



# First Draft of Report #43 – Blackmail

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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.ccrdc.dc.gov](http://www.ccrdc.dc.gov).

This Draft Report has two parts: (1) draft statutory text for a new Title 22E of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision and considers whether existing District law would be changed by the provision (and if so, why this change is being recommended).

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 #43 – Blackmail is Wednesday, January 15, 2020. Oral comments and written comments received after this date may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

First Draft of Report #43 - Blackmail

**RCC § 22E-XXXX. Blackmail.**

- (a) A person commits blackmail when that person:
  - (1) Purposely causes another person to do or refrain from doing any act,
  - (2) By threatening that any person will:
    - (A) Engage in conduct that, in fact, constitutes:
      - (i) An offense against persons as defined in subtitle II of Title 22E; or
      - (ii) A property offense as defined in subtitle III of Title 22E;
    - (B) Take or withhold action as an official, or cause an official to take or withhold action;
    - (C) Accuse another person of a crime;
    - (D) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate:
      - (i) Hatred, contempt, ridicule, or other significant injury to personal reputation; or
      - (ii) Significant injury to credit or business reputation;
    - (E) Impair the reputation of a deceased person;
    - (F) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;
    - (G) Restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns.
- (b) *Exclusion to Liability.*
  - (1) An actor shall not be subject to prosecution under subparagraph (a)(2)(D) for threats of ordinary and legal employment or business actions.
  - (2) An actor shall not be subject to prosecution under this section for causing a person to do any of the following:
    - (A) Transfer, use, give control over, or consent to damage property;
    - (B) Remain in or move to a location; or
    - (C) Give consent for a person to enter or remain in a location.
- (c) *Defense.*
  - (1) It is a defense to prosecution under subparagraphs (a)(2)(B), (C), or (D) that:
    - (A) The actor believed the threatened official action to be justified, or the accusation, secret, or assertion to be true, or that the photograph, video, or audio recording is authentic, and
    - (B) The actor's purpose was to compel the other person to:
      - (i) Desist or refrain from criminal or tortious activity or behavior harmful to any person's physical or mental health,
      - (ii) Take reasonable action to correct the wrong that is the subject of the accusation, assertion, invocation of official action, or photograph, video or audio recording; or
      - (iii) Refrain from taking any action or responsibility for which the actor believes the other unqualified.
  - (2) *Burden of Proof for Defense.* If any evidence of the defense under subparagraph (c)(1) is present at trial, the government must prove the absence of all requirements of the defense beyond a reasonable doubt.

- (d) *Penalties*. Blackmail is a Class [X] offense, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (e) *Definitions*. The terms “intent” and “purposely” have the meaning specified in RCC § 22E-206; the term “property” has the meaning specified in RCC § 22E-701; and the terms “controlled substance” and “consent” have the meaning specified in D.C. Code § 48-901.02.

## Commentary

***Explanatory Note.*** *This section establishes the blackmail offense for the Revised Criminal Code (RCC). The offense criminalizes compelling a person to act, or refrain from acting, by means of certain coercive threats. While some RCC crimes explicitly address commission by use of a coercive threat,<sup>1</sup> and many more RCC crimes may be committed by using a coercive threat,<sup>2</sup> the RCC blackmail statute is intended to criminalize various types of conduct that are not otherwise addressed. The revised blackmail statute does not apply to the use of coercive threats to make a complainant transfer, use, give control over, or allow the actor to damage property; to allow the actor to enter or remain on property; or to remain in or move to a particular location. and categorically excludes ordinary, legal employment actions. Due to its breadth, the social harm addressed by the blackmail statute overlaps with several other offenses that involve the use of coercive threats to compel a person to act or refrain from acting in a particular manner.<sup>3</sup> The general merger provision under RCC § 22E-214 applies to blackmail and these other offenses when they arise from the same act or course of conduct. The RCC blackmail statute also includes a defense that precludes criminal liability in certain cases where the defendant acted with a socially desirable purpose. The revised statute replaces the current blackmail statute in D.C. Code § 22-3252.*

Paragraph (a)(1) specifies that blackmail requires that the accused purposely causes a person to engage in, or refrain from any act. This requires that the other person acts, or refrains from acting, in a way that the person would not have absent the accused’s intervention. The subsection specifies that a “purposely” culpable mental state applies, which requires that the actor consciously desired that he or she would cause the other person to act, or refrain from acting. A threat that does not cause another person to act or refrain from acting, or an actor who does not consciously desire that the threat causes the complainant to engage in or refrain from an action, does not commit blackmail.

