D.C. Criminal Code Reform Commission

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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety

From: Richard Schmechel,
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Date: October 15, 2020

Re: Testimony for the October 15, 2020 Hearing on B23-0723, the "Rioting Modernization Amendment Act of 2020" and B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020."

Introduction.

Thank you for the opportunity to provide testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on B23-0723, the "Rioting Modernization Amendment Act of 2020" (hereafter "rioting bill"), and B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020," (hereafter "policing and justice reform bill"). My name is Richard Schmechel. I am the Executive Director of the Criminal Code Reform Commission (CCRC) and am testifying on its behalf.

The CCRC is a small, independent District agency that began operation October 1, 2016. The CCRC's primary mission is to issue comprehensive recommendations for the Mayor and Council on reform of the District's criminal statutes. Specifically, the CCRC's work is focused on developing comprehensive recommendations to reform the District's "substantive" criminal statutes—i.e. laws that define crimes and punishments.

The CCRC expects to issue its final recommendations on or by March 30, 2021. These recommendations will address at least four matters in the policing and justice reform bill and rioting bill, including: (1) codification of a new restriction on law enforcement use of force; (2) repeal of the current failure to arrest statute (D.C. Code § 5-115.03); (3) changes to the jury demandability statute (D.C. Code § 16-705(b)(1)); and (4) changes to the rioting statute (D.C. Code § 22-1322). My testimony is limited to these four subjects.

Absent final recommendations approved by the CCRC's statutorily-designated Advisory Group, the agency cannot take a position regarding the specific bill language now before the Committee. However, the CCRC has completed research and drafted statutory language on the four abovementioned matters and is near finalization of its recommendations. Based on its current drafts on these four topics, the CCRC draft recommendations are almost entirely consistent with, and broadly supportive of, the police and justice reform bill and rioting bill language.

I. Codification of a new restriction on law enforcement use of deadly force.

To start, I'd like to raise two points regarding Subtitle N of the policing and justice reform bill, regarding the use of deadly force by a law enforcement officer.

First, this provision would begin to fill a substantial gap in the current D.C. Code. The District currently is in a minority of jurisdictions nationally for not legislatively codifying the requirements self-defense, defense of others, and other general defenses. Such defenses exist in the District only to the extent they have been recognized by federally-appointed judges in individual cases over the last two centuries. For decades, the Model Penal Code, dozens of jurisdictions, and a broad array of experts have recognized that all general defenses, including as to use of deadly force, should be codified by the legislative branch because they involve weighty policy choices and fixing the language by statute provides a more consistent basis for administering the law.

Second, the language in subsections (a), (b) and (c)(1) of Subtitle N appears consistent with codified language in other jurisdictions and current District case law, while subsection (c)(2) would change District law to some degree. There are some ambiguities in subsections (a), (b) and (c)(1) that could be interpreted in a manner that would change District law, however. These ambiguities include: the meaning of "intended" in the proposed definition of "deadly force;" whether "totality of the circumstances" in subsection (b)(2) includes facts unknown to the law enforcement officer but available to the factfinder;[1] the overall characterization of the provision as a limitation on self-defense or defense of others; and the burden of proof for raising this apparent defense. However, on their face, subsections (a), (b), and (c)(1) are consistent with current District case law and national norms. Subsection (c)(2), in contrast, has little precedent in other jurisdictions' statutes. However, evidentiary provisions regarding police conduct is a fast-changing legislative area and subsection (c)(2) is quite limited in its effect. The subsection does not preclude consideration of any evidence nor make any evidence dispositive. It is merely a non-exclusive list to guide factfinder inquiry.

The policing and justice reform bill language differs somewhat from the current CCRC draft recommendations by providing less specificity regarding requirements of the defense and not addressing some possible scenarios. The CCRC draft recommendations go into more detail by, for example:

- Clarifying the meaning of "reasonable" and "necessary" by requiring the use of deadly force to be "necessary in its timing, nature, and degree;"
- Specifying that attempts to use deadly force are treated the same as actual uses of deadly force;[2]

[1] While "totality of circumstances" is ambiguous on its face as to whether the analysis reaches circumstances that the law enforcement officer has no subjective awareness of, the provision in subsection (c)(2)(A)(i) referring to "possessed or appeared to possess a deadly weapon" suggests that the "totality of circumstances" is meant to include facts *not* known to the law enforcement officer at the time of the incident (e.g., the complainant actually "possessed" a deadly weapon even though they did not appear to do so).

[2] The bill addresses this issue through its inclusion in the definition of "deadly force" of "force that is … intended to cause serious bodily injury or death." However, "intended" is not defined and it is unclear if the term is meant to differ from the requirements for attempt liability in the District.

- Specifying that deadly force may be justified to prevent a sexual act (involving penetration) or confinement (kidnapping), when other requirements of the defense are met; and
- Specifying, in addition to other considerations, that a factfinder must consider whether all reasonable efforts were made to prevent a loss of a life, including abandoning efforts to apprehend the complainant.

The CCRC draft recommendations also more comprehensively address the use of force (not just deadly force) in self-defense or defense of others, and they do so not only for law enforcement officers but for all persons. The CCRC draft recommendations specify other exceptions to claims of self-defense and defense of others, and they do all this by using definitions standardized across many revised statutes rather than being limited to the law enforcement use of deadly force.

Yet, while the CCRC draft recommendations go into greater detail and provide a much broader framework for self-defense and defense of others, the differences between the bill language and the CCRC draft recommendations are minor and the bill is almost entirely consistent with the draft recommendations and current law.

II. Repeal of the current failure to arrest statute (D.C. Code § 5–115.03).

The next matter I'd like to raise briefly is Subtitle J of the of the policing and justice reform bill, which repeals of D.C. Code § 5-115.03, a statute that criminalizes failure to make an arrest for an offense committed in a law enforcement officer's presence.

A fundamental tenet of any criminal justice system must be that the criminal justice system is a last resort when other efforts to ensure public safety fail. This statute enshrines the opposite, making an officer criminally liable for not making an arrest even when doing so does not advance justice. Moreover, as the statute refers to both federal and District law, it effectively binds District law enforcement officers to follow federal crime policy on drug and other offenses even when such the District has a different policy. The statute is routinely ignored in current practice and continuing to include the law in the D.C. Code undermines the legitimacy of all criminal laws.

When an officer's failure to arrest an individual is because of the officer's collusion in a protection scheme or because of some other illicit motive, other criminal statutes and doctrines of accomplice and conspiracy liability adequately sufficiently criminalize and punish such conduct.

Consistent with the bill, the CCRC draft recommendations also recommend repeal of this statute.[3]

III. Changes to the jury demandability statute (D.C. Code § 16-705(b)(1)).

Next, I'd like to raise three points regarding Subtitle I of the policing and justice reform bill, which gives the option of a jury trial (rather than a single-judge bench trial) to persons accused of committing a simple assault against a law enforcement officer.

[3] *See* CCRC First Draft of Report #29 – Failure to Arrest (attached).

The first point is that this amendment appears to fulfill the intent of the 2016 Neighborhood Engagement Achieves Results (NEAR) Act to let jurors decide charges of assaults on police officers. The NEAR Act in relevant part made the misdemeanor charge of assault against a police officer (APO) and charges of resisting arrest subject to six months maximum incarceration instead of 180 days. Why this slight increase? Since 1993 the District's jury demandability statute has provided that a 180-day offense *is not* jury demandable whereas a six-month offense *is* jury demandable. The NEAR Act legislation made APO and resisting arrest charges jury demandable, in recognition that most states do so and that the change, in part, could make prosecutors consider diversion options and take judges out of the position of having to make an adverse credibility determinations that could impact an officer's career.[4]

However, the NEAR Act didn't change the District's general "simple assault" statute (D.C. Code § 22-404(a)(1)), even though the simple assault statute is a 180-day, not jury demandable offense that can be brought against any person accused of assaulting anyone (including a law enforcement officer). Consequently, the NEAR Act left open the possibility that, based on the same conduct, instead of bringing a six-month jury-demandable APO charge, a prosecutor instead could bring a simple assault charge with a 180-day penalty and avoid the person accused of assaulting a law enforcement officer asking for a jury trial.

Available evidence suggests that, because the NEAR Act failed to amend jury demandability for simple assault charges against a police officer, the legislation failed to make a practical difference in how these cases were handled. Prosecutorial charging practices merely shifted to bring simple assault charges instead of APO charges. While court data on simple assault charging and convictions does not track whether the complainant in the case was a law enforcement officer, a drop in APO charges after passage of the NEAR Act coincides with a similar size increase in the number of simple assault charges.[5]

The second point I'd like to raise in connection with this expansion of jury demandability is to note that the District is a national outlier in its restrictions on the right to a jury trial. Most states make every single crime carrying an imprisonment penalty jury demandable.

Thirty-five states currently provide the right to a jury trial in virtually all criminal prosecutions in the first instance.[6] Another three states require bench trials for some minor criminal offenses, but provide a jury trial right *de novo* on appeal, effectively guaranteeing a jury trial right in every case.[7] Another three states have developed systems that stop short of a full jury

[4] Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17.
[5] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 10-11 (attached).
[6] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Alabama, Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming).
[7] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Arkansas, North Carolina, and Virginia).

trial right, but are more expansive than the constitutional minimum.[8] Only nine other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[9]

The third point is that while expansion of jury demandability may or may not result in some administrative efficiency costs,[10] it may have significant effects on the public's perception of the legitimacy of the justice system. This point has been articulated eloquently in a 2018 concurring opinion by Senior Judge Washington of the D.C. Court of Appeals who noted that the Council could reconsider its past decision to "value judicial economy above the right to a jury trial."

> Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial. This may be an important message to send at this time because many communities, especially communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise of police powers by the state.[11]

Public participation in deciding the facts of alleged assaults on a law enforcement officer may improve public trust and confidence even if the results were to be no different than those made by judges in non-jury bench trials.

The current CCRC draft recommendation on jury demandability provides that all forms of assault and threats where the complainant is a law enforcement officer should be jury demandable, consistent with Subtitle I in the policing and justice reform bill. However, the current CCRC draft recommendations on jury demandability go further, recommending (at present—these issues are still under review) the District revert to the standard it held from 1926[12] to 1993[13] that defendants have a right to demand a jury in any case in which they are subject to imprisonment for more than 90 days. In addition, certain other offenses with a 90-day or lower imprisonment penalty would also be jury demandable under the CCRC draft recommendation.[14]

IV. Changes to the rioting statute (D.C. Code § 22-1322).

Lastly, I'd like to raise several points regarding the rioting bill, which revises the elements and penalty of D.C. Code § 22-1322, the District's rioting statute.

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[8] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Hawaii (adopting a three-part test to determine an offense's severity), New Mexico (providing a jury trial right for all offenses punishable by more than ninety days), and New York (providing a full jury trial right throughout the state, but only for offenses punishable by six months in New York City).

[9] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island).

[10] The criminal justice system is a dynamic system with multiple actors exercising discretion who can adjust to time and staffing constraints in various ways. For example, rather than increase court jury trials, the system may adjust to an expansion of jury demandability by changing charging practices (as happened previously when the NEAR Act made APO jury demandable but left simple assault non-jury demandable) or plea bargaining practices.

[11] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018).

[12] Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119).

[13] Criminal and Juvenile Justice Reform Amendment Act of 1992, D.C. Law 9-272.

[14] *See* CCRC First Draft of Report #51 – Jury Demandable Offenses (attached).

First, what is distinctive about rioting as compared to the hundreds of other crimes in the D.C. Code is that an actor is engaging in wrongdoing in a group context. Other aspects of the crime being equal, group action may be harder to oppose or control, may lower inhibitions so as to effectively embolden others to join in, or may lead to a more severe overall harm resulting from cumulative actions. Consequently, wrongdoing committed in a group context arguably[15] merits having a separate offense of rioting and punishing such conduct somewhat more severely than the same conduct committed outside the group context.

However, it is critical to not lose sight of the fact that regardless whether there is a rioting statute or not, with whatever punishment it may provide, the D.C. Code contains hundreds of other criminal offenses that punish each particular form of wrongdoing in a far more specific and proportionate manner. Crimes as various as theft, destruction of property, robbery, assault, and sexual abuse vary sharply in their requirements and seriousness and a person who commits these acts should first and foremost be charged according their particular form of wrongdoing even if, in addition, there is some slight liability under a rioting statute.

For example, a person who breaks a store window during a riot could alternatively, or in addition to a rioting charge, be charged under the District's destruction of property offense which provides liability for anyone who "maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his or her own."[16] If the window damage was $1,000 or more, that person is subject to a 10 year imprisonment penalty under current District law (the same as felony rioting), and if the damage is less than $1,000 then the maximum imprisonment is 180 days (the same as misdemeanor rioting).[17] Similarly, a person who enters a store with intent to steal an item of any value during a riot ("looting") could alternatively, or in addition to a rioting charge, be charged under the District's second degree burglary statute and be subject to a 15 year imprisonment.[18] Vandalizing property with spray paint could alternatively, or in addition to a rioting charge, be charged under the District's graffiti offense and be subject to a 180-day penalty.[19] Merely threatening to commit property damage of any sort or bodily injury of any sort could alternatively, or in addition to a rioting charge, be charged under the District's threats offense and be subject to a 20 year penalty.[20]

Even when a person's conduct falls short of these traditional crimes, the District's disorderly conduct statute[21] authorizes arrest, conviction, and up to a 90 day penalty for the very same general types of behavior involved in "riotous" activity:

> "(a) In any place open to the general public, and in the communal areas of multi-unit housing, it is unlawful for a person to:

[15] Even this fundamental justification for a rioting statute is open to debate, as it may be thought that an individual is less culpable and deserves a lower punishment for committing a crime in a group context as compared to engaging in such context on their own.
[16] D.C. Code § 22–303.
[17] *Id.*
[18] D.C. Code § 22–801.
[19] D.C. Code § 22–3312.04.
[20] D.C. Code § 22–1810.
[21] D.C. Code § 22–1321.

(1) Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken;

(2) Incite or provoke violence where there is a likelihood that such violence will ensue; or

(3) Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence by that person or another person."

Moreover, both the current D.C. Code rioting statute and the reform bill's rioting statute implicitly assume that another crime provides the primary liability and punishment for illegal rioting by punishing any person who engages in rioting the same, with a flat and relatively low 180-day penalty regardless whether the individual committed an assault, an aggravated assault, a petty theft, or arson of a building. That penalty is obviously disproportionate—too low or too high—if rioting is the most severe, primary charge. However, the current 180-day penalty makes sense for a secondary offense that effectively provides a small, but significant, increase in liability for committing the act as part of group conduct.

Second, just as the D.C. Code's many crimes already provide more appropriate descriptions of the elements that must be proven and the punishment for the crime that a person commits during a riot, the D.C. Code also provides liability for any person who "incites" any type of criminal conduct. The District's current "aiding and abetting" statute in D.C. Code § 22-1805 provides that, "for any criminal offense all persons advising, *inciting*, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories." This aiding and abetting statute effectively makes a person who incites damage to property during a riot liable to the same criminal penalty as the person who actually commits the damage to property. Moreover, if a person incites multiple people to engage in damage to property during a riot, that person's liability is likewise multiplied. The District's conspiracy liability statute, D.C. Code § 22-1805a also provides overlapping liability for a person who agrees to joint participation in what constitutes a crime.

Pointing out that the current D.C. Code already addresses "incitement" of any crime is important because the current rioting statute takes a sharply different approach to incitement by penalizing incitement of rioting that results in excess of $5,000 property damage or someone experiencing serious bodily injury by 10 years imprisonment. That 10-year penalty is 20 times the 180-day penalty for incitement that results in lesser harm[22]—and 20 times the 180-day penalty for the rioter who actually commits the serious bodily injury or property damage! I'll address the likely reason for this anomalous 10-year penalty for incitement next. But, the point here is that even without a separate incitement provision a person who incites another to commit a crime faces equal liability for that crime, be it serious or minor. The flat, high penalty reserved for inciting rioting that causes serious bodily injury or more than $5,000 of damage, consequently, appears to

[22] Notably, the District's current disorderly conduct offense, D.C. Code § 22–1321, provides a maximum 90-day penalty for a person to: "Incite or provoke violence where there is a likelihood that such violence will ensue" regardless of consequences."

be superfluous[23] and the penalty disproportionate to the harm that the actor causes as compared to the penalties provided elsewhere in the current D.C. Code.[24]

Also, regarding incitement, it bears repeating that the District's current disorderly conduct statute,[25] quoted above, also specifically refers to a person who "incites" others to misconduct. The statute authorizes arrest, conviction, and provides up to a 90 day penalty for a person to "incite or provoke violence where there is a likelihood that such violence will ensue." [26]

Third, the District's current rioting statute is vague and, as a consequence, raises particular concerns to how it may infringe on free speech and assembly rights under the First Amendment. The statute's broad language requires proof only of a mere "threat" of "tumultuous and violent conduct" and a "grave danger" of harm by a group as small as five people. Moreover, as discussed further below, the statute specifically criminalizes any speech that amounts to "incitement" of rioting but does not define the term or specify how such incitement differs from the type of encouragement that is generally criminalized as aiding and abetting elsewhere in the D.C. Code. The absence of any concrete, objectively measurable results that must be proven for a rioting charge opens up the possibility of bias influencing when the statute is applied. For example, a certain group erroneously may be deemed to be "riotous" based on the content of their speech or conduct covered by the First Amendment. Or, peaceful protestors who stand near others committing violence may be deemed, by their presence, to be encouraging, facilitating, or inciting

[23] The terms "incite" and "urge" as used in the District rioting statute are not defined in the statute itself or in case law. There also is no District law on whether or to what extent "incite" and "urge" as used in the rioting statute differ from the scope of the existing aiding and abetting statute in D.C. Code § 22–1805. Congressional legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.

[24] It should be noted that if the rioting statute were to be the sole charge for conduct (rather than being in addition to liability for a separate D.C. Code offense), there would be a consistent logic to setting a 10-year maximum imprisonment penalty for incitement for rioting that causes serious bodily injury or over $5,000 in property damage. This is because the current aggravated assault statute, D.C. Code § 22-404.01, provides a 10-year maximum imprisonment penalty for causing serious bodily injury to another, the current destruction of property statute, D.C. Code § 22-303, provides a 10-year maximum imprisonment penalty for destroying $1,000 or more of property, and the current aiding and abetting statute, D.C. Code § 22-1805a, treats a person who "incites" liable to the same penalty as the person who actually commits the act in question.

However, first, as noted previously, the remainder of the current rioting statute implicitly assumes the opposite—that rioting is an add-on charge and a person may still be liable for the more specific crime the person commits. Second, the rioting statute presumably covers other (worse) harms than serious bodily injury (e.g., causing death) which merit more severe punishment than what is authorized for serious bodily injury. Finally, there is strong reason to doubt that the current D.C. Code's equal punishment of $1,000 of property destruction and serious bodily injury. The CCRC has conducted public opinion surveys that consistently found District residents rate the loss of $5,000 of property to be about the equivalent in seriousness to a more minor "significant bodily injury" that requires treatment but not hospitalization as in a "serious bodily injury." *See, e.g.*, survey questions 5.02 and 4.24 in CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses (https://ccrc.dc.gov/node/1436766).

[25] D.C. Code § 22–1321.

