent as to the effect of intoxication. However, District law seems to have established that this statute is comprised of a general intent offense,[39] 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.[40] This DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[41]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess the knowledge or intent required for any element of offensive physical contact.[42] By contrast, under the RCC criminal menace, 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 of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a criminal menace. Likewise, where appropriate, the defendant would

[36] The enhancements are: D.C. Code § 22-851 (District official, employee or the family member thereof) and D.C. Code § 22-3602 (citizen patrol member). Note that there is also a slightly greater penalty for simple assault of a law enforcement officer (6 months versus 180 days) per D.C. Code § 22-405.

[37] The enhancements are: D.C. Code § 22-3611 (minor); D.C. Code § 22-3601 (senior citizen); D.C. Code §§ 22-3751, 22-3751.01, 22-3752 (transportation worker); D.C. Code § 22-851 (District official, employee or the family member thereof); or D.C. Code § 22-3602 (citizen patrol member).

[38] As described in the commentary to the RCC criminal threat statute, RCC § 22A-204, under recent DCCA case law a criminal threat requires the defendant's knowledge or at least subjective awareness that his or her utterance would be perceived as a threat. Consequently, it appears that it is not a "general intent" crime and there is no change to the current District regarding intoxication for criminal threats.

[39] 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).

[40] *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 [^].").

[41] 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*).

[42] 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 a first degree criminal menace.

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 a criminal menace.[43] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these five substantive changes to current District law, five other aspects of the RCC criminal menace statute may be viewed as substantive changes of law.

First, the RCC criminal menace statute requires that the defendant act knowingly with respect to making a communication, that the communication is made by display of or physical contact with a weapon, and the content of the communication, and that the defendant to act with intent as to the communication being in the nature of a threat. The District's current simple assault and assault with a deadly weapon statutes are silent as to the offense's requisite culpable mental states. Current District case law has often indicated that recklessness may suffice for such assaults,[44] however, in some instances a higher level of intent has been required,[45] and the DCCA has recently declined to state that recklessness is sufficient.[46] While the District's threats statutes are silent as to required culpable mental states, knowledge or as least some subjective intent is required by case law interpreting the threats statutes.[47] The RCC criminal menace offense resolves these ambiguities by requiring a culpable mental state of knowledge with respect to subsections (a)(1) - (a)(3) and (b)(1) - (b)(2) and acting with intent for subsections (a)(4) and (b)(3) regarding the communication being perceived as a threat.[48] Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal

[43] 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).

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

[45] *See Buchanan v. United States*, 32 A.3d 990, 998 (D.C. 2011) (Ruiz, J., concurring) ("At the same time that we have labeled assault a general intent crime, however, we have also articulated additional showings of intent which would seem to go above and beyond the ordinary conception of general intent merely to do the act constituting the assault.").

[46] 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).

[47] See commentary to RCC § 22A-204.

[48] Per RCC § 22A-206(b), "with intent" is an inchoate form of a knowledge requirement. The complainant need not have actually perceived the communication as a threat, so long as the defendant believed to a practical certainty that his or her communication would be so perceived. District case law also holds that the complainant need not have actually perceived the communication as a threat. *Anthony v. United States*, 361 A.2d 202, 206 (D.C. 1976).

behavior is a well-established practice in American jurisprudence.[49] A knowledge culpable mental state requirement is also more appropriate given that the criminal menace offense involves only a communication, not a bodily injury or use of overpowering physical force,[50] which may be more easily misconstrued as a threat.[51] This change improves the clarity of the law, and is consistent with prevailing District law and the RCC on criminal threats.

Second, the RCC criminal menace statutes include an "objective element" in subsections (a)(5) and (b)(4) subject to strict liability. The District's current assault statutes are silent as to whether the communication would cause a reasonable recipient to believe that the threatened harm would take place. However, District case law on intent-to-frighten assault requires that the defendant had the "apparent present ability to injure" the complainant.[52] The DCCA further qualified that a reasonable person test is to be used to determine such an ability.[53] Although the District's threats statutes are silent on the matter, longstanding District case law has required that for a defendant to be convicted of threats, there must be proof that that the "ordinary hearer would reasonably believe that threatened harm would take place."[54] Case law further specifies that his reference to an "ordinary hearer" takes into account all the specific factual circumstances of the case.[55] By contrast, the RCC criminal menace offense clarifies in subsections (a)(4) and (b)(3) that the defendant act "with intent that the communication be perceived as a threat" while the phrase "in fact" is used in subsections (a)(5) and (b)(4) to clarify that there is a truly objective test, one dependent not on the defendant's own awareness of the threatening nature of the message. However, even though subsections (a)(5) and (b)(4) provide for an objective assessment, the factfinder still may take into account, among other factors, the subjective reactions of the recipients of the communication.[56] The revised criminal menace statute clarifies

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

[50] Note, however, that 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 where there is a physical harm involved.

[51] *See*, e.g., *Furl J. Williams v. United States*, 113 A.3d 554, 561-62 (D.C. 2015) In *Furl J. Williams*, the alleged victim of robbery felt threatened by being approached by three African Americans late at night and handed them his wallet. *Id*. The DCCA reversed their convictions, stating that the victim's fear was not objectively reasonable. *Id*. at 564. *See also*, Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235 (2017) (discussing how racial anxiety can influence behavior and perceptions); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012) (racial bias research, and specifically a phenomenon called "the suspicion heuristic" "demonstrates how easily honest--but mistaken-- beliefs can occur when the person being judged fits a criminal stereotype.").

[52] *See Anthony v. United States*, 361 A.2d 202, 207 (D.C. 1976).

[53] *See id*. at 206 ("[T]he crucial inquiry remains whether the assailant acted in such a manner as would under the circumstances portend an immediate threat of danger to a person or reasonable sensibility.").

[54] *Carrell*, 165 A.3d at 320.

[55] The DCCA has noted that "the factfinder must weigh not just the words uttered, but also the complete context in which they were used." *Gray*, 100 A.3d at 136 (D.C. 2014). For example, words that on their face are innocuous or ambiguous can become threatening in the circumstances of the threat; the opposite is true, as well. *See Clark v. United States*, 755 A.2d 1026, 1031 (D.C. 2000); *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012) ("Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening."). The DCCA has noted that words "often acquire significant meaning from context, facial expression, tone, stress, posture, inflection, and like manifestations of the speaker . . . ." *Id.*

[56] *See Anthony*, 361 A.2d at 206 ("In our view the better position holds that although the question whether the defendant's conduct produced fear in the victim is relevant, the crucial inquiry remains whether the assailant acted in

the existing "apparent present ability to injure" requirement of intent-to-frighten assault, and with the objective requirement in the threats statutes clarifies the state of the law and appears to be consistent with District practice[57] and the recent DCCA ruling in *Carrell.* This change clarifies and is consistent with prevailing District law.

