



Report No. 5: Recommendations for  
Chapter 8 of the Revised Criminal Code:  
Offense Classes & Penalties

(First Draft)

SUBMITTED FOR ADVISORY GROUP REVIEW  
May 5, 2017

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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 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. 5, Recommendations for Chapter 8 of the Revised Criminal Code—Offense Classes & Penalties, is June 16, 2017 (6 weeks from the date of issue). Oral comments and written comments received after June 16, 2017 will not be reflected in the Second Draft of Report No. 5. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

**Subtitle I. General Part**  
**Chapter 8. Offense Classes, Penalties, & Enhancements**

- Section 801. Offense Classifications.
- Section 802. Authorized Dispositions.
- Section 803. Authorized Terms of Imprisonment.
- Section 804. Authorized Fines.

**RCC § 22A-801. OFFENSE CLASSIFICATIONS.**

(a) OFFENSE CLASSIFICATIONS. Each offense in this title is classified as a:

- (1) Class 1 felony;
- (2) Class 2 felony;
- (3) Class 3 felony;
- (4) Class 4 felony;
- (5) Class 5 felony;
- (6) Class 6 felony;
- (7) Class 7 felony;
- (8) Class 8 felony;
- (9) Class A misdemeanor;
- (10) Class B misdemeanor;
- (11) Class C misdemeanor;
- (12) Class D misdemeanor; or a
- (13) Class E misdemeanor.

(b) DEFINITIONS. For purposes of this title:

- (1) “Felony” means an offense with an authorized term of imprisonment that is more than one (1) year or, in other jurisdictions, death.

(2) “Misdemeanor” means an offense with an authorized term of imprisonment that is one (1) year or less.

### Commentary

*Explanatory Note.* D.C. Code § 22A-801 classifies offenses and defines felonies and misdemeanors for the Revised Criminal Code (“RCC”). Felonies are defined as offenses for which more than a year of imprisonment may be imposed and are grouped into eight classes. Misdemeanors are defined as offenses for which a year or less of imprisonment may be imposed and are grouped into five classes. This classification system and definitions provide a clear, consistent, logical framework for organizing offenses of similar seriousness.

*Relation to Current District Law.* Section 22A-801 (a) codifies new District law. Current District law generally does not classify offenses by penalty.<sup>1</sup> However, the various penalties prescribed for specific offenses *de facto* cluster into approximately eight felony and five misdemeanor groups (see Commentary to RCC § 22A-803, below). Consequently, the classification distinctions in Section 22A-801 (a) approximate the number of distinct felony and misdemeanor penalties in current law.

Section 22A-801 (b) generally codifies existing District case law on the meaning of felony and misdemeanor.<sup>2</sup> A misdemeanor is defined to include crimes with no imprisonment as many crimes throughout the Code are punished only with a fine.<sup>3</sup>

*Relation to National Legal Trends.* The RCC follows the trend among American jurisdictions to use a classification system for offense penalties, although the number of classes varies (for details, see Commentary to RCC § 22A-803, below). The RCC also uses modern, widely-accepted definitions for felony and misdemeanor.<sup>4</sup>

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<sup>1</sup> The only exception is that a few offenses in Title 22 are designated “Class A” offenses to denote how supervised release following revocation and “backup time” work for purposes of sentencing per D.C. Code 24-403.01. Class A offenses were so designated because they had “life” penalties prior to the Sentencing Reform Amendment Act of 2000 which abolished the existing parole system. There are no “Class B” offenses in current law, just “Class A” and all other offenses.

<sup>2</sup> See *Henson v. United States*, 399 A.2d 16, 20 (D.C. 1979) (“Largely for historical reasons, the courts in this jurisdiction generally define “felony” as any offense for which the maximum penalty provided for the offense is imprisonment for more than one year; generally, all other crimes are misdemeanors.”).

<sup>3</sup> *E.g.*, D.C. Code § 22-1308, Playing games in the street; D.C. Code § 22-3314, Destroying cemetery railing or tomb.

<sup>4</sup> See FELONY, Black’s Law Dictionary (10th ed. 2014) (“A serious crime usu. punishable by imprisonment for more than one year or by death.”); MISDEMEANOR, Black’s Law Dictionary (10th ed. 2014) (“A crime that is less serious than a felony and is usu. punishable by fine, penalty, forfeiture, or confinement [usu. for a brief term] in a place other than prison [such as a county jail].”).

**RCC § 22A-802. AUTHORIZED DISPOSITIONS.**

- (a) AUTHORIZED DISPOSITIONS. Except as otherwise provided by statute, a court may sentence a defendant upon conviction to sanctions that include one or more of the following:
- (1) imprisonment as authorized in D.C. Code § 22A-803;
  - (2) fines as authorized in D.C. Code § 22A-804;
  - (3) probation as authorized in D.C. Code § 16-710;
  - (4) restitution or reparation as authorized in D.C. Code § 16-711;
  - (5) community service as authorized in § 16-712;
  - (6) postrelease supervision as authorized in D.C. Code § 24-903; and
  - (7) work release as authorized in D.C. Code § 24-241.01.

**Commentary**

*Explanatory Note.* Section 22A-802 cross-references the typical sanctions that a court may impose upon conviction, which are elsewhere authorized. Section 22A-802 does not itself authorize sanctions. This non-exhaustive list includes the typical sanctions for felonies (i.e., imprisonment and the payment of a fine), as well as other possible dispositions (e.g., community service or work release). This statute is intended to provide notice of the typical dispositions that are authorized in scattered sections and titles of the D.C. Code.

*Relation to Current District Law.* Section 22A-802 cross-references existing District law except for its references to RCC § 22A-803 and RCC § 22A-804, which are the new RCC imprisonment and fine schedules.

*Relation to National Legal Trends.* Section 22A-802 follows the recent recommendations of the American Law Institute (ALI) Sentencing project<sup>5</sup> and several other jurisdictions<sup>6</sup> by creating a centralized list of possible sanctions for criminal offenses. As the ALI recently noted, in many jurisdictions, sentencing provisions remain “overly complex,

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<sup>5</sup> Model Penal Code: Sentencing § 6.02 cmt. h at 7 (Tentative Draft No. 3, 2014).