[26] *Id*.

violent conduct. This conflict between the First Amendment and the rioting statute was explicitly recognized and endorsed by at least one member of Congress who helped pass the current statute.[27]

While the connection between incitement of rioting and free speech has not always been recognized, recently the Acting United States Attorney who has authority over District rioting charges has explicitly recognized this connection and said that his office has charged specific offenses instead of rioting.[28] However such charging practices may have or be changing, this position appears to differ sharply with the policy and practice of the Metropolitan Police Department (MPD). The Acting United States Attorney stated with regard to a number of recent arrests that MPD "arrested as a collective" persons for rioting when the arresting documents did not demonstrate "any articulable facts linking criminal conduct to each individual arrested."[29] The prosecutor went on to emphasize that, "we cannot charge crimes on the basis of mere presence or guilt by association."[30]

The fourth point I'd like to raise about the District's current rioting statute is its history with respect to race. The earliest predecessor of the District's rioting statute that the CCRC has been able to identify is an 1827 Ordinance of the Corporation of Washington entitled "Idle, Disorderly or Tumultuous Assemblages of Negroes Prohibited."[31] As a display at the National Museum of African American History and Culture states, through most of the 19th century, Black Codes in the District and virtually all Southern states prohibited African Americans to gather in groups of more than five. The language of the District's *current* rioting statute was passed by Congress in 1967 as racial tensions were at a peak, under the guidance of then Chairman of the

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[27] In support of the current law, Rep. Joel Broyhill, argued, "Those who incite others to violence should be punished whether or not their freedom of speech is involved." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 9.

[28] Keith L. Alexander and Meryl Kornfield, *Among more than 400 arrested during protests in the District, most cases involve curfew violations and burglary*, WASHINGTON POST (June 16, 2020) (https://www.washingtonpost.com/local/public-safety/among-more-than-400-arrested-during-protests-in-the-district-most-cases-involve-curfew-violations-and-burglary/2020/06/14/ef7e2e82-ac93-11ea-94d2-d7bc43b26bf9_story.html) ("'I did not authorize any of those individuals to be charged with rioting. I think that's a very gray area, a very dangerous area that bleeds into protesting, and what is First Amendment [protected] and what is not,' [Acting United States Attorney] Sherwin said in a June 5 statement to The Washington Post. 'But what we did charge and will continue to charge is any and all acts of violence, physical aggression and property damage — such conduct will never be condoned or accepted in the District.'").

[29] Peter Hermann and Spencer S. Hsu, Prosecutor accuses D.C. police of making rioting arrests with insufficient evidence, WASHINGTON POST (September 1, 2020) (https://www.washingtonpost.com/local/public-safety/prosecutor-accuses-dc-police-of-making-rioting-arrests-with-insufficient-evidence/2020/09/01/96310954-ec61-11ea-99a1-71343d03bc29_story.html) (quoting from and linking to September 1, 2020 Letter of Acting United States Attorney to Michael R. Sherwin to Mayor Muriel Bowser at: https://www.washingtonpost.com/context/letter-from-acting-u-s-attorney-michael-sherwin-to-d-c-mayor-muriel-bowser/41cbbcc9-54fd-4e82-a8ac-3e465ea170de/?itid=lk_inline_manual_7).

[30] *Id.*

[31] Ordinances of the Corporation of Washington, May 31, 1827, Section 3 ("All idle, disorderly or tumultuous assemblages of negroes, so as to disturb the peace or repose of the citizens are hereby prohibited, and any free negro or mulatto, found offending against the provisions of this section may, on conviction thereof before a justice of the peace be recognized with one or more sureties, in the penal sum of twenty dollars, conditioned for his or her peaceable and orderly behavior, for any period of time, not exceeding six months from the date of such recognizance.").

House Committee on the District of Columbia John McMillan.[32] The anomalous penalty for inciting rioting that results in a serious bodily injury or over $5,000[33] in property damage very well may have been based on an assumption by some Congressmen about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated by "professional agitators."[34] While the rioting statute was prosecuted most frequently during the 1968 riots at the assassination of Dr. King,[35] dozens of arrests under the statute have occurred this past summer.[36] From 2010-2019, as described below, most of those charged with rioting were white.

As noted above, the absence of any concrete, objectively measurable results that must be proven to sustain a rioting charge opens up the possibility that erroneous decisions will be made about what conduct constitutes a threat of violent conduct and what speech constitutes incitement of rioting. Similarly, the ambiguous language of the current rioting statute, untethered to more specifically defined criminal conduct, opens up the possibility that erroneous decisions will be made based on bias about appearance.

Fifth and finally, while the crime of rioting has been used frequently charged in recent years, very few convictions have resulted. A CCRC analysis of Superior Court data[37] for adult charging and sentencing 2010-2019 (ten years, including inauguration rioting arrests but not 2020 arrests) shows that misdemeanor rioting (D.C. Code § 22–1322(b)) was charged a total of 199 times during that period and felony rioting (D.C. Code § 22–1322(d)) 219 times during that period. In contrast, there were just 13 total convictions during that ten year span for misdemeanor rioting and just 1 felony rioting convictions. All 14 convictions were obtained by pleas. Approximately 84% of those charged (both misdemeanor and felony charges) were white, 92% of those convicted for misdemeanor rioting were white, and the sole felony conviction also appears to have been

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[32] McMillan, a signatory of the Southern Manifesto and opponent of District home rule, in 1967 sent a truckload of watermelons in response to receiving a budget from the District's newly appointed black Mayor-Commissioner Walter Washington. Harry S. Jaffe and Tom Sherwood, Dream City: Race, Power, and the Decline of Washington D.C., 1994, p.62.

[33] The statute's dollar threshold has not changed since 1967. Accounting for inflation, the 1967 threshold would be equivalent to $38,909.88 in 2020 dollars. *See* https://www.in2013dollars.com/us/inflation/.

[34] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.

[35] In April 1968 alone, District police arrested 7,600 people on rioting charges. See Rachel Chason and Rebecca Tan, *For black residents who saw D.C. burn decades ago, Floyd protests feel like hope*, WASHINGTON POST (June 16, 2020), available at https://www.washingtonpost.com/local/dc-politics/dc-protests-1968-george-floyd/2020/06/15/bc5475e6-ab28-11ea-9063-e69bd6520940_story.html.

[36] Eliza Berkon, *U.S. Attorney For D.C. Refutes Bowser's Claims That The Office Lacks 'Willingness' To Prosecute Protesters*, DCIST (September 1, 2020), available at https://dcist.com/story/20/09/01/dc-us-attorney-michael-sherwin-refutes-bowser-claim-office-prosecute-protesters/.

[37] CCRC Advisory Group Memo #38: Statistics on District Adult Criminal Charges and Convictions, available at https://ccrc.dc.gov/node/1490156.

white. Most of those who pled guilty to misdemeanor rioting served no time in jail but did receive suspended sentences. The sole person convicted of felony rioting appears to have been sentenced to serve 4 months in jail, the remainder of their 36 month sentence suspended. All but one (13 of 14) conviction had a conspiracy charge in the case. The person sentenced for felony rioting appears to have been sentenced in the case for another crime as well. The CCRC analysis is based on first-in-time court entries as to sentencing and may not reflect subsequent changes due to appeals or otherwise. For further details on the methodology and limitations of the CCRC analysis, see CCRC Advisory Group Memo #38: Statistics on District Adult Criminal Charges and Convictions.[38]

The rioting bill language before the Committee differs from the current CCRC draft recommendation language in minor respects. The current CCRC draft recommendations on rioting, for example:

- Require the actor engage in an offense reckless that at least seven others are engaging in specified criminal conduct in the perceptible area;
- Do not include sexual contact as a predicate offense;
- Clarify, through a different definition of a location "open to the public" that the statute applies in locations that require proof of age or identity to enter and may require a security screening; and
- Use a variety of standardized mental state and other terminology.[39]

However, the differences between the bill language and the current CCRC draft recommendations are minor, and the bill is almost entirely consistent with the draft recommendations.

Closing.

I have attached to my testimony, below, the CCRC's latest draft recommendations and accompanying commentary concerning law enforcement use of force, failure to arrest, jury demandability, and rioting. These documents describe in greater detail the CCRC's latest statutory language and how such language would change current District law. However, please bear in mind that the CCRC draft recommendations have been developed as a comprehensive whole with general provisions that are not included here, and the draft recommendations remain subject to further change prior to their release in March 2021.

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[38] *Id.*

[39] The CCRC's standardized mental state and other terminology clarifies the meaning of "reckless," clarifies that there must be proof of *both* the fact that others are committing criminal offenses nearby *and* that the defendant is aware of a substantial risk that such offenses are being committed, and clearly specifies predicate offenses as those that have as an element what is defined as a "bodily injury."
Notably, as the current D.C. Code contains offenses that are not defined in terms of "bodily injury," the Committee's rioting statute may benefit from clarification as to whether offenses such as simple assault (D.C. Code § 22–404(a)(1)) are intended to be included as predicate offenses for rioting liability. The current text may be construed as either requiring a fact-specific analysis of a given case to determine whether there is an offense involving bodily injury, or requiring a categorical analysis of whether the legal elements of the offense explicitly require "bodily injury."

Thank you for your consideration. For questions about this testimony or the CCRC's work more generally, please contact our office or visit the agency website at www.ccrc.dc.gov.

Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

Current as of September 28, 2020:
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.[40] 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.[41] The terms "bodily injury," "sexual act," and "sexual contact" are defined in RCC § 22E-701 and include a wide array of conduct.[42] 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,[43] but it must be objectively reasonable. Reasonableness is an objective standard that takes into account relevant characteristics of the actor.[44] A person acting in the heat of passion 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

[40] 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).

[41] 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.

[42] 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.