Third, the RCC criminal menace offense clarifies that the defendant need not threaten to carry out the harm himself, but may instead communicate that an accomplice will immediately inflict the threatened harm. The District's current simple assault and assault with a deadly weapon statutes do not address whether an intent to frighten assault can be accomplished by indicating that an accomplice will harm someone.[58] While the District's threats statutes are silent as to threats involving an accomplice committing a harm, at least one threats case suggests that it is sufficient for liability that a defendant communicates that another person will harm the victim[59]—although there is no case law directly on point. By contrast, the RCC criminal menace statute plainly states in subsections (a)(3) and (b)(2) that the content of the menace is that "the defendant or an accomplice" will carry out prohibited conduct. Assuming other elements of the offense are proven, the social harm of menacing, the intentional and immediate infliction of fear upon a person, is equal whether the person purported to inflict the harm is the defendant or an accomplice. This change improves the clarity of the offense by treating menacing that purports to have an accomplice immediately mete out harm the same as if the defendant threatened to inflict the harm himself.

Fourth, the RCC first degree criminal menace offense explicitly includes imitation weapons. The current District assault with a dangerous weapon statute is silent as to whether imitation weapons are within the scope of the statute.[60] The DCCA, however, has held that imitation firearms are within the scope of the assault with a dangerous weapon statute.[61] However, whether a non-firearm imitation weapon (e.g., a fake knife) constitutes a "dangerous weapon" under the assault with a dangerous weapon statute has not been directly addressed by the DCCA.[62] The current District threats statutes do not include the use of dangerous weapon as

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such a manner as would under the circumstances portend an immediate threat of danger to a person or reasonable sensibility.").

[57] *See* D.C. Crim. Jur. Instr. § 4.130.

[58] This may reflect the fact that, as noted above, current District intent-to-frighten assault liability is only based on conduct (not words) and it presumably is more difficult to indicate to a stranger through gestures alone how an accomplice will accomplish the harm. In the RCC criminal menace statute, by contrast, the requisite communication may be oral or by any means.

[59] In *Clark*, the defendant was convicted of threats when, after his arrest, he told a police officer, "You won't work here again, wait until I tell the boys, they will take care of you." 755 A.2d at 1028, abrogated on other grounds by *Carrell*, 165 A.3d at 324. Although the legal question was not presented, the DCCA upheld the defendant's conviction, despite the fact that the defendant's communication indicated "the boys" (and not the defendant) would harm the victim. *See also Aboye v. United States*, 121 A.3d 1245, 1251-52 (D.C. 2015) (defendant's conviction for threats upheld on basis that he said to victims, "I'm going to kill you with my dog. I'm going to have my dog kill you.").

[60] D.C. Code § 22-402.

[61] *Washington v. United States*, 135 A.3d 325, 329-30 (D.C. 2016).

[62] However, in another case on an imitation firearm, the DCCA has generally stated that it is the apparent ability of a weapon to inflict harm, not actual ability that matters. *See Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) ("However, present ability of the weapon to inflict great bodily injury is not required to prove an assault with a dangerous weapon. Only apparent ability through the eyes of the victim is required. See *United States v. Cooper*, 462 F.2d 1343, 1344 (5th Cir. 1972) (assault with dangerous weapon, i.e., imitation bomb); *Bass v. Stat*e, 232 So.2d 25, 27 (Fla.App.1970) (assault with deadly weapon, i.e., unloaded pistol); *State v. Johnston*, 207 La. 161, 20 So.2d 741 (1944) (assault with dangerous weapon, i.e., unloaded pistol). See also Annot., 79 A.L.R.2d 1412, 1424 (1961) and Later Case Service (1968).").

an element.[63] By contrast, the RCC criminal menace offense explicitly includes both imitation firearms and imitation non-firearm weapons. Inclusion of such items in the RCC criminal menace offense is consistent the social harm of menacing, the intentional and immediate infliction of fear upon a person, which is equal whether the weapon is real or an imitation that a reasonable person would believe is real. This change improves the clarity of the statute and may fill a gap in existing law.

Fifth, the revised statute in subsection (e) 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 a criminal menace. The District's assault and threats 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.[64] 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.[65] The RCC criminal menace statute clarifies that effective consent[66] by the complainant, or reasonable belief that the complainant gave effective consent, is a defense. The prefatory language in subsection (e)[67] also clarifies that any general defense under District law continues to be available to a defendant in a criminal menace prosecution. Absent such an effective consent defense, it is possible that some legal activities potentially would fall within the scope of the revised criminal menace offenses,[68] and District practice[69] has long recognized the general existence of a consent defense that is consistent with the RCC effective consent defense for a criminal menace. Subsection (e) further clarifies the burden of proof for the defense, consistent with current District practice.[70] 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.

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

First, the revised criminal menace offense clarifies that the communication need not express the defendant's intent to harm the recipient of the communication if there is an express

[63] D.C. Code §§ 22-407, 22-1810.

[64] 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).").

[65] *Woods v. United States*, 65 A.3d 667, 672 (D.C. 2013).

[66] 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*, 65 A.3d at 672 ("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").

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

[68] For example, menaces made as part of sports, acting, sexual interactions, and other consensual activity not forbidden by law.

[69] 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.").

[70] 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].").

intent to harm a third party that is present. The current District intent-to-frighten and assault with a deadly weapon statutes (as well as the District's threats statutes) are silent on this matter. This does not appear to have been addressed in District assault case law.[71] While the District's threats statutes also are silent as to a threat to harm a third party present, District case law interpreting the threats statutes have held that threats to harm a third party, other than the recipient of the communication, are sufficient for liability if other elements of the offense are met.[72]

Second, the revised criminal menace statute specifies that the offense is complete only when the message is communicated to another person. Thus, a person is not guilty of a completed (versus attempted) criminal menace if the communication is not received by another person.[73] The current District intent-to-frighten and assault with a deadly weapon statutes (as well as the District's threats statutes) are silent on this matter. This does not appear to have been addressed in District assault case law. District threats statutes are silent on the matter too, but such a requirement is a long-standing part of the body of threats case law.[74] A communication that the defendant attempts to deliver to another person, but which fails to reach any recipient, could constitute an attempted criminal menace.[75]

Third, the revised criminal menace clarifies that there is no gradation distinction based on whether harm did or did not result from the defendant's communication. Current District law provides more severe penalties for causing assaults that result in more severe physical harms—for example, the felony assault statute punishes anyone who "unlawfully assaults . . . [and] causes significant bodily injury to another," thus creating the offense of "felony assault."[76] Consequently, it may be possible under current District law for a person whose conduct amounts to an intent-to-frighten form of assault to be liable for felony punishment if that frightening conduct results in significant or serious bodily injury. No DCCA case law has addressed such felony-level liability based on intent-to-frighten conduct versus battery. The fact-patterns that would give rise to such liability are unlikely,[77] though arguably possible.[78] District threats

[71] The Redbook, however, includes an instruction on the same element with an alternative including threats to someone other than the recipient. D.C. Crim. Jur. Instr. § 4.100 ("S/he intended to cause injury or to create fear in [name of complainant] [another person] . . . ."). However, there is case law holding that there cannot be more than one ADW conviction for directing a threat at a group of people. *See, e.g., Smith v. United States*, 295 A.2d 60, 61 (D.C.1972) (holding, where the defendant patted his pocket and told two men he had a gun, that "a single threat directed to more than one person constitutes but a single unit of prosecution"); *United States v. Alexander*, 471 F.2d 923, 932–34 (D.C.Cir.1972) (holding, in case where defendant pointed his gun at a group of four individuals, that "where by a single act or course of action a defendant has put in fear different members of a group towards which the action is collectively directed, he is guilty of but one offense") *Graure v. United States*, 18 A.3d 743, 763 (D.C. 2011). The RCC criminal menace statute does not change this law regarding the appropriate unit of prosecution.