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<sup>1</sup> These RCC offenses include: extortion RCC § 22E-2301, forced labor RCC § 22E-1601; and sexual assault RCC § 22E-1301. Unlike extortion, which requires that the actor uses coercive threats to obtain property of another, blackmail broadly criminalizes the use of coercive means to compel a person to engage in or refrain from engaging in any conduct.

<sup>2</sup> These RCC offenses include criminal restraint, RCC § 22E-1402, and many other offenses that require conduct occur without the complainant’s effective consent. The term “effective consent” includes consent obtained by means of a coercive threat.

<sup>3</sup> For example, sexual assault RCC § 22E-1301; forced labor or services, RCC § 22E-1601; forced commercial sex, RCC § 22E-1602.

Paragraph (a)(2) specifies that the actor must have caused another person to act or refrain from acting by threatening that any person will commit any of the acts listed in subparagraphs (a)(2)(A)-(G). The threat may come in the form of a verbal or written communication, however gestures or other conduct may suffice.<sup>4</sup> In addition, the threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may constitute a threat under this section.<sup>5</sup> Per the rule of interpretation under RCC § 22E-207, the “purposely” mental state also applies to this element. The actor must consciously desire that the other person would fear that if he or she does not conform his or her behavior to the actor’s demands, then any person will resort to the coercive means listed in subparagraphs (a)(2)(A)-(D).

Subparagraph (a)(2)(A) specifies that blackmail includes threatening that any other person will engage in conduct that constitutes a criminal offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E. This form of blackmail does not include threats to commit any other types of criminal offenses.<sup>6</sup> The use of “in fact” indicates that no culpable mental state is required as to whether the threatened conduct constitutes an offense against persons or a property offense. However, it must be proven that the actor threatened that a person would engage in conduct that satisfies all elements of an offense against persons or property offense, including any culpable mental states.

Subparagraph (a)(2)(B) specifies that blackmail includes threatening to take or withhold action as a government official, or to cause a government official to take or withhold action. This form of threat includes threats to cite someone for violation of a regulation, make an arrest, or deny the award of a government contract or permit.<sup>7</sup>

Subparagraph (a)(2)(C) specifies that blackmail includes threatening to accuse another person of a crime. Under this form of threat, it is immaterial whether the accusation is accurate.<sup>8</sup>

Subparagraph (a)(2)(D) specifies that blackmail includes threatening to expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate hatred, contempt, ridicule, or other significant injury to personal reputation, or a significant injury to credit or business reputation. This subparagraph does not require that the asserted secret or fact be true or false. Threats to reveal minimally embarrassing information would not suffice under this form of blackmail. This form of blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.<sup>9</sup> This form of blackmail also includes threats to expose secrets, assert facts, etc., that would tend to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. A person

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<sup>4</sup> For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a threat, if it communicates that harm will continue in the future.

<sup>5</sup> For example, depending on the context, saying “it would be a shame if anything happened to your store,” may constitute an implicit threat of property damage.

<sup>6</sup> For example, threatening to commit a controlled substance offense would not satisfy this element.

<sup>7</sup> In some cases, threatening to take official action may fall under the defense under subsection (d).

<sup>8</sup> However, when the actor believes the accusation is accurate, the defense under subsection (d) may apply.

<sup>9</sup> D.C. Code § 22-3252.

who is already subject to hatred, contempt, and ridicule may still be the target of this form of threat.<sup>10</sup>

Subparagraph (a)(2)(E) specifies that blackmail includes threatening to impair the reputation of a deceased person. This subparagraph does not include threats to impair a deceased person's reputation to a trivial degree. This form of blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.<sup>11</sup>

Subparagraph (a)(2)(F) specifies that blackmail includes threatening to notify a federal, state, or local government agency or official of, or to publicize, another person's immigration or citizenship status.