<sup>6</sup> Ala. Code § 13A-5-2; Alaska Stat. Ann. § 12.55.015; Ark. Code Ann. § 5-4-104; Conn. Gen. Stat. Ann. § 53a-28; Del. Code Ann. tit. 11, § 4204; Haw. Rev. Stat. Ann. § 706-605; 730 Ill. Comp. Stat. Ann. 5/5-4.5-15; Ky. Rev. Stat. Ann. § 532.030; Mo. Ann. Stat. § 557.011; N.Y. Penal Law § 60.01; Tenn. Code Ann. § 40-35-104.

disorganized, and scattered.”<sup>7</sup> This impedes the aim of making sentencing laws accessible and understandable.<sup>8</sup>

Although the ALI recommendations would include the authorization for each type of sentencing disposition within the Model Penal Code itself, such a consolidation of sentencing provisions into Title 22A would unduly disrupt the organization of other titles of the D.C. Code. Section 22A-802 collects and provides centralized notice of possible sentencing dispositions in Title 22A through cross-referencing that leaves the placement of authorizing statutes in their current location.

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<sup>7</sup> Model Penal Code: Sentencing § 6.02 (Tentative Draft No. 3, 2014).

<sup>8</sup> *Id.*

**RCC § 22A-803. AUTHORIZED TERMS OF IMPRISONMENT.**

- (a) **AUTHORIZED TERMS OF IMPRISONMENT.** Except as otherwise provided by law, the maximum term of imprisonment authorized for an offense is:
- (1) For a Class 1 felony, life without possibility of release;
  - (2) For a Class 2 felony, not more than forty-five (45) years;
  - (3) For a Class 3 felony, not more than thirty (30) years;
  - (4) For a Class 4 felony, not more than twenty (20) years;
  - (5) For a Class 5 felony, not more than fifteen (15) years;
  - (6) For a Class 6 felony, not more than ten (10) years;
  - (7) For a Class 7 felony, not more than five (5) years;
  - (8) For a Class 8 felony, not more than three (3) years;
  - (9) For a Class A misdemeanor, not more than one (1) year;
  - (10) For a Class B misdemeanor, not more than one hundred and eighty (180) days;
  - (11) For a Class C misdemeanor, not more than ninety (90) days;
  - (12) For a Class D misdemeanor, not more than thirty (30) days; and
  - (13) For a Class E misdemeanor, no imprisonment.
- (b) **ATTEMPTS.** A court shall decrease the authorized terms of imprisonment for an attempt to commit an offense pursuant to Section 22A-301.
- (c) **PENALTY ENHANCEMENTS.** A court may increase the authorized terms of imprisonment for an offense with a penalty enhancement pursuant to Section 22A-805.

**Commentary**

*Explanatory Note.* Section 22A-803 provides specific, standardized imprisonment

penalties for offenses within Title 22A. Each class has a designated maximum term of imprisonment beyond which a court may not sentence a defendant to serve. Subsections (b) and (c) provide notice that attempt liability and penalty enhancements may change the maximum applicable penalty.

*Relation to Current District Law.* Subsection 22A-803(a) codifies new law. As discussed in the Commentary to RCC § 22A-801, above, current District law generally does not classify offenses, let alone assign specific imprisonment penalties for those classes. Currently, each offense has its own penalty which has been determined through piecemeal legislation, often without a comprehensive review of other offenses' penalties. Without a formal scheme of offense classification to guide legislative decision making and facilitate comparison of offense penalties, a wide range of statutory maxima has arisen across District offenses.

Despite the lack of a comprehensive offense classification system, the organic development of offense penalties in the District has resulted in most offenses being assigned one of a few penalties (e.g., there are many offenses with a ten year statutory maximum, despite there being no official penalty class that provides a ten year penalty *ex ante*). Subsection (a) uses these most common penalties in current District offenses (including 3, 5, 10, 15, 20, and 30 years for felonies and 30 days, 90 days, 180 days, and 1 year for misdemeanors) to provide a graduated set of classifications for the RCC.

The penalty classifications in RCC § 22A-803 do not accommodate the full range of existing statutory penalties in order to standardize offenses of similar seriousness.

Of particular note, only one classification (Class B, authorizing 45 years) is provided as a penultimate penalty between the extreme of life without the possibility of supervised release and a thirty-year term of imprisonment. Although a determinate number of years, the Class B penalty is intended to authorize an extremely long period of imprisonment that is analogous to a life sentence with the possibility of supervised release. However, given the District's prior abolition of parole, the requirement that inmates serve at least 85% of their sentence, and the life expectancy of inmates, a maximum forty-five year term of imprisonment may be a *de facto* sentence of life without supervised release, depending on the offender's age in a specific case.<sup>9</sup>

Also notable, Section 22A-803 provides for a 180 day penalty for Class B misdemeanors but makes no allowance for a "six month" penalty as is used for several offenses in the current D.C. Code. The distinction between 180 days and six months in current District law does not reflect a substantive distinction in the seriousness of the offense or its imprisonment penalty but a procedural distinction not mentioned in the those offenses. Under Supreme Court precedent, offenses involving penalties of six months or more are subject to a Sixth Amendment right to a

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<sup>9</sup> See United States Sentencing Commission, Sourcebook 2016 Appendix A, at S-163. The USSC bases this number on the "average life expectancy of federal criminal offenders given the average age of federal offenders." *Id.* As discussed more fully in Part III, below, the USSG considers 470 months to be statistically equivalent to a life sentence.



jury trial, whereas offenses with lesser penalties generally are not.<sup>10</sup> However, nothing prevents a jurisdiction from voluntarily extending jury trial rights to offenses subject to penalties of less than six months. Rather than perpetuate a distinction between 180 day and six month penalties in the RCC system of classes that is unrelated to the seriousness of the offense, misdemeanor offenses in the RCC will each plainly state whether or not they are jury-demandable. For example, what previously was a misdemeanor carrying a six month sentence may instead be a Class B misdemeanor with a 180 day penalty, but with a plain statement in the offense definition that the offense is jury demandable.

