



First Draft of Report #66 – Defense of Self, Others, or Property

SUBMITTED FOR ADVISORY GROUP REVIEW
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission’s statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

This Draft Report has two parts: (1) draft statutory text for a new Title 22E 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 #66 – Defense of Self, Others, or Property is November 9, 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.

RCC § 22E-701. Generally Applicable Definitions.

“Deadly force” means any physical force that is likely to cause serious bodily injury or death.

COMMENTARY

Explanatory Note. The term “deadly force” includes any force, with or without the use of a weapon, that is more likely than not to cause death or serious bodily injury. The likelihood could arise from the degree of force, the duration of the force, the location of the force on the human body, the complainant’s health, or other factors. A person may use deadly force even if the person does not intend to cause a serious injury¹ and even if death or serious injury does not occur.² The term “deadly force” is not currently defined in Title 22 of the D.C. Code, however a definition of the term recently was codified for the first in the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020).³ The term “serious bodily injury” that is used in the definition of “deadly force” is defined elsewhere in RCC § 22E-701. The RCC definition of “deadly force” is used in the revised defense of self or another person⁴ and defense of property statutes.⁵

Relation to Current District Law. Relation to Current District Law. The RCC definition of “deadly force” may constitute a substantive change to District law in two ways.

First, the revised definition does not specifically include a reference to force “intended” to cause serious bodily injury or death. The current D.C. Code definition of deadly force, codified only with respect to law enforcement officer use of force, refers to “any force that is likely or intended to cause serious bodily injury or death.” The definition’s term “intended” is not defined in the D.C. Code (nor are cognate words “intent,” etc.), and there is no case law or legislative history as to the meaning of “intended” in the definition. However, prior DCCA case law defined the term as “force likely to cause serious bodily injury or death.”⁶ Resolving this ambiguity, the revised definition omits from the codified definition a reference to “intent.” In the RCC, “intent” is a defined culpable mental state with a meaning and RCC definitions generally do not contain culpable mental states to avoid confusion as to the scope of their operation. The RCC codification of defense of self or others, moreover, refers in relevant part to an actor who

¹ For example, a factfinder may find that an actor who repeatedly stabs a person in the abdomen with a long knife used deadly force that was objectively likely to kill the person, even though the actor subjectively intended to only inflict a superficial wound. Expert testimony may be required to assist the factfinder in understanding whether particular conduct is likely to cause death or serious bodily injury.

² For example, a factfinder may find that a bullet wound was likely to cause a serious bodily injury if not for immediate intervention by a medical professional. Expert testimony may be required to assist the factfinder in understanding whether a particular injury is likely to cause death or serious bodily injury.

³ Act 23-336 (“‘Deadly force’ means any force that is likely or intended to cause serious bodily injury or death.”).

⁴ RCC § 22E-403.

⁵ RCC § 22E-404.

⁶ See, e.g., *Brown v. United States*, 139 A.3d 870, 872 (D.C. 2016); *McPhaul v. United States*, 452 A.2d 371, n. 1 (D.C. 1982); *Etheredge v. Dist. of Columbia*, 635 A.2d 908, n. 9 (D.C. 1993); *Edwards v. United States*, 721 A.2d 938, 942 (D.C. 1998); *Fersner v. United States*, 482 A.2d 387, 393 (D.C. 1984); *Alcindore v. United States*, 818 A.2d 152, 159 (D.C. 2003).

“uses or attempts to use deadly force” which may practically have the same meaning as “intended” within the current D.C. Code definition of “deadly force.”⁷ This change improves the clarity and consistency of the revised statutes.

Second, the revised definition primarily relies on a different, revised definition of “serious bodily injury.” The current D.C. Code definition of deadly force, codified only with respect to law enforcement officer use of force, uses a definition “serious bodily injury” that refers, in relevant part, to “extreme physical pain, illness, or impairment of physical condition.” These terms in the definition are not defined in the D.C. Code, and there is no case law or legislative history as to their meaning. This D.C. Code definition of “serious bodily injury” with respect to a law enforcement officer use of force differs from the D.C. Code definition of “serious bodily injury” for sexual abuse offenses,⁸ case law defining “serious bodily injury” for other offenses,⁹ and case law defining “deadly force” by a person other than a law enforcement (in defense of property).¹⁰ Resolving this ambiguity, the revised definition of “deadly force” uses the standard RCC definition of “serious bodily injury” which does not specifically refer to “extreme physical pain, illness, or impairment of physical condition.” The revised definition of “serious bodily injury” may narrow in some respects, and expand in other respects, the scope of conduct constituting “deadly force.”¹¹ This change improves the clarity and consistency of the revised statutes.

Relation to National Legal Trends. Eighteen out of 29 reform jurisdictions¹² have codified a definition of deadly force,¹³ however, the scope of each definition largely depends on the definition of “serious bodily injury” which is used in the definition of deadly force and varies.

⁷ See Commentary to RCC § 22E-403, Defense of Self or Another Person.

⁸ D.C. Code §22-3001 (“‘Serious bodily injury’ means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”).

⁹ In the absence of a codified definition of “serious bodily injury” for other offenses, District case law has adopted the definition of D.C. Code § 22-3001 when interpreting the term’s use in other offenses. *See, e.g. Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) (aggravated assault); *Fadero v. United States*, 59 A.3d 1239, 1250 (D.C.2013) (felony assault on a police officer).

¹⁰ *Brown v. United States*, 139 A.3d 870, 872 (D.C. 2016) (defining “serious bodily harm” to have the same meaning as “serious bodily injury” with respect to the meaning of “deadly force”).

¹¹ See Commentary to RCC § 22E-701, “Serious bodily injury.”

¹² Twenty-nine states (“reform jurisdictions”) have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

¹³ Ala. Code 1975 § 13a-3-20(2); Alaska Stat. Ann. § 11.81.900(16); Ariz. Rev. Stat. Ann. § 13-105(14); Ark. Code Ann. § 5-2-601(2); Conn. Rev. Stat. Ann. § 53a-3(5); Del. Code Ann. Tit. 11, § 471(A); Kan. Stat. Ann. § 21-5221; Ky. Rev. Stat. Ann. § 503.010(1); Me. Rev. Stat. Ann. Tit. 17, § 2(8); Minn. Stat. Ann. § 609.066; Mon. Ann. Stat. § 563.011; Nh Rev. Stat. Ann. § 627:9(Ii); N.J. Stat. Ann. § 2c:3-11(B); N.D. Cent. Code Ann. § 12.1-05-12(1); Ohio Rev. Code Ann. § 2901.01(2); 18 Pa. Stat. And Cons. Stat. Ann. § 501; Tenn. Code Ann. § 39-11-611; Wash. Rev. Code Ann. § 9a.16.010.

RCC § 22E-403. Defense of Self or Another Person.