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

[44] *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).

force than would seem necessary to a calm mind.[45] The actor must believe that the conduct is necessary in its timing, nature, and degree.[46] 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."[47] 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.[48]

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 injury[49] and even if death or serious injury does not occur.[50] 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.[51] Subparagraph (b)(1)(A) applies to any actor in any location and permits deadly force only to protect against serious bodily injury, a sexual act, confinement or death. Subparagraph (b)(1)(B) applies only when the actor is inside their own individual dwelling unit[52] 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-

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[45] *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).

[46] 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)

[47] *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.")).

[48] *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).

[49] 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.

[50] 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.

[51] 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.

[52] 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.

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.[53] However, if after a confrontation begins, the actor becomes subject to an unforeseeable amount of force, the actor may nevertheless respond in self-defense.[54]

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.[55] 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.[56] 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 speech[57] only.[58] The term "speech" is defined in RCC § 22E-701 and 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 withdraws[59] or makes reasonable efforts to withdraw from the location.[60] Efforts to withdraw include communicating a desire to withdraw.

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[53] 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.

[54] 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).

[55] 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.

[56] 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.

[57] 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.

[58] 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).

[59] 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).

[60] 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.

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.[61] 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.[62]

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.[63] 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 law[64] and the District's current pattern jury instruction require immediacy.[65] 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.[66] 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.[67] The District of

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[61] 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.

[62] 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.

[63] RCC § 22E-207.

[64] *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).

[65] Crim. Jury Inst. for DC Instruction § 9.500 (2019).

[66] 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).

[67] *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.").

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.[68] However, the court has held that the doctrine does not apply when the attacker is a co-occupant of the same home.[69] In contrast, the revised defense includes a broader right to self-defense inside one's dwelling,[70] 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.[71] 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.[72] In contrast, although there are few circumstances in which it would reasonably appear necessary in timing, nature, and degree to use deadly force to protect against a lesser harm, the revised statute permits the defense should such circumstances arise.[73] 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.[74] 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

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

[69] *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.

[70] Unlike some jurisdictions, the revised defense does not offer any broader protection inside one's place of business.

[71] 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.

[72] Act 23-336.

[73] 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.

[74] *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).

common in many jurisdictions,[75] may lead to counterintuitive and undesirable outcomes.[76] 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,"[77] but has not defined the term "harm" in this context,[78] as distinguishable from "serious bodily injury" found elsewhere in the D.C. Code and case law.[79] 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.

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."[80] 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.[81] 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.[82] Resolving this ambiguity, the revised statute applies the RCC's standardized definition of "reckless"[83] and clarifies that any person (other than a law enforcement officer or a

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[75] *See* Model Penal Code §§ 3.04 and 3.05.

[76] 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.

[77] *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).

[78] *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).

[79] "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.

[80] *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).

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

[82] *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.").

[83] RCC § 22E-701.

person engaging in mere speech[84]) 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.[85] 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.[86] 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,[87] but has not yet addressed other lawful conduct.[88] 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 consider the totality of the circumstances and provides a non-exhaustive list of factors.[89] One of these factors is: "Whether the subject of the use of deadly force [] [p]ossessed or appeared to possess a deadly weapon."[90] 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 weapon[91] and expands the list to include the officer's training and experience[92] and whether the law enforcement officer made all reasonable efforts to prevent a loss of a life. This clarifies the revised statute.

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[84] *See* Crim. Jury Inst. for DC Instruction § 9.504 (2019).

[85] *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).

[86] 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.

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

[88] E.g., a parent who is disciplining a child.

[89] Act 23-336.

[90] *Id*.

[91] 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.

[92] *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.).

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 aggressors*[93] *and the duty to retreat.*

All 29 reform jurisdictions[94] codify a defense for using force to defend a person.[95] A growing majority of states impose no duty to "retreat to the wall" before using deadly force outside of one's home or business. [96] A few states include the Model Penal Code's surrender-possession and comply-with-demand limits on deadly force.[97]

[93] *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)).

[94] 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).

[95] 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.

[96] *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.").

[97] *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.

Current as of February 19, 2020
Failure to Arrest, D.C. Code § 5-115.03

The Commission recommends the repeal of D.C. Code § 5-115.03 which criminalizes neglect to make an arrest for an offense committed in a law enforcement officer's presence.

COMMENTARY

Explanatory Note and Relation to Current District Law.
Current D.C. Code § 5-115.03 provides:

> If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District Jail or Penitentiary not exceeding 2 years, or by a fine not exceeding $500. A member of the police force who deals with an individual in accordance with § 24-604(b) shall not be considered as having violated this section.[98]

The D.C. Court of Appeals (DCCA) does not appear to have published any opinions in which a criminal defendant was charged with violating this statute. However, the DCCA has referred to this statute when finding that members of the Metropolitan Police Departments are "always on duty."[99] Additionally, the U.S. District Court for the District of Columbia has referred to this statute when finding that the District does not have a policy or practice of allowing officers to break the law and shielding the government from liability under 42 U.S.C. § 1983.[100]

There is no legislative history available as to the original intent of the statute because it is among the oldest in the D.C. Code. The crime began as part of wartime (Civil War) 1861 legislation that originally created a unified "Metropolitan Police district of the District of Columbia" out of the "corporations of Washington and Georgetown, and the county of Washington." [101]

The scope of D.C. Code § 5-115.03 is ambiguous because it does not specify culpable mental states as to applicable criminal laws or the relevant conduct of persons. In other words, it

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[98] D.C. Code § 5-115.03.

[99] *See* D.C. Code § 22–405; *Mattis v. United States*, 995 A.2d 223, 225–26 (D.C. 2010)(finding off-duty police officers are protected by the District's assault on a police officer statute); *Lande v. Menage Ltd. Pshp.*, 702 A.2d 1259 (D.C. 1997)(finding private business not liable for the unlawful actions of the off-duty police officers they employed as security guards).

[100] *Gregory v. District of Columbia*, 957 F. Supp. 299 (D.D.C. 1997)

[101] *See Compilation of the Laws in Force in the District of Columbia, April 1, 1868,* U.S. Government Printing Office (1868) at 400, (available online at https://books.google.com/books?id=87kWAAAAYAAJ&printsec=frontcover#v=onepage&q&f=false) (citing Congress' August 6, 1861 Act to create a Metropolitan Police district of the District of Columbia, and to establish a police therefor, and providing in section 21 of the law: "It shall be a misdemeanor punishable by imprisonment in the county jail or penitentiary not exceeding two years, or by a fine not exceeding five hundred dollars for any person without justifiable or excusable cause to use personal violence upon any elector in said district, or upon any member of the police force thereof when in the discharge of his duty, or for any such member to neglect making any arrest for an offence against the law of the United States, committed in his presence, or for any person not a member of the police force to falsely represent himself as being such member, with a fraudulent design.").

is unclear from the statute whether police officers may be criminally liable for neglecting to arrest persons if he or she is unaware of the laws being broken or that person's conduct.[102]

However, even if limited to situations where an officer knows a person is breaking a criminal law in their presence, the statutory language makes no exception for the many circumstances in which safety concerns or District policy would require an officer to decline to arrest. In some situations, requiring an officer to make an arrest may compromise the officer's safety,[103] the arrestee's safety,[104] or the safety of a third party.[105] In some situations, Metropolitan Police Department (MPD) orders specifically direct officers to engage with people in a manner that may not result in an arrest for wrongdoing.[106] In still other situations, District law[107] conflicts with federal law[108] and requiring an arrest undermines the District's authority to make and enforce its own criminal laws.[109]

In rare circumstances,[110] requiring law enforcement officers to make arrests for criminal actions they know to be committed in their presence may be consistent with District policy. The CCRC will evaluate such situations in the context of its review of future offenses. However, the CCRC recommends the repeal of the broad failure to make arrest requirement in D.C. Code § 5-115.03. This change improves the consistency and proportionality of the revised offenses.

Relation to National Legal Trends.

No other state has a similar criminal provision concerning a failure to make an arrest. Nevada and Oklahoma criminalize willfully refusing to arrest a person after being "lawfully commanded" to do so.[111] New Jersey punishes a public servant's refraining from performing a duty when it is done "with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit."[112] Twenty-five states explicitly allow law enforcement officers to issue a citation instead of arrest for some or all offenses, by statute or in the rules of criminal

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[102] For example, it is unclear if an officer would be liable for failure to arrest when he or she observes a group of people playing outside without knowing that the game they are playing is shindy or that there is a law against playing shindy, D.C. Code § 22-1308.

[103] E.g., the officer is undercover, the officer is outnumbered, the officer is unarmed or physically outmatched,

[104] E.g., a person in need of immediate medical care for an injury, illness, or psychiatric condition. *See* D.C. Code § 21-521.

[105] E.g., a hostage.

[106] *See., e.g.,* Metropolitan Police Department, General Order 201.26(V)(D)(2)(f), April 6, 2011; Metropolitan Police Department, General Order 303.01(I)(B)(2)-(3), April 30, 1992; Metropolitan Police Department, Special Order 96-10, July 10, 1996; Metropolitan Police Department, General Order 502.04, April 24, 2018;

[107] D.C. Code § 48-1201 (providing a civil penalty for possession of marijuana, one ounce or less).

[108] 21 U.S. Code § 844 (criminalizing possession of a controlled substance, including marijuana).

[109] Notably, the District recently adopted a policy of non-custodial arrests for public consumption of marijuana. *See* Martin Weil and Clarence Williams, *D.C. arrests for marijuana use to result in citation, not custody, officials say*, Washington Post, September 21, 2018, *available at* https://wapo.st/2OJBEZo?tid=ss_mail&utm_term=.9078c3261301.