Subparagraph (a)(2)(G) specifies that blackmail includes threatening to restrict a person's access to a controlled substance that the person owns, or to prescription medication that the person owns. As this form of blackmail requires that the other person already owns the controlled substance or prescription medication, a threat to refuse to sell or provide a controlled substance or prescription medication does not constitute blackmail under this subparagraph.

Subsection (b) establishes four exclusions to liability. Paragraph (b)(1) specifies that threats of ordinary and legal employment or business actions are not a basis for liability under the revised blackmail statute. This exclusion recognizes that ordinary and legal employment and business relationships may involve threats to reveal embarrassing information in order to coerce another party to act or refrain from acting in a particular way<sup>12</sup>, and such conduct does not constitute a crime under this section.<sup>13</sup>

Paragraph (b)(2) specifies that blackmail does not include causing a person to do any of the acts listed under subparagraphs (b)(2)(A)-(C). The blackmail offense provides broad liability for use of threats to compel a person to engage in any act, but is not intended to replace or add liability to those RCC offenses that already specifically address the use of threats to compel a person to act in a particular way.<sup>14</sup> Consequently, this paragraph eliminates liability under the revised blackmail statute when a more narrowly-tailored RCC offense addresses the actor's conduct.<sup>15</sup> Subparagraph (b)(2)(A) excludes causing a person to transfer, use, give control over property, or to give consent to damage property. The term "use" is intended to include use of

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<sup>10</sup> For example, even if it is well known that a person has engaged in numerous acts of infidelity, a threat to reveal an additional act of infidelity may still constitute blackmail under this paragraph.

<sup>11</sup> D.C. Code § 22-3252.

<sup>12</sup> For example, a manager may threaten to reveal an employee's malfeasance in the workplace to upper management unless the employee changes his behavior.

<sup>13</sup> Threats that go beyond ordinary and legal employment or business actions are subject to liability. For example, if a business owner threatens to reveal highly embarrassing personal information unless another business owner agrees to provide services for free, this exclusion to liability would not apply.

<sup>14</sup> For example, sexual assault specifically addresses the use of coercion to compel a person to engage in a sexual act or sexual contact. The revised criminal code's extortion RCC § 22E-2301 and forced labor RCC § 22E-1601 offenses also specifically address commission of those crimes by means of coercive threats.

<sup>15</sup> The harm in coercing a person to act is largely determined by the nature of the coerced act; coercing a person to engage in a sexual act is more wrongful than coercing a person to pay a small sum of money. The RCC recognizes this by defining various offenses based on the type of conduct that the complainant is coerced into performing. Sexual assault is a more serious offense than 5<sup>th</sup> degree extortion. Blackmail is a residual offense, which can include compelling a person to perform an act that could be quite harmful. When the RCC has specified particular coerced acts as warranting less severe penalties, such as 5<sup>th</sup> degree extortion, it would be inappropriate to convict the person for blackmail, which is intended to cover potentially much more harmful conduct.

both tangible<sup>16</sup> and intangible property.<sup>17</sup> This subparagraph prevents extortion, robbery, criminal damage to property, and other offenses that involve taking, using, controlling, or damaging property<sup>18</sup> being prosecuted as blackmail. Subparagraph (b)(2)(B) excludes causing a person to remain in or move to a location. This subparagraph is intended to prevent conduct that constitutes criminal restraint or kidnapping from being prosecuted as blackmail.<sup>19</sup> Subparagraph (b)(2)(C) excludes causing a person to consent to another person entering or remaining in a location. This subparagraph is intended to prevent trespass or burglary from being prosecuted as blackmail.<sup>20</sup>

Subsection (c) provides a defense to blackmail under particular circumstances, and specifies the burden of proof. Paragraph (c)(1) defines the element of the defense. This defense recognizes that criminal liability is not appropriate under certain circumstances when the actor causes a person to act or refrain from acting for certain benign purposes. The defense is only available to prosecutions under subsections (a)(2)(B)-(D). The defense has two main components. First, under subparagraph (c)(1)(A), the actor must genuinely believe that the accusation or assertion was true<sup>21</sup>, that the official action was justified,<sup>22</sup> or that the photograph, video, or audio recording was authentic.<sup>23</sup> Second, under subparagraph (c)(1)(B) the actor must have acted with the purpose to compel another person to desist or refrain from criminal<sup>24</sup> or tortious activity<sup>25</sup>, or behavior harmful to any person's physical mental health<sup>26</sup>; to take reasonable<sup>27</sup> action to correct the wrong that is the subsection of the accusation<sup>28</sup>, assertion<sup>29</sup>, or

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<sup>16</sup> For example, using threats to cause a person to allow the actor to operate a motor vehicle would fall under this inclusion.