- (a) *Defense.* It is a defense that, in fact, the actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to protect the actor or another person from a physical contact, bodily injury, sexual act, sexual contact, confinement, or death.
- (b) *Exceptions.* This defense is not available when:
 - (1) In fact, the actor uses or attempts to use deadly force, unless the actor:
 - (A) Reasonably believes the conduct is necessary in its timing, nature, and degree, to protect the actor or another person from serious bodily injury, a sexual act, confinement, or death; or
 - (B) Both:
 - (i) Is inside their own individual dwelling unit; and
 - (ii) Reasonably believes the conduct is necessary in its timing, nature, and degree, to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement;
 - (2) The actor recklessly brings about the situation requiring the defense, unless, in fact:
 - (A) The actor is a law enforcement officer acting within the reasonable scope of that role;
 - (B) The actor's conduct that brought about the situation is speech only; or
 - (C) The actor withdraws or makes reasonable efforts to withdraw from the location; or
 - (3) The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct.
- (c) *Use of deadly force by a law enforcement officer.* When, in fact, the actor is a law enforcement officer who uses or attempts to use deadly force, a factfinder shall include consideration of all of the following when determining whether the actor reasonably believed the conduct was necessary, in its timing, nature and degree:
 - (1) The law enforcement officer's training and experience;
 - (2) Whether the complainant:
 - (A) Appeared to possess, either on their person or in a location where it is readily available, a dangerous weapon; and
 - (B) Was afforded an opportunity to comply with an order to surrender any suspected dangerous weapons;
 - (3) Whether the law enforcement officer engaged in de-escalation measures, including taking cover, waiting for back-up, trying to calm the complainant, or using non-deadly force;
 - (4) Whether the law enforcement officer increased the risk of a confrontation resulting in deadly force being used; and
 - (5) Whether the law enforcement officer made all reasonable efforts to prevent a loss of a life, including abandoning efforts to apprehend the complainant.

- (d) *Definitions.* The terms “intentionally” and “reckless” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “bodily injury,” “complainant,” “dangerous weapon,” “deadly force,” “law enforcement officer,” “serious bodily injury,” “sexual act,” “sexual contact,” and “speech” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes the defense of self or another person defense for the Revised Criminal Code (RCC). The defense applies where a person acts under a reasonable belief that they are protecting themselves or another person from a specified physical harm. The RCC defense of self or another person defense is the first codification of such a defense in the District.*

Subsection (a) establishes the requirements for the defense. The term “in fact” indicates that no culpable mental state need be proven for the defense requirements in subsection (a).

Subsection (a) specifies that the person must reasonably believe that the conduct constituting the offense is necessary to prevent a specified physical harm to the actor or to another person from occurring or continuing.¹ The harm at issue may be a physical contact, bodily injury, sexual act, sexual contact, confinement, or death and must be specific and identifiable. The harm could be caused by a criminal act or an accident.² The terms “bodily injury,” “sexual act,” and “sexual contact” are defined in RCC § 22E-701 and include a wide array of conduct.³ The phrase “physical contact” should be construed to have the same meaning as in RCC § 22E-1205. The word “confinement” is undefined and is intended to broadly include confining a person in a closed space, limiting a person’s movements by applying physical restraints to the body, and taking a person to another location against their will. The actor’s belief that the harm will occur may be mistaken,⁴ but it must be objectively reasonable. Reasonableness is an objective standard that takes into account relevant characteristics of the actor.⁵ A person acting in the heat of passion

¹ An additional motive, such as animus or hatred toward the complainant, does not defeat an otherwise valid claim of self-defense or defense of another person. *Parker v. United States*, 155 A.3d 835 (D.C. 2017).

² Consider, for example, a baseball coach who observes Player A is about to take a practice swing that will accidentally hit Player B. The coach may be justified in assaulting Player A, roughly pushing them out of the way, to protect Player B from being injured.

³ The fact that a person may defend against even the most minor bodily injury or sexual contact is offset by the requirement that the conduct must be necessary in its timing, nature, and degree. For example, an actor may be justified in using a great amount physical force to protect against a beating about the head or a prolonged groping of the breast and be unjustified in using the same degree of force to protect against a mere grazing of the arm or buttocks.

⁴ *Sloan v. United States*, 527 A.2d 1277 (D.C. 1987); *Jackson v. United States*, 645 A.2d 1099 (D.C. 1994).

⁵ See Commentary to RCC § 22E-401, Lesser Harm; Model Penal Code § 3.02 cmt. at 241-42 (1985) (concerning the necessity defense) (“...these questions are asked not in terms of what the actor’s perceptions actually were, but in terms of an objective view of the situation as it actually existed...The standard for ultimate judgement invites consideration of the ‘care that a reasonable person would observe in the actor’s situation.’ There is an inevitable ambiguity in ‘situation.’ If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving

caused by an assault may actually and reasonably believe something that seems unreasonable to a calm mind and does not necessarily lose a claim of defense or another person by using greater force than would seem necessary to a calm mind.⁶ The actor must believe that the conduct is necessary in its timing, nature, and degree.⁷ Conduct is not necessary if the harm can be avoided by a reasonable “legal alternative available to the defendants that does not involve violation of the law.”⁸ Retreat may be a reasonable way to avoid a harm, however an actor has no affirmative duty to retreat before using force when the requirements of the defense are otherwise satisfied.⁹

Subsection (b) establishes three exceptions to the defense of self or another person defense.

Paragraph (b)(1) limits the availability of the defense when the actor uses or attempts to use deadly force. The term “deadly force” is defined in RCC § 22E-701 and means any physical force that is likely to cause serious bodily injury or death or death. A person may use deadly force even if the person does not intend to cause a serious injury¹⁰ and even if death or serious injury does not occur.¹¹ The word “attempt” in paragraph (b)(1) should be construed to have the same meaning as in Criminal Attempt under RCC § 22E-301. That is, a person attempts to use deadly force if they engage in conduct that is reasonably adapted to causing serious bodily injury or death.¹² Subparagraph (b)(1)(A) applies to any actor in any location and permits deadly force only to protect against serious

criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.”) (Citations omitted).

⁶ *Fersner v. United States*, 482 A.2d 387, 392 (D.C. 1984) (“[W]hen it comes to determining whether—and to what degree—force is reasonably necessary to defend a third person under attack, the focus ultimately must be on the intervenor’s, not the victim’s, reasonable perceptions of the situation.”). See also *Lee v. United States*, 61 A.3d 655, 660 (D.C. 2013); *Jones v. United States*, 555 A.2d 1024, 1027–28 (D.C. 1989); *Graves v. United States*, 554 A.2d 1145, 1147–49 (D.C. 1989).

⁷ The reasonableness of the belief that the conduct is necessary is fact-sensitive and depends in part on the type of harm that is being threatened, the degree of harm that is being threatened, and, in the case of defense of a third person, that third person’s ability to protect themselves. The actor’s awareness of the complainant’s reputation for violence is also a relevant consideration. See, e.g., *Hart v. United States*, 863 A.2d 866, 870 (D.C. 2004)

⁸ See Commentary to RCC § 22E-401, Lesser Harm; *Griffin v. United States*, 447 A.2d 776, 778 (D.C. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980) (“Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, “a chance both to refuse to do the criminal act and also to avoid the threatened harm,” the defenses will fail.”)).