[72] *Gurley v. United States*, 308 A.2d 785, 786 (D.C. 1973) ("It is obvious that this statute does not expressly require that the threats be communicated directly to the threatened individual."); *see also Beard v. United States*, 535 A.2d 1373, 1378 (D.C. 1988) ("The crime was complete as soon as the threat was communicated to a third party, regardless of whether the intended victim ever knew of the plot.").

[73] For example, a person who makes a silent punching gesture toward another person is not liable for a completed criminal menace if the other person is blind or otherwise does not notice the gesture.

[74] *Baish*, 460 A.2d at 42 ("[A] person making threats does not commit a crime until the threat is heard by one other than the speaker.").

[75] This, too, is a long-standing part of the body of threats case law. *See Evans*, 779 A.2d at 894 ("[I]f a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense.").

[76] D.C. Code § 22-404(a)(2).

[77] The Redbook acknowledges the possibility of intent-to-frighten conduct triggering a felony assault charge and includes an instruction. *See* D.C. Crim. Jur. Instr. § 4.102. But the Commentary states frankly that "it is unlikely that [felony assault] will be based on facts indicating only threatening acts . . . ."

statutes do not grade on the basis of the infliction of a bodily harm as a consequence of the threat.[79] While the criminal menacing statute does not grade based on whether there are any resulting physical harms, such conduct may be punishable under the RCC assault statute.[80]

Fourth, the RCC criminal menace statute requires that the defendant's conduct be directed at a person physically present with the defendant, and that the harm threatened must be immediate. The current District simple assault and assault with a dangerous weapon statutes are silent as to physical presence and immediacy. However, District case law on intent-to-frighten assault and assault with a dangerous weapon implicitly require immediacy, particularly through requirements that the defendant have the "apparent present ability to injure" the complainant.[81] As noted above, the DCCA held "that at the time of the assault the surrounding circumstances must connote the intention and present ability to do immediate violence."[82] Although the District's threats statutes are silent on the matter, District case law has affirmed liability for threats regardless of physical presence or the immediacy of harm.[83] The revised criminal menace statute clarifies these immediacy and physical presence requirements in existing law.

Relation to National Legal Trends. *The above-mentioned substantive changes to current District law are generally supported by national legal trends.*

First, expanding second degree criminal menace to include words, not just conduct, appears to be supported by national legal trends amongst the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions").[84] Six jurisdictions clearly require some kind of physical act for their menacing offenses,[85] whereas three states explicitly include menaces by physical conduct and by words.[86] Nine jurisdictions, however, only require proof of "causing" apprehension of imminent harm, or of "creating" such apprehension,[87] implicitly including both

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[78] For example, a person who intentionally menaces a person who is using a knife for carving might cause that person to cut themselves badly, requiring stitches. However, while such fact patterns may be unusual, the more relevant point may be that such fact patterns also could be prosecuted under a battery-type assault theory in current District law and the RCC assault statute. The person who recklessly engages in conduct of any kind that results in a significant bodily injury is liable for assault.

[79] D.C. Code §§ 22-407, 22-1810.

[80] RCC § 22A-1202. Under the revised assault statute, the *means* of causing the harms specified in the gradations is irrelevant. For example, a person who satisfies the requirements of recklessly causing bodily injury to another is liable whether the predicate conduct was menacing someone with a gesture, punching them with a fist, or poking them with a fork.

[81] *See Anthony v. United States*, 361 A.2d 202, 207 (D.C. 1976).

[82] *Id*. at 205.

[83] See commentary to RCC § 22A-204.

[84] 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.

[85] Ala. Code § 13A-6-23; Conn. Gen. Stat. Ann. § 53a-62 ("by physical threat"); Del. Code Ann. tit. 11, § 602 ("by some movement of body or any instrument"); N.H. Rev. Stat. Ann. § 631:4 ("by physical conduct"); N.J. Stat. Ann. § 2C:12-1 ("by physical menace"); N.Y. Penal Law § 120.15 ("by physical menace"); 18 Pa. Stat. and Cons. Stat. Ann. § 2701 ("by physical menace").

[86] Alaska Stat. Ann. § 11.41.230 ("by words or other conduct"); Colo. Rev. Stat. Ann. § 18-3-206 ("by any threat or physical action"); Or. Rev. Stat. Ann. § 163.190 ("by word or conduct").

[87] Ark. Code Ann. § 5-13-207 ("creates"); Ariz. Rev. Stat. Ann. § 13-1203 ("placing"); Kan. Stat. Ann. § 21-5412 ("placing"); Ky. Rev. Stat. Ann. § 508.050 ("places"); Me. Rev. Stat. tit. 17-A, § 209 ("places"); Mont. Code Ann. §

words and conduct in menacing. Therefore, it appears[88] there is a majority trend favoring the expansion of menacing to include more than physical conduct. The Model Penal Code uses the phrase "attempts . . . to put another in fear."[89] With respect to the reformed code jurisdictions and threats, the RCC appears to be somewhat in line with national legal trends. States generally do not provide statutory guidance on whether the offense requires words, or whether it encompasses conduct, as well. The eleven states and the Model Penal Code use the open-ended term, "threatens,"[90] and an additional four use the term "communicates."[91] A few states, however, qualify those verbs, by saying that the offense is committed when one "threatens by any means" (one state)[92], or when one "threatens by words or conduct" (four states).[93] And two states use other terms.[94] At the very least, therefore, the use of the word "communicates" is generally in line with the majority of states. And those states that, by statute, specify what type of communications count for threats generally have a broader view of what threats can be. Therefore, the inclusion of "communicates" and the Commentary indicating that the word is intended to include more than just words appears to be in line with national legal trends.

Second, the inclusion of robbery, sexual assault, and kidnapping in criminal menacing is partially supported by national legal trends. No other jurisdiction includes any harm besides some form of bodily injury (assault) within their criminal menace statutes, and many jurisdictions include only serious bodily harms in their criminal menace statutes. Seven states and the Model Penal Code require that the menace create a reasonable fear of serious bodily injury[95] and eleven states provide liability for a menace that causes reasonable fear of any bodily injury or harm.[96] However, reformed jurisdictions do include a wider set of harms in their threats statutes. Eleven states punish threatening bodily harm or serious bodily harm;[97] nine states punish threatening to damage or destroy property;[98] and eight states punish threatening to

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45-5-201 ("causes"); N.D. Cent. Code Ann. § 12.1-17-05 ("places"); Tenn. Code Ann. § 39-13-101 ("causes"); Tex. Penal Code Ann. § 22.01 ("threatens").

