



First Draft of Report #47 – Illegal Vending

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.ccrdc.dc.gov.

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 #47 – Illegal Vending 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.

The Commission recommends repealing D.C. Code § 37-131.08(b),¹ which authorizes a maximum penalty of 90 days in jail and a \$500 fine for illegal vending. The repeal of this criminal penalty provision is not intended to affect a person's continued civil liability for vending violations,² including fines and license revocation.³

COMMENTARY

Explanatory Note and Relation to Current District Law. Title 37 of the D.C. Code and Title 24 of the D.C. Municipal Regulations (“DCMR”) address a wide array of rules for vending goods from public spaces such as streets and sidewalks. A failure to comply with any of the regulations triggers both civil⁴ and criminal penalties.⁵ D.C. Code § 37-131.08(b) specifies a maximum penalty of 90 days in jail and a \$500 fine for a violation of “any of the provisions of this chapter or any regulations issued pursuant to this chapter.”⁶ An arrest may also result in significant business losses to a vendor.⁷

Imprisonment does not appear to be a proportionate punishment for conduct that fails to comply with vending regulations does not otherwise involve fraudulent activity,⁸ physically harm others,⁹ involve the sale of spoiled, contaminated, or food unfit for consumption,¹⁰ or block public use of locations¹¹—harms separately addressed in the current and/or revised criminal code. Recent journalism has highlighted that the District imposes some of the highest fees and most stringent requirements for vending of any American city, limiting the ability of micro-businesses and entrepreneurs young and old

¹ D.C. Code § 37-131.08(b) (“Any person who violates any of the provisions of this chapter or any regulations issued pursuant to this chapter shall, upon conviction, be subject to a fine not to exceed the amount set forth in § 22-3571.01, imprisonment not to exceed 90 days, or both, for each violation.”).

² See D.C. Code § 37-131.08(a); 24 DCMR § 575.

³ The fine amounts appear in D.C. Code § 22-3571.01 and 16 DCMR §§ 3201 and 3313. Because specific civil penalties are provided under D.C. Code § 37-131.08(a) and 24 DCMR § 575, the Attorney General may not prosecute a vending violation under 24 DCMR § 100.6, which applies only to Title 24 provisions for which no specific penalty is provided. Moreover, it is unlawful for a law enforcement officer to arrest a person for a civil infraction, for which only a monetary sanction may be imposed. *Barnett v. United States*, 525 A.2d 197, 199 (D.C. 1987).

⁴ The Commission makes no recommendation at this time regarding civil remedies or penalties. Notably, however, violations involving nonpayment of fees, such as failure to maintain a business license and parking illegally, trigger steeper penalties than do violations involving risks to public safety, such as failure to comply with the District's health and fire codes. See 16 DCMR § 3313.

⁵ D.C. Code §§ 37-131.08 and 22-3571.01; 24 DCMR § 575; 16 DCMR §§ 3201 and 3313.

⁶ See also D.C. Code § 22-3571.01.

⁷ Vendors who are arrested are subject to both lost revenue and lost product. See Associated Press, *LA Joins Other Big Cities in Legalizing Street Vending*, U.S. NEWS & WORLD REPORT (November 28, 2018) (explaining “If someone complains, the police, they could come in and take everything from us. Make us throw all our stuff away and we lose all our money for that day.”).

⁸ See D.C. Code § 22-3221; RCC § 22E-2201.

⁹ See D.C. Code §§ 22-401 – 22-405; 22-406; RCC § 22E-1202.

¹⁰ See D.C. Code § 48-109 (authorizing a penalty of up to 1 year of imprisonment and fines of up to \$10,000 for sale or possession with intent to sell an adulterated food or other item).

¹¹ See D.C. Code §§ 22-1307; RCC § 22E-4203.

to legally engage in sales.¹² The scope of illegal vending activity¹³ and the relatively small number of prosecutions (see below) also raise concerns about selective enforcement that may disproportionately affect some members of the community.¹⁴

The Metropolitan Police Department reports hundreds of arrests for vending violations each year, including 472 in 2017 (its most recent annual report).¹⁵ However, according to a CCRC analysis of data received from the Superior Court of the District of Columbia, over the entire 10-year span of 2009-2018, there were just 58 charges and fewer than 20 convictions of adults for vending without a license.¹⁶ Vending without a

¹² See, e.g., Jeff Clabaugh, *Why DC is 2nd-most challenging city for food trucks*, WTOP (March 22, 2018) (noting vendors must complete at least 23 specific interactions with regulators, pay high start-up fees, and overcome a significant number of ongoing, city-imposed hurdles in their quest to turn a profit); Robert Frommer, *Washington DC vs. Entrepreneurs: DC's Monumental Regulations Stifle Small Businesses*, Institute for Justice City Study Series (November 2010).