⁹ *Gillis v. U. S.*, 400 A.2d 311, 313 (D.C. 1979) (explaining there is no affirmative duty to retreat because “when faced with a real or apparent threat of serious bodily harm or death itself, the average person lacks the ability to reason in a restrained manner how best to save himself and whether it is safe to retreat” but that a jury may consider whether a defendant “could have avoided further encounter by stepping back or walking away” in deciding whether the defendant was actually or apparently in danger).

¹⁰ For example, a factfinder may find that an actor who repeatedly stabs a person in the abdomen with a long knife used deadly force that was objectively likely to kill the person, even though the actor subjectively intended to only inflict a superficial wound. Expert testimony may be required to assist the factfinder in understanding whether particular conduct is likely to cause death or serious bodily injury.

¹¹ For example, a factfinder may find that a bullet wound was likely to cause a serious bodily injury if not for immediate intervention by a medical professional. Expert testimony may be required to assist the factfinder in understanding whether a particular injury is likely to cause death or serious bodily injury.

¹² A person does not attempt to use deadly force by merely desiring to seriously injure the other person. For example, a person who intends to kill someone by pinching their arm does not attempt to use deadly force.

bodily injury, a sexual act, confinement or death. Subparagraph (b)(1)(B) applies only when the actor is inside their own individual dwelling unit¹³ and permits deadly force to protect against the lesser harms of bodily injury and sexual contact, provided that other requirements of the defense are met.

Paragraph (b)(2) precludes application of the defense if the defendant is reckless in bringing about the situation that necessitates the defense. “Reckless” is defined in in RCC § 22E-206 and here requires that the person consciously disregard a substantial risk that they would cause the danger to occur and that the person’s disregard of the risk is clearly blameworthy. This exception generally excludes initial aggressors from the defense.¹⁴ However, if after a confrontation begins, the actor becomes subject to an unforeseeable amount of force, the actor may nevertheless respond in self-defense.¹⁵

Subparagraphs (b)(2)(A) – (b)(2)(c) identify three circumstances in which a person may claim self-defense or defense of another person even though they were the initial aggressor.

Under subparagraph (b)(2)(A), a law enforcement officer may claim self-defense or defense of another person even if the officer provoked the danger that necessitated the defensive conduct.¹⁶ The term “law enforcement officer” is defined in RCC § 22E-701. Subparagraph (b)(2)(A) requires that the officer be acting within the reasonable scope of their professional role.¹⁷ Law enforcement officers acting in their professional roles who are required to engage in conduct that they are practically certain will cause another person to use force are not barred from raising the defense under subsection (b)(2).

Under subparagraph (b)(2)(B), the defense is still available to an initial aggressor who is engaging in speech¹⁸ only.¹⁹ The term “speech” is defined in RCC § 22E-701 and

¹³ The word “inside” should be construed to mean inside the boundaries of the structure and to include a sunroom or balcony that is exposed to outdoor elements. The term “dwelling” is defined in RCC § 22E-701 and does not require proof of ownership or long-term residency. The words “individual” and “unit” make clear that the communal areas of multi-unit housing buildings are not included.

¹⁴ Consider, for example, an actor who learns of a protest in a neighboring town and wants to confront the protestors and cause a violent scene. The actor arms himself with a concealed firearm and begins assaulting protestors, hoping that one will fight back and give him a reason to use deadly force to in self-defense. Paragraph (b)(2) precludes the defense unless one of the criteria in subparagraphs (b)(2)(A), (b)(2)(B), or (b)(2)(C) is satisfied.

¹⁵ Under these circumstances, it cannot be said that the person consciously disregarded a substantial risk that they would provoke the danger. *See Andrews v. United States*, 125 A.3d 316, 323 n.22 (D.C. 2015) (defense available when complainant “unjustifiably escalate[d] the ... level of violence[.]”); *see also Lee v. United States*, 61 A.3d 655, 658 n.2 (D.C. 2013).

¹⁶ For example, if an officer is assaulted while placing someone under arrest, the officer may be justified in using the degree of force necessary to protect the officer from further assault. *See also* RCC § 22E-402, Execution of Public Duty.

¹⁷ For example, the officer might lose the justification defense if they are engaged in a personal dispute while off-duty or if they are engaging in conduct while on duty that is outside the reasonable scope of their job duties.

¹⁸ Consider, for example, an actor who appears at a political demonstration fighting for racial justice wearing a t-shirt with racist slurs written on it, fully intending and expecting that it will provoke a physical attack. If a demonstrator attacks the actor, the actor still has a right to use the degree of force necessary to protect herself from further assault.

¹⁹ The phrase “speech only” does not include menacing under RCC § 22E-1203, criminal threats under RCC § 22E-1204, or the tort of assault, defined as “putting another in apprehension of an immediate and harmful or offensive conduct.” *See Madden v. D.C. Transit System, Inc.*, 307 A.2d 756, 767 (D.C. 1973); *Person v. Children’s Hosp. Nat Medical Center*, 562 A.2d 648, 650 (D.C. 1989).

means oral or written language, symbols, or gestures. While political speech enjoys the greatest protection under the First Amendment, the exercise of other forms of speech does not alone constitute a provocation that bars the speaker from subsequently defending themselves or others if they are attacked and otherwise meet the requirements of the defense.

Under subparagraph (b)(2)(C), the defense is still available to an initial aggressor who withdraws²⁰ or makes reasonable efforts to withdraw from the location.²¹ Efforts to withdraw include communicating a desire to withdraw.

Paragraph (b)(3) precludes application of the defense if the actor is reckless as to the fact that they are protecting against conduct that is lawful.²² The term “reckless” is defined in RCC § 22E-206 and here requires that the person consciously disregard a substantial risk that the physical harm at issue is lawful and that the actor’s conduct is blameworthy under the circumstances. The exception does not require proof that the actor knows the specific law at issue but does require conscious disregard of a substantial risk that the physical harm is lawful in some manner.²³

Subsection (c) requires a factfinder to include consideration of certain specific facts when determining whether an actor who is a law enforcement officer and uses deadly force reasonably believed the conduct was necessary, in its timing, nature and degree. The terms “law enforcement officer” and “deadly force” are defined in RCC § 22E-701. The term “in fact” indicates that the actor is strictly liable with respect to whether they are a law enforcement officer and with respect to whether the force used is deadly force.²⁴ The list is not exhaustive and the factfinder may consider other factors.

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

Relation to Current District Law. *The revised defense of self or another person defense clearly changes current District law in three main ways.*

First, the revised statute does not categorically require that the harm to be avoided be immediate. The current D.C. Code does not codify a self-defense or defense of others defense. However, District case law²⁵ and the District’s current pattern jury instruction require immediacy.²⁶ In contrast, the RCC statute requires the conduct be necessary in its timing, nature, and degree, but does not specify that harm to be avoided must be imminent.