[88] The CCRC did not research other jurisdiction case law corresponding to this menacing language.

[89] Model Penal Code § 221.1(1)(c).

[90] Ark. Code Ann. § 5-13-301; Conn. Gen. Stat. Ann. § 53a-61aa; Del. Code Ann. tit. 11, § 621; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.Y. Penal Law § 490.20; N.D. Cent. Code Ann. § 12.1-17-04; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020; Model Penal Code § 211.3.

[91] Kan. Stat. Ann. § 21-5415; Me. Rev. Stat. tit. 17-A, § 210; Mo. Ann. Stat. § 574.115; Mont. Code Ann. § 45-5-203.

[92] Ala. Code § 13A-10-15

[93] Ariz. Rev. Stat. Ann. § 13-1202; Haw. Rev. Stat. Ann. § 707-715; Wash. Rev. Code Ann. § 9A.46.020.

[94] Ohio Rev. Code Ann. § 2903.21 ("cause another to believe"). 18 Pa. Stat. and Cons. Stat. Ann. § 2706

[95] Ala. Code § 13A-6-23; Colo. Rev. Stat. Ann. § 18-3-206; Conn. Gen. Stat. Ann. § 53a-62; N.J. Stat. Ann. § 2C:12-1; N.D. Cent. Code Ann. § 12.1-17-05; Or. Rev. Stat. Ann. § 163.190; 18 Pa. Stat. and Cons. Stat. Ann. § 2701; Model Penal Code § 211.1(1)(c).

[96] Ark. Code Ann. § 5-13-207; Alaska Stat. Ann. § 11.41.230; Ariz. Rev. Stat. Ann. § 13-1203; Del. Code Ann. tit. 11, § 602; Kan. Stat. Ann. § 21-5412; Ky. Rev. Stat. Ann. § 508.050; Me. Rev. Stat. tit. 17-A, § 209; Mont. Code Ann. § 45-5-201; N.Y. Penal Law § 120.15; Tex. Penal Code Ann. § 22.01; Tenn. Code Ann. § 39-13-101.

[97] Alaska Stat. Ann. § 11.56.810; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Del. Code Ann. tit. 11, § 621; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Ohio Rev. Code Ann. §§ 2903.21, 2903.22; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[98] Ala. Code § 13A-10-15; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

commit a crime of violence.[99] Additionally, the exclusion of offensive physical contact also may be supported by national trends. Only one other jurisdiction clearly includes offensive contact as a basis for menacing.[100]

Third, it does not appear that any other reformed code jurisdiction's menacing statute statutorily provides liability based on proof that the defendant "intended to cause injury." Similarly, no reformed code jurisdiction's threat statute provides liability based on proof that the defendant "intended to cause injury." Additionally, the Model Penal Code does not provide such forms of liability.[101]

Fourth, the exclusion of victim status as a grading factor in menacing is supported by national legal trends. Only five states have menacing statutes that explicitly include the status of the victim within the grading scheme for the offense.[102] With respect to threats, five states include the status of the victim as a grading factor.[103] And the Model Penal Code's menacing provision and threats provision have no grades based on victim status.[104] Therefore, absenting menacing and threats from a victim-status grading scheme is in keeping with national legal trends.

Fifth, 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."[105] In practical effect, this means 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."[106] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent

[99] Ala. Code § 13A-10-15; Conn. Gen. Stat. Ann. § 53a-62; Me. Rev. Stat. tit. 17-A, § 210; Minn. Stat. Ann. § 609.713; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.D. Cent. Code Ann. § 12.1-17-04; 18 Pa. Stat. and Cons. Stat. Ann. § 2706.

[100] N.H. Rev. Stat. Ann. § 631:4. The New Hampshire statute allows conviction based on bodily injury or physical contact. The implication is that physical contact means something other than and less than bodily injury.

[101] See Model Penal Code § 211.1(c).

[102] Conn. Gen. Stat. Ann. § 53a-62 (threatening a person who is in certain designated places, such as houses of worship and schools); Kan. Stat. Ann. § 21-5412 (law enforcement officer); N.J. Stat. Ann. § 2C:12-1 (various occupations, including law enforcement and emergency personnel); Tex. Penal Code Ann. § 22.01 (family members of the defendant, public servants); Tenn. Code Ann. § 39-13-101 (victims of domestic abuse).

[103] Haw. Rev. Stat. Ann. § 707-716 (public servants and emergency personnel); N.H. Rev. Stat. Ann. § 631:4-a (certain government officials); Ohio Rev. Code Ann. § 2903.22 (private and public child services officers); Tex. Penal Code Ann. § 22.07 (family members of the defendant, public servants); Wash. Rev. Code Ann. § 9A.46.020 ("criminal justice participants," meaning *inter alia* law enforcement officers).

[104] Model Penal Code §§ 211.1(c), 211.3.

[105] 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 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).

[106] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[107]

[107] 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).

Chapter 12. Robbery, Assault, and Threat Offenses

Section 1204. Criminal Threat.

(a) *First Degree Criminal Threat.* A person commits a first degree criminal threat when that person:
  (1) Knowingly communicates to another person;
  (2) That the defendant or an accomplice will engage in conduct against that person or a third person constituting one of the following offenses:
    (A) Homicide, as defined in RCC § 22A-1101;
    (B) Robbery, as defined in RCC § 22A-1201;
    (C) Sexual assault, as defined in RCC § 22A-13XX;
    (D) Kidnapping, as defined in RCC § 22A-14XX; or
    (E) Assault, as defined in RCC § 22A-1202(a)-(d);
  (3) With intent that the communication would be perceived as a threat; and
  (4) In fact, the communication would cause a reasonable recipient to believe that the harm would take place.

(b) *Second Degree Criminal Threat.* A person commits a second degree criminal threat when that person**:**
  (1) Knowingly communicates to another person;
  (2) That the defendant or an accomplice will engage in conduct against that person or a third person constituting one of the following offenses:
    (1) Assault, as defined in RCC § 22A-1202(e)-(f); or
    (2) Criminal damage to property, as defined in RCC § 22A-2503(c)(1) – (c)(4);
  (3) With intent that the communication be perceived as a threat; and
  (4) In fact, the communication would cause a reasonable recipient to believe that the harm would take place.

(c) *Penalties.*
  (1) First Degree Criminal Threat. First degree criminal threat is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Criminal Threat.* Second degree criminal threat is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* 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 "dangerous weapon," "imitation weapon," and effective consent have the meanings specified in § 22A-1001.

(e) *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 a defense to prosecution under this section. If evidence is present at trial of the complainant's effective consent or the defendant's reasonable mistake that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

(f) *[Jury Demandable Offense.* When charged with a violation of this section or an inchoate violation of this section, the defendant may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.]