<sup>17</sup> For example, using threats to cause a person to allow a person to make copies of audio recordings would fall within this exception.

<sup>18</sup> Numerous property offenses can be committed by means of a coercive threat, and are intended to be excluded from the revised blackmail statute. These offenses include: unauthorized use of property, RCC § 22E-2102; unauthorized use of a motor vehicle, RCC § 22E-2103; unlawful creation or possession of a recording, RCC § 22E-2105; unlawful operation of a recording device in a motion picture theater, RCC § 22E-2106; payment card fraud, RCC § 22E-2202; identity theft, RCC § 22E-2205; financial exploitation of a vulnerable adult, RCC § 22E-2208; and criminal graffiti, RCC § 22E-2504.

<sup>19</sup> Criminal restraint and kidnapping both require that the actor *substantially* confines or moves the complainant. RCC §§ 22E-1401, 1402. The exclusion under this subparagraph applies even if the confinement or movement is not substantial.

<sup>20</sup> For example, if a person obtains consent to enter another person's property by threatening to reveal the property owner's humiliating secret, trespass liability would apply instead of blackmail.

<sup>21</sup> An actor who threatened to accuse a person of a criminal offense believing that the person had not actually committed the offense would not be able to claim this defense.

<sup>22</sup> An actor who threatened to rescind a business license believing that rescinding the license was not actually warranted would not be able to claim this defense.

<sup>23</sup> An actor who threatened to publish a photograph that had been doctored to portray another person engaged in a sexually explicit act would not be able to claim this defense.

<sup>24</sup> For example, a passenger riding in a car with a drunk driver threatening to report the person's drunk driving to authorities unless he pulls over.

<sup>25</sup> For example, threatening to expose a person's embarrassing secret in order to prevent that person from committing the tort of intentional infliction of emotional distress.

<sup>26</sup> For example, threatening to reveal an embarrassing secret about another person in order to coerce that person into obtaining necessary emergency medical care.

<sup>27</sup> Whether an action is reasonable depends on the totality of the circumstances, including the nature of the harm sought to be addressed, the effort and cost imposed on the coerced person, and the availability of alternative means of addressing the wrong. Examples of unreasonable demands to correct wrongs would include threatening to accuse another of theft unless the other person pays the original property owner an amount several times the value of the



invocation of official action<sup>30</sup>; or to refrain from taking any action or responsibility that the defendant believes the other unqualified.<sup>31</sup> Although people often act with mixed motives, the defense is only available if the actor would not have acted absent one of the benign purposes listed in this subsection. If the actor coerces another person and inadvertently brings about one of the benign ends listed in this subsection, the defense is not available. Paragraph (c)(2) specifies the burden of proof for the defense.

Subsection (d) specifies relevant penalties for the offense.

Subsection (e) cross-references applicable definitions in the RCC.

***Relation to Current District Law.*** *The RCC's revised blackmail statute replaces the blackmail statute in the current D.C. Code.<sup>32</sup> The revised blackmail statute makes five substantive changes to current District law that improve the clarity and proportionality of the code, fills gaps in the current code, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised blackmail offense requires that the actor actually compels another person to engage in, or refrain from, any act. The current blackmail offense only requires threats *with intent* to cause another to do or refrain from doing any act.<sup>33</sup> By contrast, the revised offense requires that the accused actually succeed in compelling another person to act or refrain from acting.<sup>34</sup> Requiring that the defendant actually compel another person to act or refrain from acting improves the proportionality of the RCC, and is consistent with the RCC's extortion offense,<sup>35</sup> which requires that the defendant actually takes, obtains, transfers, or exercises control over property of another.

Second, the revised blackmail offense changes the scope of threats as compared to the current blackmail statute. The current blackmail statute includes threats to accuse any person of a crime; to expose a secret or publicize an asserted fact tending to subject any person to hatred, contempt, or ridicule; to impair the reputation of any person, including a deceased person; to distribute a photograph, video, or audio recording tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation; or to notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status.<sup>36</sup> By contrast, the revised blackmail offense also includes four additional threats: (1) to

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stolen property. In addition, threatening to publish nude or sexually explicit photographs, videos, or audio recordings unless the person provides additional nude or sexually explicit materials would not satisfy the elements of the defense.