Subsections 22A-803(b) and (c) cross-reference other provisions of the RCC, concerning penalties for attempts and offenses with penalty enhancements, that change current District law to some extent. See Section 22A-301 regarding changes to current District law under the general attempt statute and Section 22A-805 regarding changes to current District law for offenses with penalty enhancements.

*Relation to National Legal Trends.* Subsection § 22A-803(a) follows national trends, almost uniform in jurisdictions that have undergone comprehensive criminal code reform, insofar as it creates standardized penalty classes according to the authorized length of imprisonment. Thirty-seven states provide some form of statutory classification system similar to § 22A-803(a).<sup>11</sup> The Proposed Federal Criminal Code<sup>12</sup> and the Model Penal Code<sup>13</sup> each recommend the use of three felony classes and two misdemeanor classes. The D.C. Basic Criminal Code proposed the use of six felony classes and three misdemeanor classes.<sup>14</sup>

Regarding the use of eight felony classes in RCC § 22A-803(a), this number of classification distinctions places the District among the most graduated systems of offense classification nationally. Of those thirty-seven jurisdictions that do have a statutory scheme of classifying offenses by penalty, nearly all have a structure that involves multiple felony levels.

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<sup>10</sup> *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) (holding that “we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as ‘petty.’ A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a ‘serious’ one.”). See also D.C. Code § 16-705 (permitting jury trials when the possible cumulative punishment exceeds two years).

<sup>11</sup> Ala. Code § 13A-5-6; Alaska Stat. Ann. § 12.55.125; Ariz. Rev. Stat. Ann. § 13-702; Ark. Code Ann. § 5-4-401; Colo. Rev. Stat. Ann. § 18-1.3-401; Conn. Gen. Stat. Ann. § 53a-35a; Del. Code Ann. tit. 11, § 4205; Fla. Stat. Ann. § 775.082; Haw. Rev. Stat. Ann. § 706-659; 730 Ill. Comp. Stat. Ann. 5/5-4.5-25; Ind. Code Ann. § 35-50-2-4; Iowa Code Ann. § 902.1; Ky. Rev. Stat. Ann. § 532.060; Me. Rev. Stat. tit. 17-A, § 125; Mo. Ann. Stat. § 558.011; N.H. Rev. Stat. Ann. § 625:9; N.J. Stat. Ann. § 2C:43-6; N.M. Stat. Ann. § 31-18-15; N.Y. Penal Law § 70.00; N.C. Gen. Stat. Ann. § 15A-1340.17; N.D. Cent. Code Ann. § 12.1-32-01; Ohio Rev. Code Ann. § 2929.14; Or. Rev. Stat. Ann. § 161.605; 18 Pa. Stat. and Cons. Stat. Ann. § 106; S.C. Code Ann. § 16-1-20; S.D. Codified Laws § 22-6-1; Tenn. Code Ann. § 40-35-112; Tex. Penal Code Ann. § 12.32; Utah Code Ann. § 76-3-203; Va. Code Ann. § 18.2-10; Wash. Rev. Code Ann. § 9A.20.021; Wis. Stat. Ann. § 939.50.

<sup>12</sup> Proposed Federal Criminal Code § 3002.

<sup>13</sup> Model Penal Code §§ 6.01, 6.08.

<sup>14</sup> D.C. Basic Criminal Code § 22-2010.

Some jurisdictions have as few as three felony levels,<sup>15</sup> whereas others have as many as nine.<sup>16</sup> More recently, however, the trend in state reforms has been towards more refined proportionality distinctions in offense classification. For example, a recent code reform project in Indiana concluded with a recommendation that the number of felony classes be increased from four to six.<sup>17</sup> Missouri recently increased the number of penalties from four to five.<sup>18</sup> And in Illinois, the state’s Commission on Criminal Justice and Sentencing Reform is considering increasing the number of drug offense classifications and thereby create “a scheme that is more graduated.”<sup>19</sup>

Recently, the American Law Institute (ALI) has recommended increasing the number of felony classes in the Model Penal Code to five,<sup>20</sup> in recognition of the use of determinate sentencing and sentencing guidelines, as opposed to the previous parole system.<sup>21</sup> Previously, the 1963 MPC contained only three felony classes, but the MPC drafters were clear that they presumed an indeterminate sentencing regime (with parole eligibility) and that three classes are the “absolute minimum” that a code requires.<sup>22</sup>

Regarding the precise imprisonment penalties in RCC § 22A-803(a), the District follows nearly every other state in authorizing life without parole for some offenses.<sup>23</sup> Below this top penalty class, variation among jurisdictions as to the availability of supervised release or parole for “life” sentences in other jurisdictions and the operation of separately codified enhancements

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<sup>15</sup> E.g., Tex. Penal Code Ann. § 12.32.

<sup>16</sup> E.g., Wis. Stat. Ann. § 939.50.

<sup>17</sup> See Press Release, Indiana Senate Republicans, Sen Steele: Criminal Code Reform Moves to Governor’s Desk (Mar. 13, 2014), available at <http://www.indianasenatepublicans.com/news/2014/03/13/2014/sen.-steele-criminal-code-reform-moves-to-governor-s-desk/> (last visited Dec. 7, 2016). See also, CRIMINAL CODE EVALUATION COMMISSION, REVIEW OF CRIMINAL CODE (July 2012), available at <http://www.in.gov/legislative/interim/committee/2012/committee/reports/CCECFB1.pdf> (last visited Dec. 7, 2016).

<sup>18</sup> See Meghan Luecke, S.B. 491 Modifies provisions relating to criminal law, <https://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CRID/documents/SB491Summary.pdf> (last visited Dec. 7, 2016) (“This act creates a new classification for felonies to be known as Class E, and a new classification for misdemeanors to be known as Class D . . . To reflect the change in the authorized terms of imprisonment, crimes once classified as Class C felonies were changed to Class D felonies and crimes once classified as Class D felonies were changed to Class E felonies throughout the statutes.”).