RCC § 22A-1204. Criminal Threat

Commentary

Explanatory Note. *This section establishes the criminal threat offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes efforts to inflict terror and fear by means of threatening communications. The offense proscribes communicating a message that indicates the defendant (or an accomplice) will harm another person. The offense is graded according to the content of the message that the defendant communicates to the recipient: first-degree criminal threat covers communications indicating the defendant will engage in conduct constituting specified serious offenses against another person, while second-degree criminal threat covers communications indicating conduct constituting minor offenses against persons or property. The revised criminal threat offense replaces the misdemeanor and felony threat statutes*[108] *in the current D.C. Code.*

Subsections (a)(1) and (b)(1) state the prohibited conduct—that the defendant "communicates to another person." The verb "communicates" is intended to be broadly construed, encompassing both written and oral communication, as well as gestures[109] and symbolic[110] kinds of speech. Such communication not only requires the defendant to take action, but also requires that the communication was received and understood by another person.[111] Subsections (a)(1) and (b)(1) also specify the culpable mental states to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct is communicating to another person. The culpable mental state applies to both the defendant's act of communicating and the fact that the communication was received.

Subsections (a)(2) and (b)(2) codify the requirements for the content of the defendant's communication. Both subsections require that the defendant communicate that he or she will engage in some conduct,[112] but here, the two gradations of criminal threats differ. Subsection (a)(2), first-degree criminal threat, requires the defendant to indicate in his or her communication that he or she will engage in conduct against that person or a third person constituting homicide, robbery, sexual assault, kidnapping, or felony-level assault. Subsection (b)(2), second-degree criminal threat, requires the defendant to indicate in his or her communication that he or she will engage in conduct against that person or a third person constituting a minor assault or criminal damage to property. Whether particular words, gestures, or symbols communicate such content is a question of fact that will often require judgment by a factfinder.[113] Per the rule of construction in RCC § 22A-207, the culpable mental state "knowingly" in subsections (a)(1) and

[108] D.C. Code §§ 22-407, 1810.

[109] For example, drawing a hand across the throat in a cutting gesture, or making a gun shape with one's hand and making an imitation of shooting it..

[110] For example, sharing a photograph via a text message.

[111] DCCA case law further clarifies, *Evans v. United States*, 779 A.2d 891,894-95 (D.C. 2001), and the revised statute continues to recognize, that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

[112] By this language, the offense is intended to punish both "conditional" and "unconditional" threats. *See Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971).

[113] For example, a jury may evaluate whether the accused's gesture of drawing a finger across his throat communicated that the accused would kill the recipient of the communication.

(b)(1) also applies to the elements in subsection (a)(2) and (b)(2), requiring the accused to be practically certain or consciously desire the communication to convey such content.[114]

Subsections (a)(3) and (b)(3) require the defendant to make the communication with the intent that it be perceived as a threat, a serious expression of an intent to do harm. "Intent" is a defined term in RCC § 22A-206 meaning the defendant believed his or her communication was practically certain to be perceived as a threat. The communication and message need not actually be perceived as a threat by the recipient.[115]

Subsections (a)(4) and (b)(4) require proof that the accused's communication is objectively threatening. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement for subsections (a)(4) and (b)(4). All that is required to prove is that the defendant's message would cause a reasonable recipient of the message to believe the defendant would actually carry out the harm.[116] This standard evaluates events from the perspective of a reasonable recipient of the communication considering the particular facts and circumstances of a given case.

Neither subsections (a)(3) and (b)(3), nor subsections (a)(4) and (b)(4) require that the defendant actually have the ability to carry out the threatened harm. The offense also does not require proof that the defendant actually intended to eventually carry out the threat.

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 a criminal threat, and provides guidance on the burden of proof. An effective consent defense is in addition to any defenses applicable to the conduct at issue.[117] 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 mistake that the complainant consented to the actor's conduct. Subsection (e) also 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 (f) clarifies that a defendant may demand a jury trial for a criminal threat or or an inchoate criminal threat—an attempted threat, conspiracy to commit a threat, [RESERVED].

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[114] The accused need not have known that his or her conduct was criminal and need not have known the elements that constitute an assault, criminal destruction of property (for second-degree criminal threat) or that constitute a homicide, robbery, assault, sexual assault, or kidnapping (for first-degree criminal threat). The accused also need not have acted knowingly with respect to the elements of a criminal menace where that offense specifies different culpable mental state requirements. The robbery offense's reference to a criminal menace imposes no additional culpable mental state requirements on the elements of a criminal menace, nor eliminates any such culpable mental state requirements.

[115] For example, a person might tell a stranger calling on the phone that he will track them down and hit them, believing to a practical certainty that the caller would perceive the communication as a threat. On such a charge, it is not necessary that the caller, perhaps a boxing champion, actually perceive the person's words as a threat.

[116] *Carrell v. United States*, 165 A.3d 314, 320 (D.C. 2017). This is also a requirement for proof of attempted threats.

[117] 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 defenses in the preface to subsection (e) clarifies that courts should not interpret the codification of this special defense 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).

Relation to Current District Law. *The revised criminal threats statute changes existing District law in three main ways.*

First, the revised criminal threat statute provides gradations based on the severity of the harm to a person. Under current District law, all general threat-type conduct is subject to the most severe (20 year) maximum statutory penalty.[118] The current District felony threat offense involves three possible kinds of harm (to "kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part") while misdemeanor threats consist of a subset of these harms ("threats to do bodily harm").[119] Consequently, even though there are two gradations in the current District's general threats statutes, these two gradations do not limit liability ability for less severe harms. The RCC criminal threat offenses, in contrast, grade according to the severity of the harm threatened. First-degree criminal threat can only be proved when the defendant threatens to engage in conduct constituting one of the offenses specified in subsections (a)(2)(A) – (a)(2)(E) and second-degree criminal threat covers less serious harms specified in subsections (b)(2)(A) – (b)(2)(B). These changes bring the threats offenses into conformity with the approach to penalty gradations used through most of the current D.C. Code and RCC,[120] and improve the proportionality of District law.

Second, the revised threat statute uses the word "communicates" to include not only verbal but non-verbal gestures and symbolic kinds of speech, expanding the means by which a threat may be issued. The current District threats statutes are silent as to the type of conduct that may transmit a threat, simply referring to a person who "threatens"[121] or issues a "threat."[122] In case law, the DCCA has frequently described the element as having, "uttered words,"[123] although that phrase has been explicitly construed to cover not only oral but written threats.[124] However, in at least one case, the DCCA has stated that a threat "requires *words* to be communicated to another person" in contrast with intent-to-frighten assault which "requires threatening conduct."[125] By contrast, the RCC criminal threat offense includes both words

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

[119] D.C. Code §§ 22-407, 22-1810.

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

[121] D.C. Code § 22-1810.

[122] D.C. Code § 22-407.

[123] *United States v. Baish*, 460 A.2d 38, 42 (D.C. 1983) ("[A] person 'threatens' when she utters words[.]").