[110] *See, e.g.,* D.C. Code § 16-1031 (requiring police officers to make an arrest in domestic violence, but without a criminal penalty for failure to comply). Another situation where a mandatory arrest policy may be considered is when a law enforcement officer is present during a criminal act by another officer. For example, Officer A witnesses Officer B steal narcotics from the evidence control branch and, although A did not consciously desire B to steal and was not an accomplice or accessory after-the-fact, he fails to arrest B to protect B's job. In such situations, the officer's failure to arrest may be conduct sufficiently harmful to be criminalized. This situation will be reviewed when the CCRC examines the District's obstruction of justice statutory provisions.

[111] Nev. Rev. Stat. Ann. § 199.270; Okla. Stat. Ann. tit. 21, § 537.

[112] N.J. Stat. Ann. § 2C:30-2.

procedure.[113] Eleven additional states appear to allow officers to issue a citation instead of arrest (that is, the code has a citation procedure and does not explicitly require an arrest).[114] Ten states enforce a presumption that officers will issue a citation instead of arrest for certain offenses.[115]

[113] Alaska, Arkansas, California, Colorado, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, and Vermont. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[114] Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Montana, North Carolina, Oregon, Texas, and Wyoming. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[115] Alaska, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, Ohio, Pennsylvania, Rhode Island, and Vermont. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

Current as of February 19, 2020
D.C. Code § 16-705. Jury trial; trial by court.

(b) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if:

(1) (A) The defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days (or for more than six months in the case of the offense of contempt of court);

(B) The defendant is charged with an attempt, conspiracy, or solicitation to commit an offense specified in subparagraph (b)(1)(A) of this section;

(C) The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701;

(D) The defendant is charged with a "registration offense" as defined in D.C. Code § 22-4001(8);

(E) The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States under federal immigration law; or

(F) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year; and

(2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.

COMMENTARY

Explanatory Note. *This section establishes the jury or nonjury trial provision for the Revised Criminal Code (RCC) and other D.C. Code provisions. The revised statute replaces D.C. Code § 16-705(b)(1) (Jury trial; trial by court).* The revised portion of D.C. Code § 16-705(b)(1) concerns the extension of a statutory right to a jury trial in six circumstances.

Subparagraph (b)(1)(A) of the revised statute permits a criminal defendant to demand a jury trial when charged with an offense punishable by imprisonment for more than 90 days.

Subparagraph (b)(1)(B) of the revised statute permits a defendant to demand a jury trial when charged with an inchoate form of an offense—i.e. attempt, solicitation, or conspiracy—that would be punishable by imprisonment for more than 90 days.

Subparagraph (b)(1)(C) of the revised statute permits a jury demand for a charge under Chapter 12 of Title 22E, including robbery, assault, menacing, criminal threats, and offensive physical contact, if the person who is alleged to have been subjected to the criminal offense [116] is a law enforcement officer as defined in § 22E-701.

Subparagraph (b)(1)(D) of the revised statute provides a right to a jury trial to a charge for a "registration offense" as defined under the District's sex offender registration statutes.

Subparagraph (b)(1)(E) of the revised statute extends a right to a jury for any charge[117] which, as a matter of law, could result in deportation of the defendant under federal immigration law were the defendant convicted of the crime and proven to be a non-citizen. This provision does not require any proof or assertion that the defendant is, in fact, a non-citizen or that federal authorities, in fact, would deport the defendant if convicted. The question under subparagraph (b)(1)(E) is purely a question of law—whether the charged offense could result in deportation under federal immigration law if the defendant were a non-citizen.

Subparagraph (b)(1)(F) of the revised statute provides a jury trial right to a criminal defendant charged with two or more offenses with a combined possibility of imprisonment of more than one year or more than $4,000.[118]

Relation to Current District Law. Revised D.C. Code § 16-705(b)(1) changes current District law by extending the circumstances under which a defendant is entitled to a jury trial. However, the revised statute makes no change to the process for waiver of a jury trial right, the jury trial procedure itself, or the procedures for adjudication absent a jury trial. The revised statute maintains the current language regarding the right to a jury trial where guaranteed by the United States Constitution, the current fine structure for jury demandable offenses, and the current language regarding jury demandable contempt of court cases.

In general, current D.C. Code § 16-705 establishes the circumstances under which a criminal defendant is entitled to a jury trial,[119] the process for waiving a jury trial,[120] the procedure for adjudicating cases in which a defendant is not entitled to a jury trial or a jury trial is waived,[121] and the procedure for jury trials.[122] Under current D.C. Code § 16-705, a criminal defendant is entitled to a jury trial in six instances: (1) where a jury trial is guaranteed by the United States Constitution;[123] (2) where the defendant is charged with an offense punishable by a fine over

[116] The term "complainant" is defined in RCC § 22E-701 as a "person who is alleged to have been subjected to the criminal offense," such that the phrasing here is identical to "complainant" in RCC § 22E-701.

[117] The application of federal immigration law to District statutes is complex and constantly evolving. Establishing a definitive list of the District's deportable misdemeanor offenses would be an immense and likely fruitless undertaking. Consequently, the revised statute codifies a clear, flexible standard that courts can evaluate as needed as federal law changes.

[118] *See* D.C. Code §§ 4-516 (Assessments for crime victims assistance and compensation); 16-711 (Restitution or reparation); 22-3571.01 (Fines for criminal offenses).

[119] D.C. Code §§ 16-705(a)-(b-1).

[120] D.C. Code § 16-705(a); D.C. Code § 16-705(b)(2); D.C. Code § 16-705(b-1).

[121] D.C. Code §§ 16-705(a)-(b-1).

[122] D.C. Code § 16-705(c).

[123] D.C. Code § 16-705(a). According to the United States Supreme Court, a criminal defendant is entitled to a jury trial under the United States Constitution when charged with a "serious" offense, but not when charged with a "petty" offense. *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968). The Supreme Court has identified the maximum authorized penalty as the most relevant objective criteria by which to judge an offense's severity and has held then no offense may be deemed "petty" if it is punishable by more than six months imprisonment. *Baldwin v. New York*, 399

$1,000;[124] (3) where a defendant is charged with two or more offenses punishable by a cumulative fine of over $4,000;[125] (4) where a defendant faces imprisonment for more than 6 months for contempt of court;[126] (5) where a defendant is charged with an offense punishable by more than 180 days imprisonment;[127] and (6) where a defendant is charged with two or more offenses punishable by imprisonment for more than two years.[128] The current statute also clarifies that when a defendant is charged with two or more offenses, if one of the offenses is jury demandable, all offenses shall be tried by jury unless waived.[129]

The revised statute changes D.C. Code § 16-705(b)(1) to expand the right of a criminal defendant to demand a jury trial in several ways. First, in contrast to the current standard of more than 180 days,[130] subparagraph (b)(1)(A) of the revised statute sets the baseline right to a jury of one's peers for a non-contempt of court charge that carries a maximum imprisonment penalty of more than 90 days. Second, in contrast to current law which makes no distinction as to whether a charge is an attempt or other inchoate form of an offense that is jury demandable, subparagraph (b)(1)(B) of the revised statute treats inchoate forms of a jury-demandable offense as jury demandable, regardless whether their imprisonment penalty is 90 days or less. Third, the revised statute creates entirely new statutory rights to a jury for any charge which, under subparagraph (b)(1)(C) or subparagraph (b)(1)(D) is an offense in Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in § 22E-701, or a charge for a "registration offense" as defined in § 22-4001(8). Fourth, the revised statute, in subparagraph (b)(1)(E), codifies a statutory right to a jury for a charge that, as a matter of law, could result in deportation were the defendant proven to be a non-citizen and convicted of the crime. This change appears to expand D.C. Court of Appeals (DCCA) case law that provides a right to a jury on constitutional grounds for a non-citizen defendant who is subject to possible deportation if convicted of the offense.[131] Finally, subparagraph (b)(1)(F) of the revised statute reduces from two years to one year the

U.S. 66, 68-69 (1970). Offenses punishable by six months imprisonment or less are presumptively "petty," but that presumption may be overcome if a defendant shows that additional statutory penalties, viewed in conjunction with the maximum period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is "serious." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

[124] D.C. Code § 16-705(b)(1)(A).

[125] D.C. Code § 16-705(b)(1)(B).

[126] D.C. Code § 16-705(b)(1)(A).

[127] D.C. Code § 16-705(b)(1)(A).

[128] D.C. Code § 16-705(b)(1)(B).

[129] D.C. Code § 16-705(b-1).

[130] D.C. Code § 16-705(b)(1)(A).

[131] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury."). The *Bado* decision does not explicitly state that a defendant must prove that he or she is a non-citizen in order to avail themselves of the right to a jury for a deportable offense, although this appears to be implicit in the *Bado* decision's reliance on Supreme Court precedent in *Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989)* and repeated emphasis that the *Blanton* court relied on the consequences to a *particular* defendant. *See also Miller v. United States*, 209 A.3d 75, 79 (D.C. 2019)("Although the trial record did not reveal that Ms. Miller is not a citizen, the United States has not relied on that circumstance to argue that the error in this case was not obvious for purposes of the plain-error standard. We therefore do not address that issue. … Second, the United States's proposed reading of Bado appears to rest on the premise that a defendant has a constitutional right to a jury trial only if conviction would in a practical sense make the defendant's situation worse than it otherwise would be. Bado, however, repeatedly states that the relevant inquiry is whether the defendant "faces" or "is exposed" to the penalty at issue, or alternatively whether the penalty "could be" imposed, if the defendant is convicted. E.g., 186 A.3d at 1246, 1249-50, 1252, 1253, 1256, 1257, 1261.").

cumulative term of imprisonment that a defendant must be subject to under two or more charges in order to demand a jury. The one-year threshold is four times the otherwise applicable revised threshold of 90 days in subparagraph (b)(1)(A), just as the current threshold of two years is four times the otherwise applicable threshold of 180 days.[132]

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The rationale for limiting a right to a jury to offenses punishable by 180 days or less is rooted in a specific factual context that no longer exists in the District.