<sup>28</sup> For example, threatening to accuse a person of theft unless that person returns the stolen property to its rightful owner.

<sup>29</sup> For example, threatening to reveal that a person has been having an extra-marital affair unless that person agrees to put an end to the affair.

<sup>30</sup> For example, a health inspector threatening to repeal a restaurant's license unless the owners bring their restaurant into compliance with health codes.

<sup>31</sup> For example, threatening to reveal prior corrupt acts of prospective political candidate unless that person declines to run for office.

<sup>32</sup> D.C. Code § 22-3252.

<sup>33</sup> D.C. Code § 22-3252.

<sup>34</sup> Even if the accused fails to compel the other person to act or refrain from acting, attempt liability may apply depending on the specific facts of the case.

<sup>35</sup> RCC § 22E-2301.

<sup>36</sup> D.C. Code § 22-3252.

commit an offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E; (2) to assert a fact about another person that would tend to impair that person's credit or business repute; (3) to take or withhold action as an official; or (4) to restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns. This change closes a gap in current District law, and makes the revised blackmail offense more consistent with the revised extortion offense.<sup>37</sup>

Third, the revised blackmail offense excludes liability when the actor's threats constituted normal and legal employment or business practices. The current D.C. Code blackmail statute does not include an exclusion for ordinary and legal employment or businesses practices, and there is no District case law on point. By contrast, the revised blackmail statute excludes threats that are part of ordinary and legal employment or business practices and involve threats to reveal embarrassing information in order to coerce another party to act or refrain from acting in a particular way.<sup>38</sup> Such conduct may have social benefits and criminalization would be inappropriate.<sup>39</sup> This change improves the proportionality of the revised statutes.

Fourth, the revised blackmail offense recognizes three exclusions to liability for conduct covered more specifically by other revised offenses. First, the revised offense does not include use of threats to cause a person to transfer, use, give control over, or consent to damage property. The current D.C. Code blackmail statute includes the use of various types of threats to obtain property of another, or to cause a person to do any act, and potentially overlaps with the several other D.C. Code offenses such as extortion and robbery.<sup>40</sup> Similarly, the revised blackmail statute also overlaps with numerous property offenses.<sup>41</sup> By contrast, to address this overlap, the revised blackmail statute excludes uses of threats to cause a person to transfer, use, give control

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<sup>37</sup> RCC § 22E-2301. The revised extortion statute covers obtaining property of another by means of a "coercive threat," a defined term which includes several types of threats. The revised blackmail offense includes all types of threats included in the definition of "coercive threat," except for the catch-all provision, which includes any threats to "cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." RCC § 22E-701. The revised blackmail statute does not include a catch-all provision, because blackmail includes compelling a person to commit or refrain from any act. Including a catch-all provision in the revised blackmail statute would be overbroad and criminalize minor negotiations that are part of everyday life.

<sup>38</sup> For example, a manager may threaten to reveal an employee's malfeasance in the workplace to upper management unless the employee changes his behavior.

<sup>39</sup> Threats that go beyond ordinary and legal employment or business actions are subject to liability. For example, if a business owner threatens to reveal highly embarrassing personal information unless another business owner agrees to provide services for free, this exclusion to liability would not apply.

<sup>40</sup> Numerous property offenses in the current D.C. Code criminalize taking or using property without consent. These offenses may include taking or using property when the consent was obtained by one of the threats enumerated in the current blackmail statute. For example, the current unauthorized use of a motor vehicle offense may include compelling a person to grant permission to use an automobile by threatening to reveal an embarrassing secret about that person. Other similar current offenses that may overlap with the current blackmail statute include: credit card fraud, D.C. Code § 22-3223; identity theft, unlawful operation of a recording device in a motion picture theater, D.C. Code § 22-3214.02; financial exploitation of a vulnerable adult or elderly person, D.C. Code § 22-933.01.