<sup>19</sup> Illinois Commission on Criminal Justice and Sentencing Reform, *Potential Sentencing Reforms for Consideration*, available at <http://www.icjia.org/cjreform2015/pdf/Potential%20Sentencing%20Reforms%20For%20Consideration.pdf> (last visited Dec. 7, 2016).

<sup>20</sup> Model Penal Code: Sentencing § 6.01 (Tentative Draft No. 2, 2011).

<sup>21</sup> Model Penal Code Sentencing (second) § 6.06 cmt. a. at 5 (Tentative Draft No. 2, 2014) (“In most prison cases under the new Code, sentencing courts will impose ‘determinate’ sentences that are closely and predictably related to actual confinement terms.”).

<sup>22</sup> Model Penal Code Commentary § 6.01 cmt. 2 at 37.

<sup>23</sup> A sentence of life imprisonment without the possibility of early release, usually termed “life without parole” or “LWOP,” is authorized in every American jurisdiction. Eighteen of the 19 non-death penalty jurisdictions (Alaska is the exception) allow for LWOP in some instances, as do all 31 death penalty jurisdictions. See Death Penalty Information Center, Life without Parole, at <http://www.deathpenaltyinfo.org/life-without-parole> (last visited Apr. 19, 2017).

complicates comparisons.<sup>24</sup> However, the District’s felony classifications may provide somewhat more severe penultimate maximum penalties (forty-five years for Class 2 and thirty years for Class 3) compared to most other jurisdictions.<sup>25</sup> In particular, it is notable that the U.S. Sentencing Commission (USSC) considers, for statistical purposes, any sentence of greater than 470 months (slightly less than 40 years) to be a life sentence and, conversely, it treats any life

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<sup>24</sup> The shift of many, but not all, jurisdictions from indeterminate to determinate sentencing with various rules for good time release makes evaluation of the meaning of a sentence to life with the possibility for supervised release difficult to analyze. However, it should be noted that prisoners admitted to life sentences in 1997 were expected to serve 29 years, up sharply from the 21 years expected for prisoners admitted in 1991. See Marc Mauer, Ryan S. King, and Malcolm C. Young, *The Meaning of “Life”: Long Prison Sentences in Context* (Sentencing Project 2004), at 12. Even allowing for continued increases in this average time since 1997, the minimum of 38.5 years (assuming maximum good time credit) for a Class B 45 year sentence under the RCC may be significantly more severe.

<sup>25</sup> Below “life” with possibility of supervised release and LWOP penalties, a thirty year maximum as in the RCC Class 3 is near the average authorized in other jurisdictions. See Model Penal Code: Sentencing § 6.06 reporter’s note b(3) at 29-30 (Tentative Draft No. 2, 2014) (citing Code of Ala. § 13A-5-6(a)(2) (20-year maximum for Class B felonies); Alaska Stat. § 12.55.125(c) (20 years for most aggravated Class A felony; offenses graded above this class include homicide, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping); Ariz. Rev. Stat. § 13-604(K) (35 years for most aggravated second-degree felony); Ark. Code § 5-4-401(a)(2) (30-year maximum for Class A felonies: “Class Y” is most serious felony level); Colo. Rev. Stat. § 18-1.3-401(1)(a)(V), (6) (48 years for most aggravated second-degree felony); Conn. Gen. Stat. § 53a-35a (25 years for most serious felony other than murder); 11 Del. Code § 4205(b)(2) (maximum of 25 years for Class B felonies); Fla. Stat. § 775.082(3)(b) (30-year maximum for first-degree felonies; “life felonies” and “capital felonies” are eligible for more severe penalties); Haw. Stat. § 706-659 (20-year maximum for class A felonies; 4 classes of homicide are eligible for more severe penalties); Ill. Stat. c. 730 § 5/5-8-1 (30-year maximum for Class X felonies, one grade below first-degree murder); Ind. Code § 35-50-2-4 (50-year maximum for Class A felonies, one grade below murder); Ia. Code § 902.9(2) (25-year maximum for class B felonies); Ky. Rev. Stat. §§ 532.030 (capital felony); 532.060(2)(b) (20-year maximum for Class B felonies; Class A maximum is life term: Capital offenses eligible for death penalty or life without parole); Me. Rev. Stat. 17-A § 1252(2)(A) (30-year maximum for Class A crimes; only murder graded above this category, with a maximum life sentence); Mo. Rev. Stat. § 558.011(1)(2) (15-year maximum for Class B felonies; maximum for Class A is 30 years or life imprisonment; capital crimes are graded above Class A); Neb. Rev. Stat. § 28-105(1) (50-year maximum for Class IC felonies; Class IB has life maximum; Class IA has life-without-parole maximum; Class I has death penalty); Nev. Rev. Stat. § 193.130(2)(b) (20-year maximum for Class B felonies; maximum penalties for Class A are death or life without parole); N.J. Rev. Stat. § 2C:43-6(a)(1) (20-year maximum for crimes of first degree); N.M. Stat. §§ 31-18-15(A)(3) & 31-18-15.1(C) (24-year maximum for most aggravated first-degree felonies, except for exceptions eligible for life imprisonment or the death penalty); N.Y. Penal Law § 70.00(2)(b) (25-year maximum for Class B felonies); N.D. Code § 12.1-32-01(2) (20-year maximum for Class A felonies; maximum for Class AA felonies is life without parole); Or. Rev. Stat. § 161.605(1) (20-year maximum for Class A felonies; more severe penalties available for murder and aggravated murder); 18 Pa. C.S. § 1103 (20-year maximum for felonies of first degree; 3 grades of murder are graded above); S.C. Code § 16-1-20(A)(1) (30-year maximum for Class A felonies; punishments for murder separately graded); S.D. Codified Laws § 22-6-1(4) (50-year maximum for Class 1 felonies; Classes A, B, and C, graded above, include death penalty and life prison terms); Tenn. Code Ann. § 40-35-111(b)(1) (60-year maximum for Class A felonies; penalties for murder, including capital punishment and life sentences, separately provided); Tex. Penal Code § 12.33(a) (20-year maximum for felonies of the second degree; felonies of first degree have maximum of life imprisonment; death penalty separately provided); Utah Code Ann. § 76-3-203(2) (15-year maximum for felonies of the second degree; felonies of the first degree have maximum of life imprisonment; death penalty separately provided); Va. Code § 18.2-10(c) (20-year maximum for Class 3 felonies; maximum for Class 2 is life imprisonment; maximum 17 for Class 1 is death); Wash. Rev. Code § 9A.20.021(b) (10-year maximum for Class B felonies; maximum for 18 Class A is life imprisonment); Wis. Stat. § 939.50(3)(b) (60-year maximum for Class B felonies; maximum for 19 Class A is life imprisonment)).