[124] *Tolentino v. United States*, 636 A.2d 433, 434-35 (D.C. 1994) (rejecting defendant's argument that the threats offense only covers oral communications, and upholding conviction based on written threats); *Andrews v. United States*, 125 A.3d 316, 325 (D.C. 2015) (upholding conviction on the basis of threatening text messages).

[125] *Joiner-Die v. United States*, 899 A.2d 762, 766 (D.C. 2006). (emphasis in the original). However, although no reported threats case before the DCCA appear to have been based on gestures alone, symbolic or non-verbal threats have been considered by that Court in the broader context of threatening conduct. *See, e.g.*, *Gray v. United States*, 100 A.3d 129, 136 (D.C. 2014) ("[T]he trial court found appellant guilty of threats based on Lowery's testimony that [the defendant] said 'I'm going to kill you,' and made 'a gun motion' with his fingers."). *See also*, D.C. Crim Jur. Instr. § 4.130 (including gestures and symbols as means of completing the offense); *Ebron v. United States*, 838

(written or oral) and gestures, symbols, or other means of communication.[126] Assuming other elements of the offense are proven, the social harm of threats, the intentional infliction of fear upon a person, appears to be equal whether gestures and symbols or words and letters are used.[127] This change fills a gap in District law to broadly encompass any communication, not just verbal communications.

Third, the revised second degree criminal threat statute clarifies the content of the threats required for each gradation, specifically excluding threats liability for damage to property amounting to less than $250. One current District threats statute refers to a threat to "physically damage the property of any person."[128] Neither current statutes nor case law define the precise meaning of terms like "damage," or "property," and it is unclear if the terms are equivalent to the harm described in case law for destruction of property.[129] In contrast, the RCC threat statute specifies the relevant harm for second degree threats as "conduct . . . constituting . . . [misdemeanor] criminal destruction of property." This reduces the scope of criminal threats to property with respect to low amounts of damage to property, but increases the scope of criminal threats to property insofar as non-physical harms are included. This change clarifies the content of covered threats and improves the consistency of the offense with current and RCC property offenses. The change also improves the proportionality of the offense by including threats to cause serious non-physical[130] damage to another's property and excluding threats of minor[131] economic harm.

Beyond these three substantive changes to current District law, five other aspects of the revised criminal threats statute may constitute a substantive change of law.

First, the revised criminal threat statute clarifies the content of the threats required for each gradation, specifically including conduct constituting homicide, robbery, sexual assault, kidnapping, and assault, and excluding conduct constituting offensive physical contact. Current District threats statutes refer to a few types of conduct harming persons: to "kidnap," "injure the person of another," or "do bodily harm."[132] Neither current statutes nor case law define the precise meaning of terms like "injure," or "do bodily harm," and it is unclear if the phrases are

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A.2d 1140, 1150-53 (D.C. 2016) (in context of threats evidence admissibility, hand being dragged across the throat constituted a "threatening action").

[126] E.g., transmitting an image or sound to a recipient.

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

[128] D.C. Code § 22-1810.

[129] *See* D.C. Code § 22-303 (malicious destruction of property [MDP]). MDP covers damage to property of *any value*, and punishes such damage with a penalty of 180 days if the value of the object damaged does not reach $1,000.

[130] For example, a threat to put a hold on a person's bank account access before a commercial real estate purchase such that they are subject to liquidated damages may, depending on the facts of the case, constitute a threat to engage in conduct constituting second degree criminal damage to property.

[131] For example, under the plain language of the current District statute, it would appear to be a criminal threat—subject to a twenty-year imprisonment penalty—for a person to threaten to crush another person's plastic drinking cup, or to scratch or blemish a cheap movie poster.

[132] D.C. Code §§ 22-407, 1810.

equivalent to the harm described in case law for simple assault.[133] In contrast, the RCC threat statute specifies the relevant harms for first-degree threats as "conduct . . . constituting . . . homicide . . . robbery . . . sexual assault . . . kidnapping . . . or [felony] assault," and the harms for second degree threats as "conduct . . . constituting . . . [misdemeanor] assault." It may be that the additional conduct described in the RCC (e.g. a threat to sexually assault someone) is already subject to liability in the current statutes insofar as those statutes all appear to involve a threat to "injure the person of another."[134] Also, it may be that the conduct clearly excluded in the RCC (e.g. a threat to commit an offensive physical contact) would also be excluded under the current District statutes as not constituting bodily harm. However, the RCC clarifies the content of the most serious threats that provide for heightened punishment and specifies the requisite conduct consistent with the RCC assault and other statutes. These changes improve the clarity and consistency of the offense.

Second, the revised threat statutes clarify that the defendant must act with intent—i.e., that the defendant believes, to a practical certainty—that his or her communication be perceived as a threat. The District's current statutes are silent as to the offense's requisite culpable mental states, and recent DCCA case law has addressed but not resolved the culpable mental state as to whether the communication is a threat. In 2017, an *en banc* decision of the DCCA in *Carrell v. United States*, held that something more than negligence, but less than purpose, is necessary.[135] The DCCA, following recent Supreme Court precedent,[136] said that acting with intent that the communication be perceived as a threat sufficed for liability in District law. But the *Carrell* majority did not explicitly state whether recklessness may provide a basis for conviction, and acknowledged that it was leaving the law unsettled.[137] By contrast, the revised statute clarifies that the defendant must act with intent, not mere recklessness as to whether the communication is a threat. Applying an intent culpable mental state requirement (an inchoate form of a knowledge requirement, as defined in the RCC[138]) to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[139] Requiring an intent culpable mental state in the revised threats offense also appears to be consistent with existing District practice.[140] These changes improve the clarity and consistency of the offense.

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[133] D.C. Code § 22-404. *See Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001) ("[A]ssault is defined as the unlawful use of force causing injury to another . . . ."). The DCCA has further held that "assault" includes "non-violent sexual touching assault as a distinct type of assault." *Id*. And in fact, even non-sexual but "offensive" touchings can constitute assault. *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990). In at least one case, the DCCA has upheld a threats conviction where the threat consisted of saying, "I'm going to smack the shit out of you." *Jones v. United States*, 124 A.3d 127, 131 (D.C. 2015). It's unclear whether slapping a person would constitute simple assault *qua* inflicting bodily harm, or simple assault *qua* engaging in an offensive touching.

[134] D.C. Code § 22-1810.

[135] *Carrell v. United States*, 165 A.3d 314, 324-25 (D.C. 2017).

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

[137] 165 A.3d 314, 323-24 (D.C. 2017) ("[W]e decline to decide whether a lesser threshold mens rea for the second element of the crime of threats -- recklessness -- would suffice.").

[138] RCC § 22A-206(b).

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

[140] D.C. Crim. Jur. Instr. § 4.130 (applying knowledge). The DCCA also noted that "the United States Attorney's Office [ ] disclaims reliance on recklessness . . . and states that it does not intend to prosecute future threats cases on a recklessness theory." *Carrell*, 165 A.3d at 325. Of course, other parties may rely on threats, as well, including the Office of the Attorney General.