²⁰ If the defendant disengages, he is able to defend himself against any subsequent attack. *See Rorie v. United States*, 882 A.2d 763, 775 (D.C. 2005).

²¹ Consider, for example, a Bar Patron A who challenges Bar Patron B to meet outside for a fight. When a large crowd gathers, A has second thoughts and tries to run away. B prevents A from fleeing and begins severely beating A. A may be now be justified in committing assault against B in self-defense.

²² For example, an actor is not justified in committing an assault against a corrections officer to protect themselves against being confined inside D.C. Jail.

²³ Consider, for example, an actor who physically attacks a bouncer, in defense of a person the bouncer is removing at a bar. It is inconsequential that the actor does not know the specific law that authorizes a bouncer to act. If the actor recklessly disregards the fact that bouncer’s conduct is lawful, the defense of another person defense does not apply.

²⁴ RCC § 22E-207.

²⁵ *Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912) (“[I]t is necessary before one may kill another in self-defense, that he shall actually have believed in his own mind at the very moment he strikes the blow, that then either his life is in danger, or that he is in danger of great bodily harm.”); *Dawkins v. United States*, 189 A.3d 223, 233, 235 (D.C. 2019).

²⁶ Crim. Jury Inst. for DC Instruction § 9.500 (2019).

In unusual circumstances, conduct may be necessary to avoid non-immediate but otherwise inevitable harm.²⁷ This change improves the proportionality of the revised statutes.

Second, the revised defense provides that the use of deadly force is justified if the actor is inside their own dwelling and reasonably believes the conduct is necessary in its timing, nature, and degree, to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement. The D.C. Code does not codify a defense of self or another person defense. The DCCA has not squarely decided to accept or reject the “castle doctrine” that one who through no fault of his own is attacked in one’s own home is under no duty to retreat.²⁸ The District of Columbia Court of Appeals (DCCA) has adopted a “middle ground” approach to analyzing whether a person has a duty to retreat, holding that while there is no affirmative duty to retreat, a failure to retreat is some evidence of whether a defendant was actually or apparently in danger.²⁹ However, the court has held that the doctrine does not apply when the attacker is a co-occupant of the same home.³⁰ In contrast, the revised defense includes a broader right to self-defense inside one’s dwelling,³¹ as defined in RCC § 22E-701, permitting the use of deadly force to protect against more than serious bodily injury or death, irrespective of the complainant’s co-occupancy. Deadly force may be used to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement when the actor is in their dwelling and the other requirements of the defense (reasonable belief that the conduct is necessary in its timing, nature, and degree) are met.³² The revised defense specifically recognizes that protection against even lower-level bodily harms that occur in the home (versus another location) involve special consideration and a blanket ban on the use of deadly force for such lesser harms is unwarranted. This change improves the clarity and proportionality of the revised statutes.

Third, the revised statute provides that a law enforcement officer may be justified in using deadly force to protect a person from a sexual act or confinement. The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 forbids a law enforcement officer from using deadly force unless it is immediately necessary to protect a person from serious bodily injury or death.³³ In contrast, although there are few circumstances in which it would reasonably appear necessary in timing,

²⁷ As the Model Penal Code commentary to Necessity explains, “[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A’s car to a remote mountain location for a month’s stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A’s car although the threatened harm will not occur for three weeks.” See Model Penal Code § 3.02 cmt. at 17 (1985).

²⁸ *Cooper v. United States*, 512 A.2d 1002, 1005 (D.C. 1986); see also *Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996) (“We need not decide definitively whether the castle rule should apply.”).

²⁹ *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979).

³⁰ *Cooper v. United States*, 512 A.2d 1002, 1005–06 (D.C. 1986). The court reasoned that co-occupants are usually related and have some obligation to attempt to defuse the situation. The court stated that even unrelated roommates have a heightened obligation to treat each other with a degree of tolerance and respect.

³¹ Unlike some jurisdictions, the revised defense does not offer any broader protection inside one’s place of business.

³² Instances where deadly force is reasonably necessary in timing, nature, and degree to protect against a bodily injury or sexual contact are expected to be extremely rare, as other means of protection such as withdrawal or more moderate use of force may avoid the harm.

³³ Act 23-336.

nature, and degree to use deadly force to protect against a lesser harm, the revised statute permits the defense should such circumstances arise.³⁴ This change improves the proportionality of the revised statutes.

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

First, the revised defense applies to all offenses. The D.C. Code does not codify a self-defense or defense of others defense. The DCCA has recognized that self-defense is a defense to various offenses, including assault, possession of a prohibited weapon and threats.³⁵ However, the scope of offenses to which the current self-defense and defense of others defense applies is largely undefined. To resolve this ambiguity, the RCC clarifies that defense of self or another person may justify any offense. Limiting the defense to crimes involving the use of physical force, as is common in many jurisdictions,³⁶ may lead to counterintuitive and undesirable outcomes.³⁷ This change improves the consistency and proportionality of the revised statutes.

Second, the revised statute provides that an actor may be justified in using deadly force to protect against a sexual act or confinement. The current D.C. Code does not codify a self-defense or defense of others defense. District case law provides that a person may use deadly force to protect against “serious bodily harm,”³⁸ but has not defined the term “harm” in this context,³⁹ as distinguishable from “serious bodily injury” found elsewhere in the D.C. Code and case law.⁴⁰ Resolving this ambiguity, the revised statute permits the defense should such circumstances arise, provided that the conduct reasonably appears necessary in timing, nature, and degree. This change clarifies and may improve the proportionality of the revised statutes.

³⁴ Consider, for example, an assailant who has confined a large number of people in an internment camp, where they are being raped and tortured but not sustaining serious bodily injuries. If all other reasonable legal alternatives have been exhausted, an officer may be justified in using a less-lethal weapon that is likely (though not certain) to kill the assailant.

³⁵ *McBride v. United States*, 441 A.2d 644 (D.C. 1982); *Potter v. United States*, 534 A.2d 943 (D.C. 1987); *Reid v. United States*, 581 A.2d 359 (D.C. 1990); *Douglas v. United States*, 859 A.2d 641 (D.C. 2004); *Hernandez v. United States*, 853 A.2d 202 (D.C. 2004).

³⁶ See Model Penal Code §§ 3.04 and 3.05.

³⁷ Consider, for example, an actor who picks up a large tree branch to protect themselves from an assault in a public park. Under the Model Penal Code’s formulation, the actor would have a defense to assault for hitting the attacker with the tree branch but would have no defense to disorderly conduct for instead swinging the branch around wildly to create an appearance of danger.

³⁸ *Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912); *Gillis v. U. S.*, 400 A.2d 311, 313 (D.C. 1979).

³⁹ *But see Brown v. United States*, 139 A.3d 870, 872 (D.C. 2016) (defining “serious bodily harm” to have the same meaning as “serious bodily injury” with respect to the meaning of “deadly force”); *Stewart v. United States*, 370 A.2d 1374, 1376 (D.C. 1977) (recognizing in *dicta* that other jurisdictions include sexual attacks as a bodily harm that is a possible predicate for a duress defense but then describing only serious bodily injury and death as predicates in the District).