¹³ Vending without a license is an open, longstanding, tolerated practice in many District locations. See, e.g., Orion Donovan-Smith, *At Dave Thomas Circle, fixing a traffic nightmare threatens a D.C. vending empire*, WASHINGTON POST (August 14, 2019).

¹⁴ In 2017, three black teenagers were handcuffed and detained on the National Mall by undercover U.S. Park Police officers for attempting to sell cold water without a permit. In response, Councilmember Charles Allen sent a letter to the U.S. Park Police Chief, Robert D. MacLean stating, "I can't help but think how the reaction by these same officers might have varied if different children had set up a quaint hand-painted lemonade stand on the same spot. While still the same violation of selling a beverage without proper permits and licenses, I doubt we would have seen little girls in pigtails handcuffed on the ground." See NBC Channel 4 Washington, *Teens Detained for Selling Water on the National Mall*, (June 23, 2017). See, also, *United States v. Harrison*, 2018 WL 5046496 Slip Copy (D.D.C. Aug 7, 2018) at 1 (where a parolee was arrested for vending without a license but was otherwise compliant with his conditions of release).

¹⁵ See MPD Annual Report: 2017 (February 22, 2019) (available at <https://mpdc.dc.gov/page/mpd-annual-reports>).

¹⁶ See CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions (October 10, 2019) and Appendix D to Advisory Group Memorandum #28 - DC Superior Court Criminal Division Adult Charges and Convictions Disposed (October 10, 2019) (available at <https://ccrc.dc.gov/page/ccrc-documents>).

Data labeled as vending without a license specifically cited to 24 DCMR 502.2 which states: "In addition to the requirements specified in § 502, no person shall vend food from public or private space in the District of Columbia without obtaining and maintaining a valid: (a) Health inspection certificate issued by the DOH Director; (b) Food Protection Manager Certificate issued by the Conference of Food Protection Standards for Accreditation of Food Protection Manager Certification Programs in accordance with § 203.1 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; (c) Certified Food Protection Manager Identification Card issued by DOH in accordance with § 203 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; provided, that a vendor without such certification may employ a person who holds a valid: (1) Food Protection Manager Certificate issued by the Conference of Food Protection Standards for Accreditation of Food Protection Manager Certification Programs in accordance with § 203.3 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; and (2) Certified Food Protection Manager Identification Card issued by DOH in accordance with § 203 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; (d) Required food safety analyses and plans in accordance with § 3701 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; and (e) Permit from FEMS, if the vendor uses propane gas, open flames, or solid fuels such as wood pellets or charcoal."

license is a crime eligible for post and forfeit procedures,¹⁷ however, which may partly account for the low number of prosecutions.

In a recent CCRC survey, District voters were asked to assign a ranking to the seriousness of “selling sunglasses on a public sidewalk without a business license or vending permit, as required by law.”¹⁸ The most frequent (modal) response, selected by 28.2% of recipients, was “0,” a rating equivalent to “Not a crime (e.g. a speeding ticket).” The median response was a “2,” a low rating equivalent to “non-painful physical contact (e.g. pushing someone around).” The mean response was a “3.1,” a rating that is about one class lower than a “4” which was equivalent to the harm of causing a “minor injury treatable at home (e.g. a black eye).”¹⁹ Given the skewed distribution of responses,²⁰ the mode or median is likely the best indicator of the central tendency of responses.

In sum, the CCRC recommends the repeal of D.C. Code § 37-131.08(b). This will eliminate imprisonment penalties of up to 90 days for violations of vending regulations, but leave in place civil liability under D.C. Code § 37-131.08(a) and 24 DCMR § 575 for violations.²¹ This change improves the proportionality of the revised offenses.

Legislative History. The District of Columbia has regulated street vending since 1887.²² Past regulations have been described as “vague and practically impossible to enforce.”²³ After a comprehensive reform effort in 1974 proved ineffective, the District imposed a moratorium on new vending licenses in 1998.²⁴ Eight years later, the Department of Consumer and Regulatory Affairs (“DCRA”) produced a report comparing best practices in other cities, the moratorium was temporarily lifted, and the District began passing emergency and temporary legislation to regulate vending based on the DCRA’s research.²⁵

The purpose of the Vending Regulation Act of 2009 was to reestablish²⁶ a vibrant vending program in the District that provides residents and visitors safe and varied foods,

¹⁷ See Superior Court Bond and Collateral List: Non-Traffic Offenses – Collateral (July 5, 2019) (available at https://www.dccourts.gov/sites/default/files/Bond%20Collateral_Non-Traffic%20Offenses-Collateral_07052019.pdf).

¹⁸ For more information on the survey results and methodology, see CCRC Advisory Group Memo #27, Public Opinion Surveys on Ordinal Rankings of Offenses (October 10, 2019) (available at <https://ccrc.dc.gov/page/ccrc-documents>).