Third, the revised threat offense clarifies that the defendant need not threaten to carry out the harm himself, but may instead communicate that an accomplice will inflict the threatened harm. The District's current threats statutes do not address whether a threat to have an accomplice harm someone is sufficient for liability.[141] At least one case suggests that it is sufficient for liability that a defendant communicates that another person will harm the victim,[142] but there is no case law directly on point. By contrast, the revised threat statute plainly states in subsections (a)(2) and (b)(2) that the content of the threat is that "the defendant or an accomplice" will carry out prohibited conduct. Assuming other elements of the offense are proven, the social harm of threats, the intentional infliction of fear upon a person, is equal whether the person purported to inflict the harm is the defendant or an accomplice. This change improves the clarity of the offense by treating threats purporting to have an accomplice mete out harm the same as if the defendant threatened to inflict the harm himself.

Fourth, the revised threat statute includes an "objective element" in subsections (a)(4) and (b)(4) subject to strict liability.[143] The District's current threats statutes are silent as to whether the communication would cause a reasonable recipient to believe that the threatened harm would take place. However, longstanding District case law has required that for a defendant to be convicted of threats, there must be proof that that the "ordinary hearer would reasonably believe that threatened harm would take place."[144] Case law further specifies that his reference to an "ordinary hearer" takes into account all the specific factual circumstances of the case.[145] The DCCA's recent *en banc* opinion in *Carrell* reaffirmed that there must be proof of this "objective element,"[146] while adding the additional requirement "that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat."[147] However, the *Carrell* decision did not clarify the relationship between the objective standard and the defendant's culpable mental state of knowledge that his communication be a threat.[148] By contrast, the RCC criminal threat offense clarifies in subsections (a)(3) and (b)(3) that the

[141] Arguably, however, the current statutory language suggests that the utterer of the threat must directly inflict the harm. See, e.g., D.C. Code § 22-1810: "Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part . . . ."

[142] In *Clark v. United States*, the defendant was convicted of threats when, after his arrest, he told a police officer, "You won't work here again, wait until I tell the boys, they will take care of you." 755 A.2d 1026, 1028 (D.C. 2000), abrogated on other grounds by *Carrell*, 165 A.3d at 324. Although the legal question was not presented, the DCCA upheld the defendant's conviction, despite the fact that the defendant's communication indicated "the boys" (and not the defendant) would harm the victim. *See also Aboye v. United States*, 121 A.3d 1245, 1251-52 (D.C. 2015) (defendant's conviction for threats upheld on basis that he said to victims, "I'm going to kill you with my dog. I'm going to have my dog kill you.").

[143] See *Carrell*, 165 A.3d at 320.

[144] *Id*.

[145] The DCCA has noted that "the factfinder must weigh not just the words uttered, but also the complete context in which they were used." *Gray v. United States*, 100 A.3d at 136. For example, words that on their face are innocuous or ambiguous can become threatening in the circumstances of the threat; the opposite is true, as well. *See Clark v. United States*, 755 A.2d at 1031; *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012) ("Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening."). The DCCA has noted that words "often acquire significant meaning from context, facial expression, tone, stress, posture, inflection, and like manifestations of the speaker . . . ." *Id*.

[146] *Carrell*, 165 A.3d at 324.

[147] *Id*.

[148] E.g., in addition to believing to a practical certainty that the communication would be perceived as a threat, does the defendant also have to believe that a "reasonable recipient" would believe that the harm would take place?

defendant act "with intent that the communication be perceived as a threat"[149] while the phrase "in fact" is used in subsections (a)(4) and (b)(4) to clarify that there is a truly objective test, one dependent not on the defendant's own awareness of the threatening nature of the message. However, even though subsections (a)(4) and (b)(4) provide for an objective assessment, the factfinder may take into account, among other factors, the subjective reactions of the recipients of the communication.[150] The RCC's use of "in fact" with the objective requirement in the threats statutes clarifies the state of the law and appears to be consistent with District practice[151] and the recent DCCA ruling in *Carrell.* This change improves the clarity of the law, and is consistent with prevailing District law on criminal threats.

Fifth, the revised statute in subsection (e) 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 a criminal threat. The District's assault and threats 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.[152] 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.[153] The RCC criminal threat statute clarifies that effective consent[154] by the complainant, or reasonable belief that the complainant gave effective consent, is a defense. The prefatory language in subsection (e)[155] also clarifies that any general defense under District law continues to be available to a defendant in a criminal menace prosecution. Absent such an effective consent defense, it is possible that some legal activities potentially would fall within the scope of the revised criminal threat offenses,[156] and District practice[157] has long recognized the general existence of a consent defense that is consistent with the RCC effective consent defense for a criminal menace. Subsection (e) further clarifies the burden of proof for the defense, consistent with current District practice.[158] This change improves the clarity of the law and, to the extent it may result in a change, improves the

[149] *Carrell*, 165 A.3d at 325.

[150] *See Gray*, 100 A.3d at 134-35 ("[W]hether an ordinary hearer would understand words to be in the nature of a threat of serious bodily harm is a highly context-sensitive question.").

[151] *See* D.C. Crim. Jur. Instr. § 4.130.

[152] 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).").

[153] *Woods v. United States*, 65 A.3d 667, 672 (D.C. 2013).

[154] 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*, 65 A.3d at 672 ("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").

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

[156] For example, threats made as part of sports, acting, sexual interactions, and other consensual activity not forbidden by law.

[157] 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.").

[158] 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].").

proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

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

First, the revised criminal threat offense clarifies that the message need not express the defendant's intent to harm the recipient of the communication where there is nonetheless an express intent to harm a third party. The current District threats statutes are silent on this matter. However, DCCA case law has long recognized that threats to harm a third party, other than the recipient of the communication, are sufficient for liability if other elements of the offense are met.[159] Additionally, while the statute does not explicitly note that the offense only applies to natural persons, current DCCA case law holding that threats cannot apply to non-human persons is not intended to change.[160]

Second, the revised criminal threat statute specifies that the offense is complete only when the message is communicated to another person. Thus, a person is not guilty of a completed threat if the communication does not reach another person besides the defendant. This requirement is a long-standing part of the body of threats case law.[161] Of course, a message that the defendant attempts to deliver to another person, but fails to reach any recipient, could constitute an attempted threat, as could a message that is transmitted but "garbled and not understood."[162] This, too, is a long-standing part of the body of threats case law.[163]

Third, the revised criminal threat statute specifies that the mental state of knowledge applies to the requirement that the defendant make the communication that is received by another, and that the communication convey a particular message (e.g., that the defendant will inflict bodily harm on the victim). This is consistent with the DCCA's recent *en banc* opinion in *Carrell*.[164]

Fourth, under the revised criminal threat 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 threats statutes are silent as to the effect of intoxication, and case law has not addressed the matter since the DCCA's recent *en banc* opinion in *Carrell* found that knowledge or some subjective intent is required for liability.[165] Under the RCC criminal threat statute, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a

[159] *Gurley v. United States*, 308 A.2d 785, 786 (D.C. 1973) ("It is obvious that this statute does not expressly require that the threats be communicated directly to the threatened individual."); *see also Beard v. United States*, 535 A.2d 1373, 1378 (D.C. 1988) ("The crime was complete as soon as the threat was communicated to a third party, regardless of whether the intended victim ever knew of the plot.").