⁴⁰ “Serious bodily injury” in other contexts has been construed to mean injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or loss or impairment of a bodily member or function. *Brown v. United States*, 139 A.3d 870, 876 (D.C. 2016) (regarding the meaning of “serious bodily injury” in defense of property); *Jackson v. United States*, 970 A.2d 277, 279 (D.C. 2009) (citing *Jackson v. United States*, 940 A.2d 981, 986 (D.C. 2008); *Bolanos v. United States*, 938 A.2d 672, 677 (D.C. 2007); *Payne v. United States*, 932 A.2d 1095, 1099 (D.C. 2007); *Swinton v. United States*, 902 A.2d 772, 776–77 (D.C. 2006)); see also RCC § 22E-701.

Third, the revised statute defines clear parameters for when the defense is available to a someone who provokes an attack. District case law has held that self-defense is not available to someone who “deliberately places himself in a position where he has reason to believe his presence would provoke trouble.”⁴¹ The District of Columbia Court of Appeals (DCCA) has adopted a “middle ground” approach to analyzing whether a person has a duty to retreat, holding that while there is no affirmative duty to retreat, a failure to retreat is some evidence of whether a defendant was actually or apparently in danger.⁴² The ambiguity of this rule has resulted in courts requiring a duty to retreat in some cases and not others, with sometimes inconsistent and counterintuitive outcomes.⁴³ Resolving this ambiguity, the revised statute applies the RCC’s standardized definition of “reckless”⁴⁴ and clarifies that any person (other than a law enforcement officer or a person engaging in mere speech⁴⁵) who consciously disregards a substantial risk that they will provoke the danger necessitating the defense loses the right to self-defense, unless they retreat or make reasonable efforts to retreat.⁴⁶ This change improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised defense does not apply when the person is reckless as to the fact that they are protecting against conduct that is lawful.⁴⁷ The current D.C. Code does not codify a self-defense or defense of others defense. District case law has held that a person has no right to defend against an apparently lawful arrest or other apparently lawful restraint by a police officer,⁴⁸ but has not yet addressed other lawful conduct.⁴⁹ Resolving this ambiguity, the revised statute clarifies that a person cannot assert the offense if they are defending against a physical contact, bodily injury, sexual act, sexual contact, confinement, or death that is lawful and they are reckless as the fact that it is lawful. This change clarifies the revised statute.

Fifth, the revised statute amends the list of factors that a factfinder should consider when determining whether a law enforcement officer reasonably believed that deadly force was necessary, in its timing, nature and degree. The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 states that a factfinder should

⁴¹ *Rowe v. United States*, 370 F.2d 240, 241 (D.C. Cir. 1966); *Harris v. United States*, 364 F.2d 701 (D.C. Cir. 1966) (“One cannot provoke fight and then rely on claim of self-defense when such provocation results in counterattack unless he has previously withdrawn from fray and communicated such withdrawal.”); *Nowlin v. United States*, 382 A.2d 9, 14 n.7 (D.C. 1978); *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995).

⁴² *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979).

⁴³ *Compare Laney v. United States*, 294 F. 412, 414 (D.C. Cir. 1923) (finding that self-defense was unavailable to a man who ran away from a mob of 100 men yelling “Catch the nigger,” and “Kill the nigger,” because he reached a place of “comparative safety” and could have gone home) *with Marshall v. United States*, 45 App. D.C. 373 (1916) (finding no duty to retreat during a fight over a craps game and stating, “The right of a defendant when in imminent danger to take life does not depend upon whether there was an opportunity to escape.”).

⁴⁴ RCC § 22E-701.

⁴⁵ See Crim. Jury Inst. for DC Instruction § 9.504 (2019).

⁴⁶ See *Harris v. United States*, 364 F.2d 701, 702 (D.C. Cir. 1966); *Parker v. United States*, 158 F.2d 185, 186 (D.C. Cir. 1946); *Rowe v. United States*, 164 U.S. 546 (1896); *Bedney v. United States*, 471 A.2d 1022, 1023–24 (D.C. 1984).

⁴⁷ For example, an actor is not justified in committing an assault against a corrections officer to protect themselves against being confined inside D.C. Jail.

⁴⁸ *Speed v. United States*, 562 A.2d 124, 128 (D.C. 1989).

⁴⁹ E.g., a parent who is disciplining a child.

consider the totality of the circumstances and provides a non-exhaustive list of factors.⁵⁰ One of these factors is: “Whether the subject of the use of deadly force [] [p]ossessed or appeared to possess a deadly weapon.”⁵¹ The scope and meaning of “possession” of a deadly weapon, whether an officer’s training and experience is relevant, and other factors in this statute are unclear and there is no case law to date. To resolve these ambiguities, the revised statute clarifies the provision regarding possession of a weapon⁵² and expands the list to include the officer’s training and experience⁵³ and whether the law enforcement officer made all reasonable efforts to prevent a loss of a life. This clarifies the revised statute.

Relation to National Legal Trends. Statutory codification of self-defense and defense of others is broadly supported by national legal trends, however, there is variance with respect to the rights of initial aggressors⁵⁴ and the duty to retreat.

All 29 reform jurisdictions⁵⁵ codify a defense for using force to defend a person.⁵⁶ A growing majority of states impose no duty to “retreat to the wall” before using deadly

⁵⁰ Act 23-336.

⁵¹ *Id.*

⁵² Current law requires the factfinder to consider whether the complainant “Possessed or appeared to possess a deadly weapon,” whereas the revised statute focuses on whether it appeared to the law enforcement officer that the person possessed a weapon or had one readily available. It is of little consequence that a person constructively possessed a weapon in a far-off location.

⁵³ See Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, & Imperfect Self-Def.*, 2018 U. Ill. L. Rev. 629, 665 (2018) (“Unlike civilians, police officers undergo extensive training, including training on threat perception, and are more attuned than the average citizen to behaviors indicative of threat. Therefore, it makes sense to assess the reasonableness of an officer's beliefs and actions from the perspective of a reasonable officer in the defendant officer’s shoes.”) (Citations omitted.).

⁵⁴ See § 10.4(e) The aggressor's right to self-defense, 2 Subst. Crim. L. § 10.4(e) (3d ed.) (explaining An initial aggressor (or mutual combatant) to use self-defense in two situations: when a nondeadly aggressor is met with deadly force or when the initial aggressor withdraws (or tries to withdraw)).