¹⁹ This conduct is roughly equivalent to simple assault under current District law, punishable by up to 180 days imprisonment. See D.C. Code § 22-404; RCC §§ 22E-1202 and 22E-1205.

²⁰ Notably, 20.5% of survey respondents selected a value of “1,” the lowest possible criminal conduct, rated a class less than to “non-painful physical contact (e.g. pushing someone around).”

²¹ The fine amounts appear in D.C. Code § 22-3571.01 and 16 DCMR §§ 3201 and 3313.

²² See Report on Bill 18-257, the “Vending Regulation Act of 2009,” Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009) at Page 3.

²³ See *Id.* at 3, 5.

²⁴ *Id.* at 3.

²⁵ *Id.* DCRA based its research on vending programs in Boston, Atlanta, New York City, Philadelphia, Chicago, Miami, and Portland.

²⁶ The Afro-American Vendors Association testified:

Street vendors have been a hallmark in Washington, D.C. since the turn of the century when the first pushcart peddlers began selling their wares around the Capitol. Most

goods, and services.²⁷ The bill was expected to encourage entrepreneurs and bolster the District’s tax rolls.²⁸ The Council recognized that, “historically, vending has provided a means for people to earn a living independently while gaining experience in the operation of a small business”²⁹ and explained that the legislation aimed to balance interests of “safety and economic opportunity.”³⁰

In contrast to the substantial public comment, discussion, and controversy preceding passage of the Vending Regulation Act of 2009,³¹ there was minimal community input or discussion on the record regarding amendments in 2014³² and 2015³³ that included the criminal penalties.³⁴ The criminal provisions were introduced as a technical correction of an inadvertent oversight in failing to provide criminal penalties in the Vending Regulation Act of 2009.³⁵

On two occasions since the current laws were passed, the Council has recognized some instances of vending without a license³⁶ that should not be penalized. First, in 2015, the Council authorized the mayor to establish exemptions from the licensure requirement “when the public interest would be served by establishing such an

vendors are people of color who earn very little money and work under harsh conditions. They perform an important service by providing convenient and affordable goods to both Washingtonians and tourists alike. Street vendors are entrepreneurs who ask for nothing more than the opportunity to earn a decent living. Yet, the city continues to treat these small businessowners as criminals.

Report on Bill 18-257, the “Vending Regulation Act of 2009,” Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009) at Page 152.

²⁷ *Id.* at 2.

²⁸ *Id.* at 11.

²⁹ *Id.* at 6.

³⁰ *Id.* at 18.

³¹ The hearing record includes 26 witnesses, 30 letters, and a petition with 305 signatures, overwhelmingly advocating for deregulation and decriminalization. *See* Report on Bill 18-257, the “Vending Regulation Act of 2009,” Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009).

³² D.C. Act 20-354 (temporarily adding a D.C. Code § 37-131.08(b) and a 24 DCMR § 575.4 (“A person convicted of violating any provision of this chapter shall be punished by a fine of not more than three hundred dollars (\$300) or by imprisonment for not more than ninety (90) days, or both, for each such offense.”)).

³³ D.C. Act 21-261.

³⁴ Only two parties testified at the public hearing on Oct 5, 2015, both of whom supported the addition of the penalties. The first was a panel of executives from the Washington Nationals Baseball Club, and the second was a Government Witness, Melinda Bolling, the Director of DCRA.

³⁵ *See* Report on Bill 21-113, the “Vending Regulations Amendment Act of 2015,” Council of the District of Columbia Committee on Business, Consumer, and Regulatory Affairs (November 4, 2015). Notably, however, the Committee Report on the Vending Regulation Act of 2009 does not indicate a clear intent to criminalize improper vending. *See* Report on Bill 18-257, the “Vending Regulation Act of 2009,” Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009).

³⁶ The D.C. Code provides that “a person shall not vend from a sidewalk, roadway, or other space unless the person holds” the proper licensure, and unless the person is located in a specifically approved vending location that has been assigned to them by lottery. D.C. Code §§ 37-131.02 – 131.04. The DCMR provides that “[n]o person shall vend any product, service, or merchandise from public space in the District of Columbia without obtaining and maintaining a valid...business license for vending...issued by the [Department of Consumer and Regulatory Affairs] Director...” 24 DCMR § 502.1.

exemption.” The Council explained, “[P]unishing Girl Scouts for selling cookies outside of a grocery store without a license would not serve the public interest.”³⁷ Second, in 2019, the Council unanimously introduced the “Lemonade Stand Amendment Act of 2019,” which proposes an exemption for any minor who is operating on a small-scale³⁸ without a business license or vending site permit.³⁹