sentence as a sentence of 470 months.<sup>26</sup> At the bottom, by contrast, the District’s felony classifications provide for somewhat less severe statutory penalties (three years for Class 8) compared to most jurisdictions.<sup>27</sup>

The ALI has recently recommended that the most severe punishment be set at life without parole (LWOP)<sup>28</sup>, though it did so hesitatingly. The ALI Sentencing Project reporters noted that “a sentence of life without possibility of release is close in severity to a death sentence,”<sup>29</sup> that the Supreme Court has banned the imposition of LWOP for juvenile defendants convicted of non-homicide crimes<sup>30</sup>; that the Supreme Court has banned the *mandatory* imposition of LWOP for homicide crimes<sup>31</sup>; and that other developed nations have banned LWOP on the basis that it violates basic human rights.<sup>32</sup> For these reasons, the reporters stated that the ALI only endorses the use of LWOP “when it is the only alternative to the death penalty.”<sup>33</sup> Thus, “the Institute does not approve of the ‘creep’ of life sentences without parole to offenses beyond those that would otherwise be eligible for the death penalty,” i.e., murder.<sup>34</sup> With respect to the penultimate class, following many states, the ALI recommends a penultimate penalty class set at a twenty-year maximum.<sup>35</sup> For the lowest level felony, the ALI recommends a three year

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<sup>26</sup> See United States Sentencing Commission, Sourcebook 2016 Appendix A, at S-163. The USSC bases this number on the “average life expectancy of federal criminal offenders given the average age of federal offenders.” *Id.*

<sup>27</sup> See Model Penal Code: Sentencing § 6.06 reporter’s note b(4) at 30 (Tentative Draft No. 2, 2014) (citing Code of Ala. § 13A-5-6(a)(3) (maximum of 10 years for least serious felony grade); Alaska Stat. § 12.55.125(e) (5 years); Ariz. Rev. Stat. § 13-701(C)(5) (1 year); Ark. Code § 5-4-401(a)(5) (6 years); Colo. Rev. Stat. § 18-1.3-401(1)(a)(V), (4)(b)(II)(6) (3 years); Conn. Gen. Stat. § 53a-35a (5 years); 11 Del. Code § 4205(b)(7) (2 years); Fla. Stat. § 775.082(3)(d) (5 years); Haw. Stat. § 706-660(2) (5 years); Ill. Stat. c. 730 § 5/5-8-1(7) (3 years); Ind. Code § 35-50-2-7(a) (3 years); Ia. Code § 902.9(5) (5 years); Ky. Rev. Stat. § 532.060(2)(d) (5 years); Me. Rev. Stat. 17-A § 1252(2)(C) (5 years for “Class C” crimes; equivalent of lowest felony grade); Mo. Rev. Stat. § 558.011(1)(4) (4 years); Neb. Rev. Stat. § 28-105(1) (5 years); Nev. Rev. Stat. § 193.130(2)(e) (4 years); N.H. Rev. Stat. § 625:9(III)(a)(2) (7 years); N.J. Rev. Stat. § 2C:43-6(a)(3) (5 years for crimes “of the third degree”; equivalent of lowest felony grade); N.M. Stat. §§ 31-18-15(A)(10) (18 months); N.Y. Penal Law § 70.00(2)(e) (4 years); N.D. Code § 12.1-32-01(4) (5 years); Or. Rev. Stat. § 161.605(3) (5 years); 18 Pa. C.S. § 1103(3) (7 years); S.C. Code § 16-1-20(A)(6) (5 years); S.D. Codified Laws § 22-6-1(9) (2 years); Tenn. Code Ann. § 40-35-111(b)(5) (6 years); Tex. Penal Code § 12.35(a) (2 years); Utah Code Ann. § 76-3-203(3) (5 years); Va. Code § 18.2-10(f) (5 years); Wash. Rev. Code § 9A.20.021(c) (5 years); Wis. Stat. § 939.50(3)(i) (3 years and 6 months)).

<sup>28</sup> Model Penal Code: Sentencing § 6.06 (Tentative Draft No. 2, 2014).

<sup>29</sup> Model Penal Code: Sentencing § 6.06 reporter’s note b(2) (Tentative Draft No. 2, 2014). See also, Proposed Federal Criminal Code § 3601 (codifying a sentence of life imprisonment).

<sup>30</sup> *Graham v. Florida*, 560 U.S. 48, 82 (2010).

<sup>31</sup> *Miller v. Alabama*, 567 U.S. 460 (2012).

<sup>32</sup> See *Vinter and Others v. United Kingdom*, available at <http://hudoc.echr.coe.int/eng?i=001-122664> (last visited Apr. 10, 2017). See also, Model Penal Code: Sentencing § 6.06 reporter’s note b(2) (Tentative Draft No. 2, 2014) (noting that “[a] few nations, such as Germany, France, and Italy, have declared natural-life sentences unconstitutional” and that “[i]n the International Criminal Court, the most severe penalty available for any crime, including war crimes and genocide, is life imprisonment reviewable by the Court after a period of 25 years.”).