⁵⁵ Twenty-nine states (“reform jurisdictions”) have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

⁵⁶ Ala.Code § 13A-3-23; Alaska Stat. Ann. § 11.81.330; Ariz. Rev. Stat. Ann. § 13-405; Ark. Code Ann. §§ 5-2-605, 5-2-607; Colo. Rev. Stat. Ann. § 18-1-704; Conn. Gen. Stat. Ann. § 53a-19; Del. Code Ann. tit. 11, § 464; Haw. Rev. Stat. Ann. § 703-304; 720 Ill. Comp. Stat. Ann. 5/7-1; Ind. Code Ann. § 35-41-3-2; Kan. Stat. Ann. § 21-5222; Ky. Rev. Stat. Ann. § 503.050; Me. Rev. Stat. tit. 17-A § 108; Minn. Stat. Ann. § 609.065; Mo. Ann. Stat. § 563.031; Mont. Code Ann. § 45-3-102; Mont. Code Ann. § 45-3-105; N.H. Rev. Stat. Ann. § 627:4; N.J. Stat. Ann. § 2C:3-4; N.Y. Penal Law § 35.15; N.D. Cent. Code Ann. § 12.1-05-03; Ohio Rev. Code Ann. § 2901.05; Or. Rev. Stat. Ann. § 161.209; 18 Pa. Stat. and Cons. Stat. Ann. § 505; S.D. Codified Laws § 22-16-35; Tenn. Code Ann. § 39-11-611; Tex. Penal Code Ann. § 9.31; Utah Code Ann. § 76-2-407; Wash. Rev. Code Ann. § 9A.16.020; Wis. Stat. Ann. § 939.48.

force outside of one’s home or business.⁵⁷ A few states include the Model Penal Code’s surrender-possession and comply-with-demand limits on deadly force.⁵⁸

⁵⁷ See § 10.4(f) Necessity for retreat, 2 Subst. Crim. L. § 10.4(f) (3d ed.) (explaining the National Rifle Association has recently advocated for states to pass “Stand Your Ground” laws, but the ABA Task Force has found that “[s]tand-your-ground laws hinder law enforcement, are applied inconsistently, and disproportionately affect minorities,” and also “that states with some form of stand-your-ground laws have seen increasing homicide rates.”).

⁵⁸ *Id.* (citing Conn. Gen. Stat. Ann. § 53a-19; Del. Code Ann. tit. 11, § 464; Haw. Rev. Stat. § 703-304; Me. Rev. Stat. Ann. tit. 17-A, § 108; Neb. Rev. Stat. § 28-1409; N.J. Stat. Ann. § 2C:3-4); Model Penal Code § 3.04.

RCC § 22E-404. Defense of Property.

- (a) *Defense.* It is a defense that, in fact, the actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to protect real property or tangible personal property from damage, taking, trespass, or misuse.
- (b) *Exceptions.* This defense is not available when, in fact:
 - (1) The actor uses or attempts to use deadly force;
 - (2) The property is land that is property of another, unless the actor has or reasonably believes they have the effective consent of a property owner to protect the land; or
 - (3) The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct.
- (c) *Definitions.* The term “reckless” has the meaning specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “deadly force,” “effective consent,” “property,” and “property of another,” have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. This section establishes defense of property defense for the Revised Criminal Code (RCC). The defense applies when a person acts under a reasonable belief that they are protecting their own property or property of another. The RCC defense of property defense is the first codification of such a defense in the District.

Subsection (a) establishes the requirements for the defense. The term “in fact” indicates that no culpable mental state need be proven for the defense requirements in subsection (a).¹

Subsection (a) specifies that the person must reasonably believe that the conduct constituting the offense is necessary to prevent a property harm from occurring or continuing. The term “property” is defined in RCC § 22E-701 to include services, credit, money, licenses, and benefits. However, the defense of property defense applies only when an actor is protecting real property (including things growing on, affixed to, or found on land) or personal property (i.e. movable property, including an animal).² The threatened harm may be damage, taking, trespass, or misuse of property belonging to any person and must be specific and identifiable.³ The actor’s belief that the harm will occur may be mistaken, but it must be objectively reasonable. Reasonableness is an objective standard

¹ RCC § 22E-207.

² For example, a person is not justified in committing fraud to protect their own wealth or in committing assault to protect a friend from being financially exploited.

³ The defense does not apply where a person takes proactive measures to avoid a risk of some indeterminate harm. Consider, for example, a person who believes that a group of protestors pose a general danger to a neighborhood. That person is not justified in using force against a protestor unless they believe that specific protestor is posing a specific threat to specific property.

that takes into account relevant characteristics of the actor.⁴ The actor must believe⁵ that the conduct is necessary in its timing, nature, and degree.⁶ Conduct is not necessary if the harm to property can be avoided by a reasonable “legal alternative available to the defendants that does not involve violation of the law.”⁷

Subsection (b) establishes three exceptions to the defense of property defense.

Paragraph (b)(1) makes the defense unavailable when the actor uses or attempts to use deadly force. The term “deadly force” is defined in RCC § 22E-701 and means any physical force that is likely to cause serious bodily injury or death. A person may use deadly force even if the person does not intend to cause a serious injury⁸ and even if death or serious injury does not occur.⁹ The word “attempt” in paragraph (b)(1) should be construed to have the same meaning as in Criminal Attempt under RCC § 22E-301. That is, a person attempts to use deadly force if they engage in conduct that is reasonably adapted to causing serious bodily injury or death.¹⁰

Paragraph (b)(2) precludes application of the defense when a person is acting to protect someone else’s¹¹ land without their permission.¹² The exception is limited to

⁴ See Commentary to RCC § 22E-401, Lesser Harm; Model Penal Code § 3.02 cmt. at 241-42 (1985) (concerning the necessity defense) (“...these questions are asked not in terms of what the actor’s perceptions actually were, but in terms of an objective view of the situation as it actually existed...The standard for ultimate judgement invites consideration of the ‘care that a reasonable person would observe in the actor’s situation.’ There is an inevitable ambiguity in ‘situation.’ If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.”) (Citations omitted).

⁵ The reasonableness of the belief that the conduct is necessary is fact-sensitive and depends in part on the type of harm that is being threatened, the degree of harm that is being threatened, and the actor’s relationship to the property.

⁶For example, an actor may be justified in beating a person severely (causing bodily injury but not serious bodily injury) to prevent that person from setting the actor’s home on fire and unjustified in beating a person severely to prevent them from keying the actor’s car or walking across the far edge of the actor’s lawn.

⁷ See Commentary to RCC § 22E-401, Lesser Harm; *Griffin v. United States*, 447 A.2d 776, 778 (D.C. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980) (“Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, “a chance both to refuse to do the criminal act and also to avoid the threatened harm,” the defenses will fail.”)).

⁸ For example, a factfinder may find that an actor who repeatedly stabs a person in the abdomen with a long knife used deadly force that was objectively likely to kill the person, even though the actor subjectively intended to only inflict a superficial wound. Expert testimony may be required to assist the factfinder in understanding whether particular conduct is likely to cause death or serious bodily injury.

⁹ For example, a factfinder may find that a bullet wound was likely to cause a serious bodily injury if not for immediate intervention by a medical professional. Expert testimony may be required to assist the factfinder in understanding whether a particular injury is likely to cause death or serious bodily injury.