However, neither the 2015 amendment nor the pending legislation exempts a child (or adult) from other requirements such as obtaining a Health Inspection Certificate, Food Protection Manager Certificate, Certified Food Protection Manager Identification Card, or food safety analyses and plans in accordance with 25 DCMR § 3701.⁴⁰ Nor do these exceptions apply to adult owners of micro-businesses. Also, neither the 2015 amendment nor the pending legislation specify what culpable mental state, if any, a person needs as to the existence of vending regulations. A person generally is not liable for reasonable mistakes of fact about the circumstances and results of one’s behavior.⁴¹ However, neither the D.C. Code nor the DCMR address these matters, and the District of Columbia Court of Appeals (“DCCA”) has not yet addressed whether a person must be notified of (or otherwise familiar with) the vending rules and whether a reasonable mistake of law is an available defense.⁴²

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC’s proposed changes in law. Street and sidewalk vending are often regulated at the municipal level and infrequently appear in state’s criminal codes. The wide variability among local governments was prohibitive

³⁷ See Report on Bill 21-113, the “Vending Regulations Amendment Act of 2015,” Council of the District of Columbia Committee on Business, Consumer, and Regulatory Affairs (November 4, 2015) at Page 2.

³⁸ “Small-scale” means selling no more than 10 types of items on a sporadic basis, and in operation no more than 100 days per year.

³⁹ Bill 23-398; see also Natalie Delgadillo, *D.C. Council Stands United On...Lemonade Stands*, DCist (July 11, 2019).

⁴⁰ See 24 DCMR § 502.2.

⁴¹ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *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)).

⁴² Some street vending rules are more obvious than others. For example, 24 DCMR § 503.3 categorically prohibits peddling counterfeit goods, pornography, and drug paraphernalia. However, it also prohibits selling large luggage and carpets, which may not be as intuitive. Moreover, a person who observes someone vending a particular item in a particular location may innocently assume that they, too, may vend. See, e.g., Mikaela Lefrak, *What’s the Story Behind Those \$5 Baseball Hats at Nationals Park?*, WAMU 88.5 (Oct 5, 2017).

given agency staffing constraints. In 2018, California decriminalized public vending state-wide.⁴³ Other legislative efforts are underway, city by city.⁴⁴

Notably, however, regulation of vending often results in litigation over fundamental legal rights. There have been a variety of lawsuits⁴⁵ and constitutional challenges concerning freedom of speech,⁴⁶ freedom of religious expression,⁴⁷ and freedom of artistic expression.⁴⁸

⁴³ Josh Ocampo, *Selling street food is no longer a crime in California, easing fears of jail time and deportation*, MIC (September 20, 2018) (discussing concerns about police harassment and immigration detention and annual economic contributions exceeding \$504 million).

⁴⁴ E.g., the Institute for Justice's National Street Vending Initiative has advocated for legislation in Birmingham, AL; Orlando, FL; Miami, FL; St. Petersburg, FL; Sarasota, FL; Sunrise, FL; Chicago, IL; Lexington, KY; New Orleans, LA; Las Vegas, NV; Buffalo, NY; Rochester, NY; Columbus, OH; Salem, OR; Pittsburgh, PA; York, PA; and Cranston, RI. See *National Street Vending Initiative* (available at <https://ij.org/issues/economic-liberty/vending/>) (last visited September 17, 2019).

⁴⁵ See, e.g., *Pizza di Joey, LLC v. Mayor & City Council of Baltimore*, 241 Md. App. 139.

⁴⁶ See *Enten*, *supra* note 66, (convicting a Korean war veteran of vending without a license for displaying, discussing, and selling historic and contemporary political buttons on sidewalks in order to “express his commitment to the American tradition of political pluralism and to convey his adherence to certain political viewpoints” despite his protestation that the restriction violated his First Amendment rights); see also *People v. Andujar*, 52 Misc. 3d 57 (Supreme Court, Appellate Term, NY 2016) (convicting man of vending without a license for selling condoms contained in packages with political messaging on a street corner).

⁴⁷ See *Al-Amin v. City of New York*, 979 F. Supp. 168 (E.D.N.Y. 1997) (in which four African-American Muslims were arrested and issued summonses for unlawful vending on several occasions in 1994 and 1995 for selling perfume oils and incense, and in which the men asserted violation of their free exercise of religion and expressive activity).

⁴⁸ See *People v. Howard*, 45 Misc. 3d 66 (Supreme Court, Appellate Term, NY 2014) (convicting a woman of unlicensed general vending for selling rings and costume jewelry in a public space made of “free-pressed flowers,” despite her claim the rings were inherently artistic or expressive in nature); see also *People v. Samuels*, 28 N.Y.S. 2d 113 (Court of Special Sessions, NY 1941) (in which three men were convicted of vending song sheets in a public place without a license). See also Christen Martosella, *Refusing to Draw the Line: A Speech-Protective Rule for Art Vending Cases*, 13 N.Y.U.J. Legis. & Pub. Pol’y 603 (2010).