For most of the past century, the District has provided a more expansive jury trial right than it does today.[133] Between 1926 and 1993, criminal defendants were entitled to a jury trial in all cases punishable by a fine or penalty of $300 or more, or by imprisonment for more than 90 days.[134] In 1992, however, the D.C. Council passed the Criminal and Juvenile Justice Reform Amendment Act, increasing the penalty threshold for a jury trial more than threefold and doubling the imprisonment threshold.[135] Although this was a dramatic change to the substantive jury trial right, its impact on the actual number of jury trials in the District was minimal. As Fred B. Ugast, then Chief Judge of D.C. Superior Court subsequently explained, because the vast majority of charged misdemeanors at the time had maximum penalties of one year, the amendment did not result in a significant change in jury trial rates.[136] However, the year after the Criminal and Juvenile Justice Reform Amendment Act went into effect, the Council passed the Omnibus Criminal Justice Reform Amendment Act of 1994.[137] The legislation reduced the penalties of more than forty misdemeanor offenses to remove criminal defendants' rights to demand a jury trial.[138] Today, jury trial rates in misdemeanor cases remain well below 1%.[139]

Both the Criminal and Juvenile Justice Reform Amendment Act of 1992 and the Omnibus Criminal Justice Reform Amendment Act of 1994 were passed at a time when responding to violent crime was the Council's priority as part of a conscious effort to promote expediency in the criminal process. Although there was no claim that the legislation would result in cost savings, the stated aim of the legislation was to promote judicial efficiency:

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[132] D.C. Code § 16-705(b)(1)(A).

[133] *See* Act of June 17, 1870, 41st Cong., (1870) (16 Stat. 153) (providing right to trial by jury *de novo* on appeal from all actions in Police Court); Act of March 3, 1891, 51st Cong., (1891) (26 Stat. 848) (providing right to trial by jury in Police Court for all cases punishable by penalty $50 or more or imprisonment for thirty days or more); Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119) (providing right to trial by jury in Police Court for all cases punishable by penalty of $300 or more or by imprisonment for more than ninety days).

[134] Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119).

[135] Criminal and Juvenile Justice Reform Amendment Act of 1992, D.C. Law 9-272.

[136] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" attached "Copy of letter dated September 20, 1993 from Chief Judge Fred B. Ugast of the Superior Court ("Last year, the Council passed an amendment to D.C. Code §16-705(b)(1) providing for the right to a trial by jury in criminal cases where the maximum penalty exceeds 180 days incarceration or a fine of $1000 (up from 90 days and $300). Because the vast majority of charged misdemeanors currently have maximum penalties of one year, the amendment has not significantly reduced the number of jury trials in misdemeanor cases.").

[137] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[138] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[139] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor jury trials as a percentage of misdemeanor dispositions at: 0.13% in 2003, 0.15% in 2004, 0.16% in 2005, 0.10% in 2006, 0.27% in 2007, 0.18% in 2008, 0.11% in 2009, 0.10% in 2010, 0.13% in 2011, 0.23% in 2012, 0.21% in 2013, 0.09% in 2014, 0.20% in 2015, 0.07% in 2016, 0.08% in 2017, and 0.07% in 2018.

> Title V reduces the penalty of more than 40 crimes to 180 days, presumptively making them non-jury demandable. Both the Superior Court and the U.S. Attorney support this change to allow for efficiencies in the judicial process. While there would be no actual monetary savings, this change will relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow more felony trials to be scheduled at an earlier date.[140]

In 1993, the year the Criminal and Juvenile Justice Reform Amendment Act went into effect and the year the Omnibus Criminal Justice Reform Amendment Act was introduced, violent crime in the District had reached an all-time high. According to the FBI's Uniform Crime Reporting Program, rates of violent crime in the District peaked in 1993 at 2,922 per 100,000 people.[141] The D.C. Council was reaching for all available options to respond. As noted in the committee report for the Omnibus Criminal Justice Reform Amendment Act of 1994:

> Over the past few years, the Council has passed much legislation in an attempt to curtail the crime and violence in the District of Columbia. However, crime and violence continues to hold the District of Columbia within its grip. . . .
>
> . . . The Council in its continued fight, must look at all options to increase public safety, including redefining crimes, reviewing management, and reallocating resources.[142]

Yet, overall violent crime in the District has been in steady decline since 1993.[143] In 2018, violent crime in the District reached 996 per 100,000 people, a 66% decrease from 1993,[144] and the lowest since the 1967.[145] This decrease in violent crime rates in the District in recent decades undermines the primary rationale for prioritizing judicial expediency over due process.

In addition, the impact of expanding jury demandability on judicial resources is unclear. Assuming that both judicial and prosecutorial resources are relatively constant and inelastic in the near future, and that jury trials require greater resources than bench trials, the result of expanding jury demandability may be an increase in non-trial dispositions (plea, diversion, or dismissal) for lower level cases. This is because any judicial impact depends on prosecutorial charging decisions which are highly discretionary, dynamic, and likely to change with resource pressure.

Expansion of the jury trial right would almost certainly increase to some degree the number of misdemeanor jury trials held annually. However, the overall rate of jury trials has been variable but at historic lows in recent years. The rate of jury trials has steadily declined for decades across

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[140] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4.

[141] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[142] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 2.

[143] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[144] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[145] Federal Bureau of Investigation, UCR Data Tool, Violent Crime Rates in the District of Columbia, 1960-2014, https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm.

the United States, with jury trials making up only a small fraction of overall dispositions.[146] In the District, felony jury trial rates averaged 7% over the past 15 years,[147] with the vast majority of charges resulting in either dismissal (36%)[148] or a guilty plea (52%).[149] Similarly, the vast majority of misdemeanor cases in the District resolve through dismissal (42%),[150] a plea (30%),[151] or diversion (14%).[152] Misdemeanor bench trial rates have remained low, averaging 5% of all misdemeanor dispositions.[153] There is no reason to think that an expansion of the misdemeanor jury trial right would create a significant shift in these numbers beyond converting bench trials to jury trials.

Further undermining the judicial efficiency argument is the fact that the vast majority of states successfully provide full jury trial rights to their citizens. Thirty-five states currently provide the right to a jury trial in virtually all criminal prosecutions in the first instance.[154] Another three states require bench trials for some minor criminal offenses, but provide a jury trial right *de novo*

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[146] *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. L. Stud. 459 (2004); Brian J. Ostrom, Shauna M. Strickland, and Paula L. Hannaford-Agor, "Examining Trial Trends in State Courts: 1976-2002," Journal of Empirical Legal Studies 1, no. 3 (November 2004): 755-782.

[147] Compiled from District of Columbia Courts Annual Reports, showing felony jury trials as a percentage of felony dispositions at: 5% in 2003, 5% in 2004, 4% in 2005, 5% in 2006, 7% in 2007, 8% in 2008, 8% in 2009, 10% in 2010, 9% in 2011, 9% in 2012, 10% in 2013, 10% in 2014, 9% in 2015, 6% in 2016, 5% in 2017, and 4% in 2018.

[148] Compiled from District of Columbia Courts Annual Reports, showing felony dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of felony dispositions at: 46% in 2003, 44% in 2004, 40% in 2005, 31% in 2006, 33% in 2007, 34% in 2008, 31% in 2009, 27% in 2010, 27% in 2011, 27% in 2012, 25% in 2013, 29% in 2014, 32% in 2015, 38% in 2016, 43% in 2017, and 41% in 2018.

[149] Compiled from District of Columbia Courts Annual Reports, showing felony guilty pleas as a percentage of felony dispositions at: 34% in 2003, 35% in 2004, 28% in 2005, 62% in 2006, 59% in 2007, 58% in 2008, 60% in 2009, 63% in 2010, 63% in 2011, 62% in 2012, 64% in 2013, 59% in 2014, 58% in 2015, 56% in 2016, 51% in 2017, and 54% in 2018.

[150] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of misdemeanor dispositions at: 46% in 2003, 41% in 2004, 39% in 2005, 36% in 2006, 40% in 2007, 39% in 2008, 44% in 2009, 40% in 2010, 43% in 2011, 39% in 2012, 36% in 2013, 40% in 2014, 43% in 2015, 49% in 2016, 47% in 2017, and 51% in 2018.

[151] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor guilty pleas as a percentage of misdemeanor dispositions at: 21% in 2003, 23% in 2004, 26% in 2005, 41% in 2006, 36% in 2007, 34% in 2008, 31% in 2009, 36% in 2010, 32% in 2011, 29% in 2012, 31% in 2013, 30% in 2014, 28% in 2015, 27% in 2016, 28% in 2017, and 27% in 2018.

[152] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor diversion as a percentage of misdemeanor dispositions at: 8% in 2003, 9% in 2004, 5% in 2005, 10% in 2006, 11% in 2007, 14% in 2008, 15% in 2009, 14% in 2010, 17% in 2011, 23% in 2012, 25% in 2013, 21% in 2014, 20% in 2015, 18% in 2016, 18% in 2017, and 16% in 2018.

[153] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor bench trials as a percentage of misdemeanor dispositions at: 3% in 2003, 4% in 2004, 4% in 2005, 5% in 2006, 5% in 2007, 5% in 2008, 6% in 2009, 8% in 2010, 6% in 2011, 7% in 2012, 6% in 2013, 7% in 2014, 7% in 2015, 5% in 2016, 5% in 2017, and 5% in 2018.

[154] The following thirty-five states ensure the right to a jury trial in the first instance for virtually all criminal offenses: Alabama, Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details. Some states provide this right by judicial interpretation of state constitutional provisions while others have legislatively enacted it.

on appeal, effectively guaranteeing a jury trial right in every case.[155] Another three states have developed systems that stop short of a full jury trial right, but are more expansive than the constitutional minimum.[156] Only nine other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[157]

Yet, even if the rationale of judicial efficiency or financial[158] cost still holds for the District today, for several reasons, it is not clear that these considerations should outweigh right to a jury of one's peers.