¹⁰ A person does not attempt to use deadly force by merely desiring to seriously injure the other person. For example, a very weak person who intends to kill someone by pinching their arm does not attempt to use deadly force.

¹¹ The term “property of another” is defined in RCC § 22E-701 to include property in which the actor has some interest. However, the exception does not apply where the actor has the effective consent of any owner, including themselves.

¹² Consider, for example, Tourist A notices Tourist B continuing to take photographs instead of promptly leaving the National Arboretum at closing time. A is not justified under this section in assaulting B and removing them from the grounds unless A reasonably believes that the U.S. Department of Agriculture gave effective consent to A protecting its property.

protection of land and does not include real property that is growing on, affixed to, or found on land.¹³ The exception applies when the actor reasonably believes they have the owner’s effective consent to take action to protect the land, even if the owner does not actually consent.¹⁴ The terms “property of another” (and “property”) and “effective consent” (and “consent”) are defined in RCC § 22E-701. An agency relationship may be evidence of effective consent¹⁵ but is not required.¹⁶

Paragraph (b)(3) precludes application of the defense if the actor is reckless as to the fact that they are protecting against conduct that is lawful.¹⁷ The term “reckless” is defined in RCC § 22E-206 and here requires that the person consciously disregard a substantial risk that the property harm is lawful and that the actor’s conduct is blameworthy under the circumstances. The exception does not require proof that the actor knows the specific law at issue but does require conscious disregard of a substantial risk that the harm to property is lawful in some manner.

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

Relation to Current District Law. *The revised defense of property defense clearly changes current District law in two main ways.*

First, the revised statute does not categorically require that the harm to be avoided be immediate. The current D.C. Code does not codify a defense of property defense. However the D.C. Court of Appeals (DCCA) previously has approved use of a jury instruction that includes an immediacy requirement¹⁸ and the District’s current pattern jury instruction includes an even stronger immediacy requirement.¹⁹ In contrast, the RCC statute requires the conduct be necessary in its timing, nature, and degree, but does not specify that harm to be avoided must be imminent. In unusual circumstances, conduct may be necessary to avoid non-immediate but otherwise inevitable harm.²⁰ This change improves the proportionality of the revised statutes.

¹³ For example, an actor may be justified in protecting a school window from being criminally damaged, even if the actor does not have the effective consent of the school. However, the actor is not justified under this section in protecting the school from a trespass. *But see* D.C. Code § 23-582 (concerning citizen arrests).

¹⁴ Consider, for example, Neighbor A asks Neighbor B to “keep an eye on” A’s house while A is away on vacation. B observes an intruder attempting to crawl through A’s window and trespasses onto A’s lawn and assault the intruder to hinder the burglary. A would have preferred that B call the police instead of trespassing. B’s assault is justified if B reasonably believed that the A gave effective consent.

¹⁵ For example, a person who is hired to work as a bouncer at the door of a bar has the effective consent of the bar to protect the land from a trespass.

¹⁶ For example, a fashion model may be justified in using force to protect a runway from an intruder. *See* Jonah Engel Bromwich and Sanam Yar, *Meet the Chanel Crasher*, NEW YORK TIMES (October 4, 2019).

¹⁷ For example, an actor is not justified in committing an assault to protect their vehicle from what they know to be a lawful repossession.

¹⁸ *Gatlin v. United States*, 833 A.2d 995, 1008 (D.C. 2003) (“A person is justified in using reasonable force to protect his/her property from trespass or theft when s/he reasonably believes that his/her property is in immediate danger of an unlawful trespass or taking and that the use of such force is necessary to avoid the danger...”)

¹⁹ Crim. Jury Inst. for DC Instruction § 9.520 (2019) (“But s/he must act immediately after the taking has occurred, or in hot pursuit of the person who has taken the property. If time has elapsed, a person may not use force in repossessing the property.”).

²⁰ As the Model Penal Code commentary to Necessity explains, “[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an

Second, the revised statute includes harm to property belonging to a third person. The current D.C. Code does not codify a defense of property defense. However, the DCCA has stated that the District follows the common law with regard to defense of property,²¹ and at common law the defense is generally believed to be available only with respect to one’s own property.²² Also, in at least one case the DCCA has also held that the defense was available only if the evidence shows the property belonged to the defendant or that the defendant reasonably believed it did.²³ In contrast, the RCC provides that an actor may be justified in protecting another person’s property, provided that the conduct is reasonable and the actor reasonably believes it is necessary. In some circumstances, current law effectively punishes a person who is acting to protect the property of a family member or with reasonable and charitable intentions to help a stranger.²⁴ Current law also may punish a person who is acting according to their job duties.²⁵ However, the revised defense also provides an exception in paragraph (b)(2) for a person who is unilaterally acting to protect public or private land without permission from the owner to act.²⁶ This change improves the consistency and proportionality of the revised statutes.

Beyond these two changes to current District law, two other aspects of the revised statute may constitute substantive changes to District law.

First, the revised defense applies to all offenses. The D.C. Code does not codify a defense of property defense. The DCCA has recognized that defense of property is a defense to various offenses, including simple assault and a possession of a prohibited weapon offense²⁷ that requires proof of specific intent to use the weapon “unlawfully.”²⁸ However, the scope of offenses to which the current defense of property defense applies is largely undefined. To resolve this ambiguity, the RCC clarifies that defense of property may justify any offense. Limiting the defense to crimes involving the use of physical force, as is common in many jurisdictions,²⁹ may lead to counterintuitive and undesirable outcomes.³⁰ This change improves the consistency and proportionality of the revised statutes.

evil that may occur in the future. If, for example, A and B have driven in A’s car to a remote mountain location for a month’s stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A’s car although the threatened harm will not occur for three weeks.” See Model Penal Code § 3.02 cmt. at 17 (1985).

²¹ *Jones v. United States*, 172 A.3d 888, 891 (D.C. 2017).

²² § 10.6(e) Property of another, 2 Subst. Crim. L. § 10.6(e) (3d ed.).

²³ *Gatlin v. United States*, 833 A.2d 995, 1010 (D.C. 2003).

²⁴ Consider, for example, a person who observes a thief snatch a purse from an elderly person, runs after the thief, retrieves the purse, and returns it to the owner.

²⁵ For example, a bouncer at a bar.

²⁶ Consider, for example, Tourist A notices Tourist B continuing to take photographs instead of promptly leaving the National Arboretum at closing time. A is not justified under this section in assaulting B and removing them from the grounds unless A reasonably believes that the U.S. Department of Agriculture effectively consented to A protecting its property. *But see* D.C. Code § 23-582 (concerning citizen arrests).

²⁷ D.C. Code § 22-4514(b).

²⁸ *Jones v. United States*, 172 A.3d 888, 893 and n. 19 (D.C. 2017).

²⁹ See Model Penal Code § 3.06.

³⁰ Consider, for example, an actor who observes a person attempting to spray graffiti on their home. Under the Model Penal Code’s formulation, the actor would have a defense to assault for tackling the graffiti artist to the ground but would have no defense to theft for instead stealing the spray paint and carrying it away.