<sup>33</sup> Model Penal Code: Sentencing § 6.06 cmt. b(2) at 13 (Tentative Draft No. 2, 2014).

<sup>34</sup> *Id.* at 14.

<sup>35</sup> Model Penal Code: Sentencing § 6.06 (Tentative Draft No. 2, 2014). See also, Proposed Federal Criminal Code § 3201 (penultimate class set at a thirty-year maximum).

penalty.<sup>36</sup>

Subsections 22A-803(b) and (c) cross-reference other provisions of the RCC, concerning penalties for attempts and offenses with penalty enhancements. See Section 22A-301 regarding comparison of the RCC attempt statute to other jurisdictions and Section 22A-805 regarding comparison of the RCC penalty enhancements to other jurisdictions.

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<sup>36</sup> Model Penal Code: Sentencing § 6.06 (Tentative Draft No. 2, 2014). *See also*, Proposed Federal Criminal Code § 3201 (penalty for lowest class of felony set at a seven-year maximum).

**RCC § 22A-804. AUTHORIZED FINES.**

(a) **AUTHORIZED FINES.** Except as otherwise provided by law, the maximum fine for an offense is:

- (1) For a Class 1 felony, not more than \$500,000;
- (2) For a Class 2 felony, not more than \$250,000;
- (3) For a Class 3 felony, not more than \$75,000;
- (4) For a Class 4 felony, not more than \$50,000;
- (5) For a Class 5 felony, not more than \$37,500;
- (6) For a Class 6 felony, not more than \$25,000;
- (7) For a Class 7 felony, not more than \$12,500;
- (8) For a Class 8 felony, not more than \$6,000;
- (9) For a Class A misdemeanor, not more than \$2,500;
- (10) For a Class B misdemeanor, not more than \$1,000;
- (11) For a Class C misdemeanor, not more than \$500;
- (12) For a Class D misdemeanor, not more than \$250; and
- (13) For a Class E misdemeanor, not more than \$250.

(b) **LIMITS ON MAXIMUM FINE PENALTIES.** A court may not impose a fine that would impair the ability of the defendant to make restitution or deprive the defendant of sufficient means for reasonable living expenses and family obligations.

(c) **ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN.** Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:

- (1) not more than twice the pecuniary loss,

- (2) not more than twice the pecuniary gain, or
  - (3) not more than the economic sanction in subsection (a) that the defendant is otherwise subject to, whichever is greater. The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt.
- (d) **ALTERNATIVE MAXIMUM FINE FOR ORGANIZATIONAL DEFENDANTS.** Subject to the limits on maximum fine penalties in subsection (b) of this section, if an organizational defendant is convicted of a Class A misdemeanor or any felony, a court may fine the organizational defendant not more than double the applicable amount under subsection (a) of this section.
- (e) **ATTEMPTS.** A court shall decrease the authorized fines for an attempt to commit an offense pursuant to Section 22A-301.
- (f) **PENALTY ENHANCEMENTS.** A court may decrease the authorized fines for an offense pursuant to Section 22A-805.
- (g) **DEFINITIONS.** For purposes of this section:
- (1) “Organizational Defendant” means any person other than an individual human being. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.
  - (2) “Pecuniary loss” means actual harm that is monetary or readily measurable in money.
  - (3) “Pecuniary gain” means before-tax profit, including additional revenue or cost savings.

### **Commentary**

*Explanatory Note.* Subsection 22A-804(a) sets standardized fines in a set penalty schedule. Subsection § 22A-804(b) states that courts must take into account the defendant’s financial circumstances when sentencing a defendant to pay a fine. In particular, the court must consider how imposing the fine will affect the defendant’s ability to pay restitution (if restitution has been ordered). The court may not impose a fine that would leave the defendant without the means to provide for his or her reasonable living expenses. The court must also take into account the defendant’s obligations to financially support family members.

Subsections (c) and (d) set alternative maximum fine penalties in particular circumstances. Subsection (c) states that if the defendant’s offense of conviction resulted in pecuniary loss, then the fine imposed may be double the pecuniary loss, or the fine the defendant is otherwise subject to, whichever is greater. Subsection (d) states that an organizational defendant is subject to double the fines provided for in subsection (a). Both subsections (c) and (d) are, however, subject to the limitations of subsection (b).

Subsections (e) and (f) are intended to give notice that attempt liability and penalty enhancements may change the maximum applicable penalty. Subsection (g) defines the terms “organizational defendant” and “pecuniary loss” for purposes of the section.

*Relation to Current District Law.* Subsection 22A-804(a) is generally consistent with existing District law regarding maximum fines. District law does not set a schedule of fines by offense class; however, the Criminal Fine Proportionality Act of 2012 (FPA) now codified in D.C. Code §§ 22-3571.01 and 22-3571.02 sets fines for District offenses that generally corresponded to the imprisonment penalty of each offense.<sup>37</sup> Subsection (a) tracks the fines provided in the FPA, albeit with higher maximum fines for Class 1, Class 2 offenses not resulting in death, and Class E misdemeanors, and lower maximum fines for Class 3 felonies resulting in death and Class 8 felonies. The higher maximum fine for Class 2 offenses not resulting in death and the lower maximum fine for Class 3 felonies not resulting in death are due to the fact that the Subsection 22A-804(a) does not create a categorical exception for offenses resulting in death. The higher maximum fine for Class 1 offenses and lower maximum fine for Class 8 felonies reflect the addition of slightly more class distinctions in the RCC fine schedule than in the FPA, and the need for consistent, progressive fines for these additional classes. The higher maximum fine for Class E misdemeanors in the RCC fine schedule reflects the greater reliance on fines to sanction crimes that are not punishable by imprisonment.

Subsection 22A-804(b) is a new provision of District law, although it follows the DCCA’s reasoning in *One 1995 Toyota Pick-up Truck v. District of Columbia*<sup>38</sup> and the consideration of financial means and family obligations when ordering restitution.<sup>39</sup> This subsection is intended to ensure that victim restitution is a priority over the collection of fines, to

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<sup>37</sup> The FPA did not precisely track imprisonment penalties as D.C. Code § 22-3571.01(12) provides a separate maximum fine of \$250,000 if the offense resulted in death, regardless of the imprisonment penalty, and D.C. Code 22-3571.02(a) provides that specific offenses may state they are exempt from D.C. Code § 22-3571.01 and state a different penalty.