<sup>41</sup> Numerous property offenses can be committed by means of a coercive threat, and are intended to be excluded from the revised blackmail statute. These offenses include: unauthorized use of property, RCC § 22E-2102; unauthorized use of a motor vehicle, RCC § 22E-2103; unlawful creation or possession of a recording, RCC § 22E-2105; unlawful operation of a recording device in a motion picture theater, RCC § 22E-2106; payment card fraud, RCC § 22E-2202; identity theft, RCC § 22E-2205; financial exploitation of a vulnerable adult, RCC § 22E-2208; and criminal graffiti, RCC § 22E-2504.

over, or consent to damage property.<sup>42</sup> This limitation on liability prevents multiple convictions for offenses addressing the same social harm. Second, the revised offense excludes causing a person to remain in or move to a location. The current D.C. Code blackmail statute does not include this limitation, and there is no District case law on point. The current blackmail potentially overlaps with the D.C. Code kidnapping offenses.<sup>43</sup> By contrast, the revised statute includes this limitation to prevent the less serious offense of criminal restraint from being charged as blackmail. Third, the revised offense excludes causing another person to consent to allow a person to enter or remain in a location.<sup>44</sup> The current blackmail statute does not include this limitation. By contrast, the revised statute includes this limitation to prevent the less serious offense of trespass from being charged as blackmail. These exclusions to liability address overlap between the revised blackmail offense and other lesser offenses, and improves the clarity and proportionality of the revised criminal code.

Fifth, the revised blackmail offense includes a defense that the actor believed the accusation, assertion, or secret to be true, and acted with certain benign purposes. The current blackmail statute does not include any defenses, and there is no relevant D.C. Court of Appeals (DCCA) case law. By contrast, the revised blackmail offense includes a defense, which allows an actor to use certain threats to compel another person to act or refrain from acting in cases when criminal liability would be inappropriate. This revision improves the clarity and proportionality of the revised criminal code.

*Beyond these five main changes to current District law, three other aspects of the revised blackmail statute may constitute substantive changes of law.*

First, the revised blackmail offense requires a culpable mental state of purpose. The current blackmail statute does not specify a culpable mental state as to threatening another, but requires that the actor did so “with intent to obtain property of another or to cause another to do or refrain from doing any act.”<sup>45</sup> The term “intent” as used in the current statute is not defined, and there is no relevant DCCA case law. To resolve this ambiguity, the revised statute applies the RCC standardized definition of “purposely.” Applying at least a knowing culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.<sup>46</sup> Using the purposeful culpable mental

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<sup>42</sup> Many other property offenses may overlap with blackmail. For example, using a coercive threat to compel a person to consent to use copy a sound recording could constitute unlawful creation or possession of a recording under RCC § 22E-2105.

<sup>43</sup> The current blackmail statute criminalizes causing a person to engage in, or refrain from, any act, by use of certain enumerated threats. The current kidnapping statute includes “seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual *by any means whatsoever*.” It is possible that confining a person under threat of revealing a deeply embarrassing secret would constitute both kidnapping and blackmail under the current D.C. Code.

<sup>44</sup> The current blackmail statute criminalizes causing a person to engage in, or refrain from, any act, by use of certain enumerated threats. The current unlawful entry offense criminalizes entering property “without lawful authority[.]” Entering property with consent obtained by threat could constitute entering “without lawful authority,” creating overlap between the current blackmail and unlawful entry statutes.

<sup>45</sup> D.C. Code § 22-3252 (a).

<sup>46</sup> 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)”).

state is justified due to the breadth of the revised blackmail statute, which includes causing a person to do, or refrain from doing, any act. Since people routinely, and legally, engage in threatening behavior in everyday life, not desiring to cause fear but knowing the behavior will do so,<sup>47</sup> criminalization would be inappropriate. However, requiring only a knowing mental state would criminalize a broad array of cases in which the actor merely knew that, due to the otherwise legal threat, another person would react in some manner.<sup>48</sup> Requiring a purposeful mental state improves the proportionality of the revised criminal code.