[160] *See Ruffin v. United States*, 76 A.3d 845, 855 (D.C. 2013) (holding that "the contextual features suggest that 'person' is limited to natural persons" in threats, and therefore, threatening to destroy District of Columbia government property does not constitute an offense).

[161] *Baish*, 460 A.2dat 42 ("[A] person making threats does not commit a crime until the threat is heard by one other than the speaker.").

[162] *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001).

[163] *Id.* ("[I]f a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense.").

[164] *Carrell*, 165 A.3d at 323-24 (rejecting an analysis of the threats statute in terms of "specific" or "general" intent and requiring proof of knowledge, or at least some subjective intent, on the part of the defendant as to whether his or her communication would be perceived as a threat).

[165] *Id.* at 324 .

claim of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a criminal threat. 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 a criminal threat.[166]

Relation to National Legal Trends. *The revised criminal threats offense's above-mentioned substantive changes to current District criminal threats law are partially supported by national legal trends.*

First, the RCC's gradation of threats into two offenses is generally supported by national legal trends. However, the basis for the RCC's gradations (the type of threatened harm communicated by the defendant) is not supported by the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions").[167] Of the twenty-nine reformed code jurisdictions, twelve have two or more gradations of threats.[168] Of those twelve states, only two grade their threats offenses on the basis of nature of threatened conduct.[169] The particular conduct and harms specified in the offense gradations generally comport with national legal trends. In particular, there are: eleven states that punish threatening bodily harm or serious bodily harm;[170] nine states that punish threatening to damage or destroy property;[171] and eight states that punish threatening to commit a crime of violence.[172]

Second, with respect to the requirement that the defendant "communicate" the threatening message, the RCC appears to be in line with most other jurisdictions. States generally do not provide guidance on whether the offense requires words, or whether it

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[166] 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).

[167] 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.

[168] Alaska Stat. Ann. § 11.56.807; Ark. Code Ann. § 5-13-301; Conn. Gen. Stat. Ann. § 53a-61aa; Haw. Rev. Stat. Ann. § 707-715; Kan. Stat. Ann. § 21-5415; Ky. Rev. Stat. Ann. § 508.075; Minn. Stat. Ann. § 609.713; Mo. Ann. Stat. § 574.115; N.H. Rev. Stat. Ann. § 631:4; Ohio Rev. Code Ann. § 2903.21; 18 Pa. Stat. and Cons. Stat. Ann. § 2706; Wash. Rev. Code Ann. § 9A.46.020. Like most of the reformed code jurisdictions, the Model Penal Code provides only a single grade for threats. Model Penal Code § 211.3.

[169] Ark. Code Ann. § 5-13-301; Ohio Rev. Code Ann. § 2903.21. Most jurisdictions grade the offense on the basis of the threat causing evacuation of public building, or otherwise causing (or intending to cause) disruptions to many people. E.g., Alaska Stat. Ann. § 11.56.807; Conn. Gen. Stat. Ann. § 53a-61aa; Del. Code Ann. tit. 11, § 621; Kan. Stat. Ann. § 21-5415; Ky. Rev. Stat. Ann. § 508.075; Me. Rev. Stat. tit. 17-A, § 210; Mo. Ann. Stat. § 574.115; N.J. Stat. Ann. § 2C:12-3; 18 Pa. Stat. and Cons. Stat. Ann. § 270; Tex. Penal Code Ann. § 22.07.

[170] Alaska Stat. Ann. § 11.56.810; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Del. Code Ann. tit. 11, § 621; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Ohio Rev. Code Ann. §§ 2903.21, 2903.22; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[171] Ala. Code § 13A-10-15; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[172] Ala. Code § 13A-10-15; Conn. Gen. Stat. Ann. § 53a-62; Me. Rev. Stat. tit. 17-A, § 210; Minn. Stat. Ann. § 609.713; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.D. Cent. Code Ann. § 12.1-17-04; 18 Pa. Stat. and Cons. Stat. Ann. § 2706.

encompasses conduct, as well. Eleven states use the open-ended term, "threatens,"[173] and an additional four use the term "communicates."[174] A few states, however, qualify those verbs, by saying that the offense is committed when one "threatens by any means" (one state)[175], or when one "threatens by words or conduct" (four states).[176] And two states use other terms.[177] Therefore, it appears[178] the use of the word "communicates" is generally in line with the majority of states. And those states that, by statute, specify what type of communications count for threats generally have a broader view of what threats can be. Therefore, the inclusion of "communicates" and the Commentary indicating that the word is intended to include more than just words appears to be in line with national legal trends.

Third, the exclusion of threats to commit low-level property offenses is consistent with national legal trends. First, as noted above, only nine states that punish threatening to damage or destroy property.[179] Among those states, only three refer generally to property "damage,"[180] and two of those states require some further criminal intent beyond merely an intent to threaten.[181] The remaining six states require that the defendant threaten "serious damage"[182] or "substantial property damage."[183] Therefore, requiring a higher level of property damage is consistent with the approach taken by states punishing threats against property.

[173] Ark. Code Ann. § 5-13-301; Conn. Gen. Stat. Ann. § 53a-61aa; Del. Code Ann. tit. 11, § 621; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.Y. Penal Law § 490.20; N.D. Cent. Code Ann. § 12.1-17-04; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[174] Kan. Stat. Ann. § 21-5415; Me. Rev. Stat. tit. 17-A, § 210; Mo. Ann. Stat. § 574.115; Mont. Code Ann. § 45-5-203.

[175] Ala. Code § 13A-10-15.

[176] Ariz. Rev. Stat. Ann. § 13-1202; Haw. Rev. Stat. Ann. § 707-715; Wash. Rev. Code Ann. § 9A.46.020.

[177] Ohio Rev. Code Ann. § 2903.21 ("cause another to believe"). 18 Pa. Stat. and Cons. Stat. Ann. § 2706.

[178] The CCRC did not research other jurisdiction case law corresponding to this criminal threat language.

[179] Ala. Code § 13A-10-15; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[180] Ala. Code § 13A-10-15; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07.

[181] N.H. Rev. Stat. Ann. § 631:4 ("the person threatens to commit any crime against the property of another *with a purpose to coerce or terrorize any person*"); Tex. Penal Code Ann. § 22.07 ("threatens to commit any offense involving violence to any . . . property with intent to . . . *place any person in fear of imminent serious bodily injury*" among other various intents).

[182] Ariz. Rev. Stat. Ann. § 13-1202; Haw. Rev. Stat. Ann. § 707-715.

[183] Ark. Code Ann. § 5-13-301; Ky. Rev. Stat. Ann. § 508.080; Utah Code Ann. § 76-5-107.