<sup>38</sup> 718 A.2d 558 (D.C. 1998). The DCCA held that, in the conceptually related arena of asset forfeiture, the Eighth Amendment poses *substantive limits* on financial sanctions. A salient fact in the DCCA’s analysis was that the truck may have “played a significant role in the maintenance of [the defendant’s] livelihood.” *Id.* at 566.

<sup>39</sup> D.C. Code § 16-711 provides authority for requiring restitution or reparation and states in subsection (b) that, when ordered: “[T]he court shall take into consideration the number of victims, the actual damage of each victim, the resources of the defendant, the defendant’s ability to earn, any obligation of the defendant to support dependents, and other matters as pertain to the defendant’s ability to make restitution or reparation.”



deter possible criminogenic effects of fines due to rendering a defendant destitute, and to ensure that family members or dependents of a defendant do not suffer additional negative consequences. Notably, subsection 22A-804(b) does not restrict a court’s lawful authority to require victim restitution, or otherwise address the relative priority of victim restitution and the defendant’s means for reasonable living expenses and family obligations.

Except for a minor change to existing law in subsection 22A-804(c), subsections 22A-804(c) and 22A-804(d) recodify their corresponding provisions of the FPA. Whereas D.C. Code § 22-3571.01(c) states that the additional penalty for organizational defendants applies to offenses punishable by 6 months or more imprisonment, as the RCC does not include a Class providing for up to 6 months imprisonment, the threshold for additional organizational liability under D.C. Code § 22-3571.01(c), Section 22A-804(d) applies only to Class A misdemeanors (1 year) or felonies. Although unclear from legislative history, presumably the underlying concern is ensuring that such additional penalties only be levied in cases that are jury-demandable, which Section 22A-804(d) preserves.

Subsections 22A-804(e) and (f) cross-reference other provisions of the RCC (concerning penalties for attempts and offenses with penalty enhancements) that change current District law to some extent. See Section 22A-301 regarding changes to current District law under the general attempt statute and Section 22A-805 regarding changes to current District law for offenses with penalty enhancements.

Subsection 22A-804(g) fills a gap in the D.C. Code by codifying definitions for “pecuniary loss,” “pecuniary gain” and “organizational defendant” that are currently undefined in the D.C. Code §§ 22-3571.01 and 22-3571.02. The Fine Proportionality Act fails to define any of these terms, and no case law has been published interpreting these phrases. The definitions of “pecuniary loss” and “pecuniary gain” are modeled on the definitions provided in the Federal Sentencing Guidelines.<sup>40</sup> The definition of “organizational defendant” is intended to broadly reach any non-individual person recognized by law and is modeled on a definition in the Federal Sentencing Guidelines.<sup>41</sup>

*Relation to National Legal Trends.* Subsection § 22A-803(a) follows national trends, insofar as it provides a set schedule of fines applicable to standardized penalty classes.<sup>42</sup> Similarly the ALI’s Model Penal Code recommends a set schedule of fines,<sup>43</sup> as does the

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<sup>40</sup> U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1, 8A1.2 (2016).

<sup>41</sup> U.S. SENTENCING GUIDELINES MANUAL § 8A1.1 (2016). The Sentencing Guidelines in turn reference 18 U.S.C. § 18.

<sup>42</sup> *E.g.*, Colo. Rev. Stat. Ann. § 18-1.3-401; Conn. Gen. Stat. Ann. § 53a-41; Haw. Rev. Stat. Ann. § 706-640; Va. Code Ann. § 18.2-10. Wash. Rev. Code Ann. § 9A.20.021; Wis. Stat. Ann. § 939.50.

<sup>43</sup> Model Penal Code § 6.03. *See also*, Model Penal Code: Sentencing § 6.04 (Tentative Draft No. 3, 2014).

Proposed Federal Criminal Code.<sup>44</sup>

Subsection (b) is generally supported by common law tradition and jurisprudence regarding constitutional claims in other jurisdictions. The Anglo-American tradition—dating back to the Magna Carta<sup>45</sup>—has long required that fines allow for a defendant to maintain his or her livelihood.<sup>46</sup> The United States Constitution provides at least some limitation on “excessive fines” in the Eighth Amendment,<sup>47</sup> and the due process clause provides some degree of protection from consequences stemming from a defendant’s inability to pay fines. The Supreme Court has held that a defendant whose terms of probation includes the payment of criminal fines may not have his probation revoked based solely on failure to pay if the defendant was too impecunious to fulfill his obligation.<sup>48</sup> The RCC modestly states that an analysis of the defendant’s ability to pay be applied up front at sentencing, not just at a possible revocation hearing.<sup>49</sup>

However, notwithstanding the longstanding recognition that a defendant’s ability to pay a fine should be considered when imposing such a sanction, only a few jurisdictions have explicitly codified provisions similar to subsection (b).<sup>50</sup>

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<sup>44</sup> Proposed Federal Criminal Code § 3301.

<sup>45</sup> Magna Carta, 9 Hen. III, ch. 14 (1225). (“A free-man shall not be amerced for a small offence, but only according to the degree of the offence; and for a great delinquency, according to the magnitude of the delinquency, saving his contenment [*salvo contenemento suo*]: and a merchant in the same manner, saving his merchandise, and a villain, if he belong to another, shall be amerced after the same manner, saving to him his wainage, if he shall fall into our mercy; and none of the aforesaid ameracements shall be assessed, but by the oath of honest and lawful men of the neighbourhood.”). So important is this provision of the Great Charter that “a leading nineteenth century legal historian suggests that ‘[v]ery likely there was no clause in Magna Carta more grateful to the masses of the people than that about ameracements.’” Nicholas M. McLean, Article, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 854 (2013) (quoting F. W. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884)).