Second, the revised defense of property defense does not apply when the person is reckless as to the fact that they are protecting against conduct that is lawful.³¹ The current D.C. Code does not codify a defense of property defense. However, DCCA case law previously has approved a jury instruction that included an unlawfulness requirement,³² and the District’s current pattern jury instruction includes the same language.³³ However, there is no DCCA case law on point. Resolving this ambiguity, the revised statute clarifies that a person cannot assert the offense if they are defending against a damage, taking, trespass, or misuse of property that is lawful and they are reckless as the fact that it is lawful. This change clarifies the revised statute.

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

The revised defense codifies a rejection of the pre-20th century castle doctrine approach to defense of property (permitting deadly force in defense of one’s “castle”)³⁴ and categorically bars use of deadly force in defense of property only. The D.C. Code does not codify a defense of property defense. However, the DCCA recently has held that deadly force cannot be used to defend property alone.³⁵ Elsewhere, the RCC adopts a more modern castle doctrine approach, permitting deadly force under certain circumstances *within* one’s castle.³⁶ Specifically, the revised defense of self or another person defense³⁷ provides that the use of deadly force is justified if the actor is inside their own dwelling

³¹ For example, an actor is not justified in committing an assault to protect their vehicle from what they know to be a lawful repossession.

³² *Gatlin v. United States*, 833 A.2d 995, 1008 (D.C. 2003) (“A person is justified in using reasonable force to protect his/her property from trespass or theft when s/he reasonably believes that his/her property is in immediate danger of an *unlawful* trespass or taking and that the use of such force is necessary to avoid the danger...”) (emphasis added).

³³ Crim. Jury Inst. for DC Instruction § 9.520 (2019).

³⁴ “It is a familiar maxim of the law, that ‘a man’s house is his castle,’ and that he has a right to defend it.” *State v. Hooker*, 17 Vt. 658, 670 (1845).

It is sacred for the protection of his person, and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant, or members of his family, and in order to accomplish this, the assailant attacks the castle, in order to reach the inmate. In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold, and prevent him from breaking in, by any means rendered necessary by the exigency—and upon the same ground and reason that one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.

State v. Patterson, 45 Vt. 308 (1873).

³⁵ *Jones v. United States*, 172 A.3d 888, 892 (D.C. 2017) (“It is never reasonable or justifiable, however, to use deadly force—force likely to cause death or ‘serious’ bodily harm or injury—merely to protect property, even if the intrusion or danger to the property cannot otherwise be prevented. This is because ‘[t]he preservation of human life, and of limb and member from grievous harm, is of more importance to society than the protection of property.’” (internal citations omitted)).

³⁶ “In some cases, this ‘castle doctrine’ is described as follows: ‘[W]hen one is violently assaulted in his own house or immediately surrounding premises, he is not obliged to retreat.’” *Jenkins v. State*, 942 So. 2d 910, 914 (Fla. Dist. Ct. App. 2006).

³⁷ RCC § 22E-403.

and reasonably believes the conduct is necessary in its timing, nature, and degree, to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement. However, the revised defense of property defense does not permit an actor to meet an intruder at the threshold of the home and prevent him from entering by deadly force, or to assume automatically that an intruder intended to commit an act of violence therein.³⁸ This change clarifies the revised statutes.

Relation to National Legal Trends. *Statutory codification of a defense of property defense statute is broadly supported by national legal trends, however, contrary to the RCC, many states permit the use of deadly force with respect to defense of property and few expressly permit defending property of another.*

All 29 reform jurisdictions³⁹ codify a defense of property defense.⁴⁰ Most jurisdictions allow deadly force to protect against arson, burglary, robbery, or felonies (generally or only forcible), but five states⁴¹ follow the MPC and RCC approach and limit deadly force to instances in which there is a substantial risk to the person.⁴² Ten states expressly allow a person to use force to protect property of another.⁴³

³⁸ See, e.g., N.C. Gen. Stat. Ann. § 14-51.2 (“The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm...”); S.C. Code Ann. § 16-11-440 (same); see also *Howell v. State*, 144 So. 3d 211, 217 (Miss. Ct. App. 2014) (“[T]he castle doctrine ‘creates a presumption of fear and abridges a duty to retreat in certain prescribed circumstances.’”).

³⁹ Twenty-nine states (“reform jurisdictions”) have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

⁴⁰ Ala. Code § 13A-3-26; Alaska Stat. Ann. § 11.81.350; Ariz. Rev. Stat. Ann. § 13-408; Ark. Code Ann. §§ 5-2-608, 5-2-609, 5-2-620; Colo. Rev. Stat. Ann. § 18-1-706; Conn. Gen. Stat. Ann. § 53a-21; Del. Code Ann. tit. 11, § 466; Haw. Rev. Stat. Ann. § 703-306; 720 Ill. Comp. Stat. Ann. 5/7-3; Ind. Code Ann. § 35-41-3-2; Kan. Stat. Ann. § 21-5223; Ky. Rev. Stat. Ann. § 503.080; Me. Rev. Stat. tit. 17-A; § 105, Minn. Stat. Ann. § 609.06; Mo. Ann. Stat. § 563.041; Mont. Code Ann. § 45-3-104; N.H. Rev. Stat. Ann. § 627:7; N.J. Stat. Ann. § 2C:3-6; N.Y. Penal Law § 35.25; N.D. Cent. Code Ann. § 12.1-05-06; Ohio Rev. Code Ann. § 2305.40; Or. Rev. Stat. Ann. § 161.229; 18 Pa. Stat. and Cons. Stat. Ann. § 507; S.D. Codified Laws § 22-18-4; Tenn. Code Ann. § 38-2-102; Tex. Penal Code Ann. § 9.41; Utah Code Ann. § 76-2-406; Wash. Rev. Code Ann. § 9A.16.020; Wis. Stat. Ann. § 939.49.

⁴¹ Del.Code Ann. tit. 11, § 466; Haw.Rev.Stat. § 703-306; Ky.Rev.Stat. § 503.080; Neb.Rev.Stat. § 28-1411; Pa.Cons.Stat. Ann. tit. 18, § 507.

⁴² § 10.6(b) Defense of dwelling, 2 Subst. Crim. L. § 10.6(b) (3d ed.).

⁴³ See § 10.6(e) Property of another, 2 Subst. Crim. L. § 10.6(e) (3d ed.) (citing Del. Code Ann. tit. 11, § 466; Haw. Rev. Stat. § 703-306; Ky. Rev. Stat. Ann. § 503.080; Neb. Rev. Stat. § 28-1411; N.D. Cent. Code § 12.1-05-06 (nondeadly force); Pa. Cons. Stat. Ann. tit. 18, § 507; S.D. Cod. Laws § 22-18-4 (nondeadly force); Tenn. Code Ann. § 39-11-615; Tex. Penal Code Ann. § 9.43; Wis. Stat. Ann. § 939.49).