First, the right to a jury is a foundational right of the American legal system. It is one of the only rights enumerated in the original, unamended Constitution[159] and is given additional protection in the Sixth Amendment.[160] The constitutional language itself is unequivocal, ensuring the right to a jury trial for "all Crimes"[161] and in "all criminal prosecutions."[162] As many historians, legal scholars, and Supreme Court Justices have pointed out, the jury trial serves a score of critical democratic functions.[163] It ensures that community standards are represented in local courtrooms.[164]

Second, the Council itself, in considering legislation impacting the jury trial right in the District, has repeatedly discussed and considered numerous circumstances in which the jury serves a particularly important role in weighing the outcome of a case. This includes cases where civil liberties are at stake,[165] cases where subjectivity plays a large role in demarcating criminal

[155] Arkansas, North Carolina, and Virginia. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[156] Hawaii (adopting a three-part test to determine an offense's severity), New Mexico (providing a jury trial right for all offenses punishable by more than ninety days), and New York (providing a full jury trial right throughout the state, but only for offenses punishable by six months in New York City). See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[157] Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[158] Considering that the 1994 reduction in jury-demandable offenses had no anticipated monetary impact, it is likewise unlikely that the reverse process, an expansion of jury-demandable offenses, would result in additional cost. Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4 (indicating no monetary savings as a result of the amendment).

[159] U.S. Const. art. III, § 2, cl. 1 (The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury).

[160] U.S. Const. amend. VI, cl. 1 (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed).

[161] U.S. Const. art. III, § 2, cl. 1.

[162] U.S. Const. amend. VI, cl. 1.

[163] *See, e.g.*, Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wisc. L. R. 133, 136-37 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).

[164] *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).

[165] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, —that is, allowing for a jury trial—is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones will permit law enforcement against otherwise permitted activity—freedom of association, for instance—and thus the bill permits trial by jury.").

conduct,[166] and cases where law enforcement officers' credibility is at issue.[167] While these Council statements have been made in the context of specific offenses, these rationales apply much more broadly across misdemeanors.[168]

Third, rights-based arguments aside, the limitations on jury demandability produce two main problems in specific cases.

First, the existence of a divide between jury-demandable and non-jury demandable cases in which the former require greater prosecutorial and judicial resources than the latter distorts charging practices by incentivizing the prosecution of lower charges that do not fully account for the facts of a case. Prosecutors enjoy wide discretion in charging decisions and the overlap between the scope of conduct covered by particular offenses (to a lesser degree under the RCC than the current D.C. Code) gives prosecutors multiple options as to which crimes to charge in a given case. If a prosecutor wishes to avoid a jury trial for any reason—and to the extent that added time is required for a jury trial or a conviction is less likely,[169] a prosecutor may be incentivized to do so—he or she often can simply opt to charge a non-jury demandable offense. The extent to which prosecutors make their charging decisions based on whether the crime is jury demandable is difficult to measure because charging discretion may be based on so many different reasons and

[166] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt."); Committee on the Judiciary Report on Bill 18-151, the "Omnibus Public Safety and Justice Amendment Act of 2009," at 33 ("A key change recommended by the Committee has to do ensuring a defendant's right to a jury trial. The primary factor in the Committee's decision to ensure this right relates to the subjective nature of stalking. It seems highly appropriate that a jury of peers would be best equipped to judge whether the behavior is acceptable or outside the norm and indicative of escalating problems. As stated by PDS, '[s]talking is an offense for which the community, not a single judge, should sit in judgment. Community norms should inform decisions about whether behavior is criminal or excusable.'").

[167] *See* Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17 (emphasizing the importance of the jury in moderating prosecutorial charging decisions and the importance of removing the judge from having to make officer credibility findings as support for making assault on police officer offenses jury demandable).

[168] For example, for a charge of current D.C. Code § 22–1307, Crowding, obstructing, or incommoding (a 90 day offense) or other misdemeanor public order offenses the complainant of record and sole witness may be a law enforcement officer. Arguably, as with assault on a police officer, the same rationale of removing the judge from having to make officer credibility findings in a case would support making this offense jury demandable.

[169] Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("But while the Council's goal may have been efficiency, the effect on imprisonment rates was immediate and monumental. At the time, according to a report by the Court's executive officer, Superior Court judges were almost twice as likely as a jury to decide that someone was guilty—so reducing jury trials made the conviction rate skyrocket. For misdemeanors, the year prior to the MSA, only 46 percent of cases ended with a guilty verdict or a guilty plea. The year after, that number jumped to 64 percent. This wasn't exactly an unexpected consequence. Several councilmembers were sure to clarify that despite reducing criminal penalties, the MSA was tough on crime. Even though the maximum sentence for most of these crimes used to be one year, the actual sentence was already generally less than 180 days. Thus, explained Harold Brazil—then-Ward 6 councilmember and one of the Act's co-sponsors—the MSA would mean 'misdemeanants would actually do more time.' 'Crime in our society…[is] out of control,' Brazil argued at a Council hearing on April 12, 1994. 'Years and years of leniency and looking the other way and letting the criminal go has gotten us into this predicament.'").

there is no record as to the reason for choosing one charge over another.[170] However, there are two examples that indicate the impact of this practice.

One example of how restriction of jury demandability distorts charging is the use of attempt charges to avoid jury trials in threat cases. D.C. Code § 22-407 criminalizes threats to do bodily harm.[171] Because the authorized maximum penalty for threats to do bodily harm is six months, a criminal defendant charged with the offense is entitled to a jury trial.[172] The District's attempt statute, however, has a maximum authorized penalty of 180 days for non-crime of violence offenses, making an attempted threat to do bodily harm non-jury demandable.[173] Although it is legally possible to attempt a threat without actually completing a threat, the likelihood of this factual scenario both occurring and resulting in prosecution is exceedingly low.[174] Nonetheless, of the 6,556 charges brought under D.C. Code § 22-407 between 2009 and 2018, 56% were for attempted threats rather than completed threats.[175] As there is no practical difference in the authorized imprisonment penalty between the attempt and completed offense (the difference between 6 months and 180 days), such a high percentage of charges for attempted threats of bodily injury suggests charging decisions may be based on jury demandability rather than how the facts fit the law.

Another example of example of how restriction of jury demandability distorts charging is evidenced by the shift in the number of charges brought under D.C. Code § 22-405(b)—assault on a police officer (APO)—before and after the offense became jury demandable. In 2016, the D.C. Council passed the Neighborhood Engagement Achieves Results (NEAR) Act, which split the existing 180-day, non-jury demandable APO offense into a new APO offense and a resisting arrest offenses and increased the penalty for both to six months.[176] The apparent legislative purpose of this shift was to make sure that these offenses were decided by juries rather than judges.[177] But charging data suggests that this has not been the effect of the law. The number of charges for violations of D.C. Code § 22-405(b) remained relatively consistent within the range of 1,592 and

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[170] *But, see* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Reviewing more than 500 cases from 2019, City Paper found that over the course of one month, prosecutors dodged jury trials more than 24 times a week by taking a crime that is jury-demandable and charging it as another, counterintuitive crime that's not.").

[171] D.C. Code § 22-407 ("Whoever is convicted in the District of threats to do bodily harm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year.").

[172] D.C. Code § 22-407; D.C. Code § 16-705.

[173] D.C. Code § 22-1803; D.C. Code § 16-705.

[174] *See Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001) (holding that "if a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense" but recognizing that "[a]s a practical matter, such unconsummated threats may be unprovable").

[175] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Also, of the 1,869 convictions under D.C. Code § 22-407 between 2009 and 2018, 72% were for attempted threats rather than completed threats. *Id.*

[176] Neighborhood Engagement Achieves Results Amendment Act of 2016 (effective June 30, 2016), D.C. Law 21-125.

[177] *See* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Ward 5 Councilmember Kenyan McDuffie, who wrote the NEAR Act, tells City Paper that the goal was the make the crime jury-demandable."); Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17.

1,712 for every two-year period between 2009 and 2016.[178] However, after the NEAR Act, for the period of 2017 to 2018, the combined number of charges for APO[179] and resisting arrest[180] dropped by about a thousand charges to a mere 529[181] This represents a more than 66% decrease in charging from the previous years. However, the number of charges brought for violations of D.C. Code § 22-404(a)—simple assault—saw a corresponding uptick with the passage of the NEAR Act. For two-year periods between 2009 and 2016 simple assault charges were in the range of 3,221 to 3,865, but rose about a thousand charges to 5,282 for the period of 2017 to 2018.[182] The elements of the simple assault offense are identical to the prior APO offense, except that the complainant's status as a law enforcement officer need not be proven. And the NEAR Act did not explicitly preclude prosecutors from using their discretion to charge what previously had been an APO case as a simple assault. As there is no practical difference in the authorized imprisonment penalty between the revised offenses (revised APO and resisting arrest) and simple assault (the difference between 6 months and 180 days), the shift in charges so simple assault suggests these charging decisions may be based on jury demandability rather than how the facts fit the law.

The second main problem caused by the limitation of the right to a jury is that the maximum term of imprisonment is sometimes an inaccurate proxy for the real seriousness of a criminal charge to a particular person. Some offenses carry severe consequences for those charged despite having relatively low terms of incarceration yet are not afforded a jury trial.