<sup>46</sup> See Nicholas M. McLean, Article, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 865-72 (2013) (discussing role of fines in early and 19th century American law).

<sup>47</sup> U.S. Const. Amend. XVIII.

<sup>48</sup> See *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983) (“if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available”). *Id.* at 674 (“[b]y sentencing [a defendant] to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turn[s] a fine into a prison sentence.”).

<sup>49</sup> See also, *United States. Levesque*, 546 F.3d 78 (1st Cir. 2008) (holding that district courts ordering asset forfeiture pursuant to criminal case must consider the financial circumstances of the defendant).

<sup>50</sup> But see Haw. Rev. Stat. Ann. § 706-641 (“In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.”); N.Y. Penal Law § 80.00 (“When imposing a fine pursuant to the provisions of this paragraph, the court shall consider the profit gained by defendant’s conduct, whether the amount of the fine is disproportionate to the conduct in which defendant engaged, its impact on any victims, and defendant’s economic circumstances, including the defendant’s ability to pay, the effect of the fine upon his or her immediate family or any other persons to whom the defendant owes an obligation of support.”); Or. Rev. Stat. Ann. § 161.645 (“In determining whether to impose a fine and its amount, the court shall consider: (1) The financial resources of the defendant and the burden that

Recent sentencing trends have given greater consideration to the defendant's circumstances when imposing fines. For example, the U.S. Sentencing Guidelines states that fines should be imposed unless "the defendant establishes that he is unable to pay and is not likely to become able to pay any fine."<sup>51</sup> The Proposed Federal Criminal Code also limits the imposition of fines based on the defendant's ability to pay "restitution or reparation to the victim of the offense."<sup>52</sup>

The ALI's latest work on the Model Penal Code (Sentencing) project recommends a similar limitation to subsection (b) on the imposition of economic sanctions. The provision says:

(6) No economic sanction [other than victim compensation] may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction.<sup>53</sup>

As the ALI notes, limiting fines based on ability to reasonably pay "is required not because criminals deserve society's munificence, but because it is a proven route to increased public safety."<sup>54</sup> Studies have shown that fines can have effect of making it more difficult for offenders to successfully reintegrate into the community.<sup>55</sup>

Similarly, the American Bar Association's Criminal Justice Section has also published sentencing standards, which recommend that "[a]n offender's ability to pay should be a factor in determining the amount of the sanction. Sentencing courts, in imposing a fine on an individual, should consider the offender's obligations, particularly family obligations."<sup>56</sup>

Other jurisdictions also provide for higher penalties based on pecuniary loss, as in

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payment of a fine will impose, with due regard to the other obligations of the defendant; and (2) The ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court."); 18 U.S.C.A. § 3572 (a)(1)-(2) (a) In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in [...] (1) the defendant's income, earning capacity, and financial resources; (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose...").

<sup>51</sup> U.S.S.G. 5E1.2.

<sup>52</sup> Proposed Federal Criminal Code § 3302(1).

<sup>53</sup> Model Penal Code: Sentencing § 6.04 (Tentative Draft No. 3, 2014).

<sup>54</sup> Model Penal Code: Sentencing § 6.04 cmt. b at 58 (Tentative Draft No. 3, 2014).

<sup>55</sup> See REBEKAH DILLER, ET. AL., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), available at <https://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry> (last visited April 24, 2017). After examining sentencing practice in certain states, the report states that "[i]n all fifteen of the examined states, criminal justice debt and related collection practices create a significant barrier for individuals seeking to rebuild their lives after a criminal conviction." *Id.*

<sup>56</sup> ABA, Standards for Criminal Justice, Standard 18-3.16 (3d ed. 1994), available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_sentencing\\_blkold.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blkold.html).

subsection (c),<sup>57</sup> as well as higher penalties as applied to organizational defendants, as in subsection (d).<sup>58</sup>

Subsections 22A-804 (e) and (f) cross-reference other provisions of the RCC, concerning penalties for attempts and offenses with penalty enhancements. See Section 22A-301 regarding comparison of the RCC attempt statute to other jurisdictions and Section 22A-805 regarding comparison of the RCC penalty enhancements to other jurisdictions.

Comparable to the definitions in subsection 22A-804 (g) several jurisdictions define organizational defendants and pecuniary loss.<sup>59</sup>

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<sup>57</sup> *E.g.*, Ala. Code § 13A-5-11; Alaska Stat. Ann. § 12.55.185; Conn. Gen. Stat. Ann. § 53a-44; Del. Code Ann. tit. 11, § 4208; Haw. Rev. Stat. Ann. § 706-640; 730 Ill. Comp. Stat. Ann. 5/5-4.5-50; Ind. Code Ann. § 35-50-5-2; N.J. Stat. Ann. § 2C:43-3; N.Y. Penal Law § 80.00; Or. Rev. Stat. Ann. § 161.625.

<sup>58</sup> *E.g.*, Alaska Stat. Ann. § 12.55.035; N.Y. Penal Law § 80.10; Tenn. Code Ann. § 40-35-111; Tex. Penal Code Ann. § 12.51.

<sup>59</sup> *E.g.*, Alaska Stat. Ann. § 12.55.185 (“‘pecuniary gain’ means the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the offense, less the amount of money or value of property returned to the victim of the offense or seized by or surrendered to lawful authority before sentence is imposed.”); N.J. Stat. Ann. § 2C:43-3 (“For purposes of this section the term ‘gain’ means the amount of money or the value of property derived by the offender and ‘loss’ means the amount of value separated from the victim or the amount of any payment owed to the victim and avoided or evaded and includes any reasonable and necessary expense incurred by the owner in recovering or replacing lost, stolen or damaged property, or recovering any payment avoided or evaded, and, with respect to property of a research facility, includes the cost of repeating an interrupted or invalidated experiment or loss of profits.”); Or. Rev. Stat. Ann. § 161.625 (“As used in this section, ‘gain’ means the amount of money or the value of property derived from the commission of the felony, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority before the time sentence is imposed.”).