Second, the revised blackmail offense includes threats that any person will engage in the conduct specified in subparagraphs (a)(2)(A)-(G). The current blackmail statute does not specify whether it includes threats that another person will carry out the threatened conduct, and there is no DCCA case law on point. Specifying that blackmail includes threats that any person will carry out the threatened conduct improves the clarity of the revised criminal code, and make the offense consistent with the revised extortion statute.<sup>49</sup>

Third the revised blackmail statute, through application of the general merger provision under RCC § 22E-214, prevents multiple convictions for blackmail and other offenses that address more specific instances of coercive threats causing harms, or address the same basic social harm. The current D.C. Code does not include a general merger provision, and the DCCA has held that offenses merge if the elements of one offense are necessarily included in the elements of the other offense.<sup>50</sup> There is no District case law that squarely addresses whether blackmail merges with other overlapping offenses, however in dicta the DCCA has suggested that a person may be convicted of both blackmail and a separate offense that involves blackmail.<sup>51</sup> Resolving this ambiguity, the RCC general merger provision provides that multiple convictions for 2 or more offenses arising from the same act or course of conduct merge whenever one offense is “defined to prohibit a designated kind of conduct generally, and the other is defined to prohibit a specific instance of such conduct,”<sup>52</sup> or when “one offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each[.]”<sup>53</sup> Numerous offenses in the RCC criminalize use of coercive threats to compel another person to act in specific manner. For example, sexual assault<sup>54</sup> criminalizes compelling a person to engage in or submit to a sexual act or contact; forced labor or services<sup>55</sup>

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<sup>47</sup> For example, telling someone that if they don’t stop illegal conduct they will be reported the activity to the police may be perceived as a threat, but the purpose is to cause a person to cease further criminal activity.

<sup>48</sup> For example, it is legal to threaten to accuse a person of a crime. In most cases a person making such a threat will *know* that the other person will act in some manner that he or she would not have absent the threat. However, this knowledge alone should not create criminal liability. Only when the person makes the threat with the *purpose* of causing the other person to act is criminal liability justified.

<sup>49</sup> RCC § 22E-2301. The revised extortion statute criminalizes taking property of another by means of a “coercive threat.” The term “coercive threat” is defined as a threat that “any person” will engage in one of the enumerated types of conduct. RCC § 22E-701.

<sup>50</sup> *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

<sup>51</sup> *See, Hall v. United States*, 343 A.2d 35, 39 (D.C. 1975) (holding that convictions for simple assault and obstructing justice do not merge, because it is possible to commit obstructing justice without necessarily committing a simple assault. The DCCA noted that “acts such as blackmail and unfulfilled threats of violence could support an obstructing justice charge.”).

<sup>52</sup> RCC § 22E-214 (a)(2)(C).

<sup>53</sup> RCC § 22E-214 (a)(4).

<sup>54</sup> RCC § 22E-1301.

<sup>55</sup> RCC § 22E-1601.

criminalizes compelling a person to perform labor or services, and forced commercial sex<sup>56</sup> criminalizes compelling a person to engage in commercial sex acts. In most cases, a person who commits these offenses will also satisfy the elements of blackmail.<sup>57</sup> If the other offense and blackmail arise from the same act or course of conduct, the offenses will merge as provided in RCC § 22E-214. Other offenses criminalize use of coercion to compel a person to act in a specific manner, whereas blackmail more broadly criminalizes compelling a person to engage in, or refrain from, any act. The authorized penalties for these offenses reflect the relative seriousness of being coerced to engage in the specific acts required for each offense.<sup>58</sup> It would be disproportionately severe for an actor to be convicted of both the separate offense and blackmail based on the same act or course of conduct. This change improves the clarity and proportionality of the revised criminal code.

***Relation to National Legal Trends.***

Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

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<sup>56</sup> RCC § 22E-1602.

<sup>57</sup> It is possible to commit these offenses without satisfying the elements of blackmail, and therefore the offenses do not merge under a strict *Blockburger* elements test under current DCCA case law and codified in RCC § 22E213 (a)(1). Each of these offenses includes the use of a "coercive threat." The term "coercive threat" is defined in RCC § 22E-701, and includes threats to "cause harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." This catch-all provision in the "coercive threat" definition is not included in the blackmail statute. A person committing these offenses using a threat that satisfies the catch-all, but not the threats specified in the blackmail statute, would not be guilty of blackmail.

<sup>58</sup> For example, forced commercial sex and criminal restraint may both be committed using identical threats. However, the penalties for forced commercial sex are significantly higher than for criminal restraint, due to the particular harmfulness of coercing someone into engaging in commercial sex acts.