One example of how an imprisonment penalty misrepresents the seriousness of a criminal charge is D.C. Code § 22-3010.01—misdemeanor sexual abuse of a child or minor—a 180-day offense that currently is not entitled to a jury trial.[183] But the offense is a "registration offense" under D.C. Code § 22-4001(8)(A).[184] Because of this, a person convicted of misdemeanor sexual abuse of a child or minor is subject to mandatory sex offender reporting requirements for ten years following their conviction or release.[185] The collateral consequences of sex offender registration—including burdensome restrictions on residency, internet usage, and access to public housing have been extensively documented.[186] The long-term and public nature of reporting requirements, the increased exposure to criminal liability for failures to report, and the additional social and structural consequences that accompany sex offender registration indicate that the seriousness of

[178] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Specifically, the numbers were: 1,712 in 2009-2010, 1,592 in 2011-2012, 1,659 in 2013-2014, 1,697 in 2015-2016. *Id.*

[179] The 2017-2018 charges for the unrevised and revised APO, D.C. Code § 22-405, were 355, with 80 convictions (a 23% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[180] The 2017-2018 charges for D.C. Code § 22-405.01 were 174, with 25 convictions (a 14% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[181] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[182] The charges for D.C. Code § 22-404(a) were: 3,221 in 2009-2010, 3,506 in 2011-2012, 3,432 in 2013-2014, 3,865 in 2015-2016, and 5,282 in 2017-2018.

[183] D.C. Code § 22-3010.01. See also misdemeanor sexual abuse, D.C. Code § 22–3006, carrying a 180-day (non-jury demandable) maximum imprisonment penalty.

[184] D.C. Code § 22-4001(8)(A).

[185] D.C. Code § 22-4003.

[186] *See, e.g.*, Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531, 532-539 (2007); Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (September 2007).

a misdemeanor sexual abuse or other charge involving sex offender registration may warrant elevated due process rights as a matter of policy.[187]

A second example of how imprisonment penalties do not accurately represent the seriousness of a criminal charge is when that charge could result in deportation. In 2018, an *en banc* decision of the D.C. Court of Appeals in *Bado v. United States* first held that a criminal defendant is entitled to a jury trial under the United States Constitution if charged with an offense that could result in deportation.[188] Although this decision addressed the fundamental issue of severe consequences resulting from juryless convictions, it has also produced its own set of challenges. As Senior Judge Washington noted in his concurring opinion, the court's decision created an odd dichotomy in which non-citizens are now entitled to more due process in the District's Superior Court than citizens for the exact same offense.[189] While the *Bado* decision extends jury demandability to relevant crimes for non-citizens, these non-citizens are in the difficult position of having to reveal their immigration status in open court in order to claim a constitutional right.[190]

The partial restoration of a jury right may have significant benefits to public safety insofar as this change in District law helps to restore community support for the criminal justice system.[191] In his concurring opinion to the *Bado* decision, Judge Washington urged the D.C. Council to adopt a full jury trial right and stating:

> Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial.[192]

However, the revised statute does not address all rights-based and other problems with restriction of jury-demandability. As long as the right to a jury trial is restricted for some charges and the prosecution of those charges require fewer resources or are more likely to result in a conviction, there will continue to be incentives to base charging decisions on jury demandability rather than what charge best fits the facts of the case at hand. In addition, as noted above, the revised statute's codification of the *Bado* holding requires non-citizen defendants to disclose their citizenship status in court in order to avail themselves of jury demandability. Finally, there may

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[187] The DCCA has previously held that, as a matter of law, a right to a jury does not exist for a charge of misdemeanor child sexual abuse under current law. *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008).

[188] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury.")

[189] *Bado v. United States*, 186 A.3d 1243, 1262 (D.C. 2018) (en banc) ("I write separately because I am concerned that our decision today, while faithful to the dictates of *Blanton*, creates a disparity between the jury trial rights of citizens and noncitizens that lay persons might not readily understand. That disparity is one that the legislature could, and in my opinion, should address. The failure to do so could undermine the public's trust and confidence in our courts to resolve criminal cases fairly.").

[190] This point previously has been raised the Public Defender Service for the District of Columbia, a CCRC Advisory Group Member. *See* CCRC Comments on First Draft of Report #41 Ordinal Ranking of Maximum Imprisonment Penalties, 2 (November 15, 2019).

[191] Tom R. Tyler et al., The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement, *Psychological Science in the Public Interest*, 16, 75-109. (Available at http://dx.doi.org/10.1177/1529100615617791.)

[192] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (en banc).

be significant judicial efficiency costs that arise from litigation over the right to a jury for specific charges and individual defendants—efficiency costs that would not exist if the District followed the majority of states in extending a right to a jury in every criminal case carrying an imprisonment penalty.

The revised statute is a compromise solution to restore jury demandability that mitigates the potential impact on judicial efficiency. The revised statute, however, should not be construed as a permanent judgment as to the appropriate balance between judicial efficiency and the right to a jury of one's peers. A future expansion of jury-demandability to all criminal offenses may be feasible and warranted in the near future.

Current as of February 19, 2020
RCC § 22E-4301. Rioting.

(a) *Offense*. An actor commits rioting when that actor:
  (1) Knowingly attempts or commits a District offense involving bodily injury, taking of property, or damage to property;
  (2) Reckless as to the fact 7 or more other people are each personally and simultaneously attempting or committing a District offense involving bodily injury, taking of property, or damage to property in the area perceptible to the actor.

(b) *No attempt liability.* The general attempt provision in RCC § 22E-301 does not apply to this section.

(c) *Penalties*. Rioting is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "bodily injury," and "property" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes the rioting offense for the Revised Criminal Code (RCC). The offense proscribes knowingly participating in a group of eight or more people who are each personally engaging in a criminal harm involving injury, property loss, or property damage. The revised offense replaces D.C. Code § 22-1322 (Rioting or inciting to riot).*

Paragraph (a)(1) requires that the accused act "knowingly," a defined term,[193] which here means the person must be practically certain that he or she is personally attempting or committing a District crime involving bodily injury, taking of property, or damage to property.[194] A person who is engaging in conduct that is merely obnoxious, disruptive, or provocative is not liable for rioting.[195] "Bodily injury" is defined in RCC § 22E-701 and means physical pain, illness, or any impairment of physical condition. "Property" is defined in RCC § 22E-701 and means "anything of value." Conduct that threatens a non-criminal harm or a harm not involving bodily injury, taking of property, or damage to property[196] is not a predicate for rioting liability.

Paragraph (a)(2) requires proof that seven[197] or more persons are also engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be the

[193] RCC § 22E-206.

[194] RCC offenses that involve bodily injury, loss of property, or damage to property include: Assault (RCC § 22E-1202), Robbery (RCC § 22E-1201), Murder (RCC § 22E-1101), Theft (RCC § 22E-2101), Arson (RCC § 22E-2501), Criminal Damage to Property (RCC § 22E-2503), and Criminal Graffiti (RCC § 22E-2504).

[195] The RCC does not outlaw "all 'offensive conduct' that disturbs 'any neighborhood or person.'" *See Cohen v. California*, 403 U.S. 15, 22 (1971); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression…[T]o justify prohibition of a particular expression of opinion, [the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

[196] For example, the RCC criminal threats statute is not included in the scope of the revised rioting statute.

[197] The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense, RCC § 22E-4301 requires the defendant behave in a riotous manner with seven other

precise type of conduct the actor is engaged in, but must also be criminal harm involving bodily injury, taking of property, or damage to property.[198] The revised statute does not require that the eight people act in concert with one another[199] or organize together in advance.[200] However, the others' conduct must be in a location where the actor can see or hear their activities.[201] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that seven or more persons are engaged in riotous conduct nearby. A person who is merely present in or near a riot is not criminally liable under the revised rioting statute,[202] nor is a person engaged in First Amendment activities or seeking to prevent criminal activities liable.[203]

Subsection (b) specifies that there is no attempt liability for the rioting offense as a whole. However, attempts to commit specified District crimes are part of the element specified in paragraph (a)(1).

Subsection (c) provides the penalty for this offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised rioting statute changes current District law in four main ways.*

First, the revised rioting statute has only one gradation that addresses attempted and completed criminal harms involving bodily injury, taking of property, or damage to property. The current rioting statute addresses a "public disturbance" that involves "tumultuous and violent conduct" and is divided into two sentencing gradations.[204] The lower grade consists of such conduct that merely "creates grave danger of damage or injury to property or persons" or incites persons to such risk-creating behavior.[205] Limited case law indicates that this lower grade does

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riotous people nearby. However, the revised failure to disperse offense, RCC § 22E-4302, does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot.

[198] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.

[199] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

[200] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

[201] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[202] S*ee United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("The mere accidental presence of the Defendant among persons engaged in such a public disturbance, however, without more, does not establish willful conduct or involvement.").

[203] For example, the following persons are not liable under the RCC rioting statute: a journalist who is present to observe and report on riotous activities; a demonstrator (or counter-demonstrator) who decides to peacefully remain at a particular location in protest; a community leader who acts as a "counterrioter" and attempts to calm the crowd; or a local resident using public ways to leave and return home through a group engaged in riotous activity.

[204] D.C. Code § 22-1322(a).

[205] D.C. Code §§ 22-1322(b) and (c).

not include "minor breaches of the peace," but instead reaches "frightening group behavior" and "will usually be accompanied by the use of actual force or violence against property or persons."[206] The higher grade consists of inciting such conduct that actually causes "serious bodily harm or there is property damage in excess of $5,000."[207] The current statute's higher gradation has a maximum penalty twenty-times that of the lower gradation.[208] In contrast, the revised statute consists of one penalty gradation based on the attempt or commission of actual criminal harms involving bodily injury, taking of property, or damage to property. Revising the statute to require the attempt or commission of actual harms by the actor more clearly distinguishes rioting liability from minor breaches of the peace by a group, and, unlike the current statute, does not base the degree of punishment on the extent of others' misconduct.[209] Or, in the case of police-monitored crowds, such conduct may violate the RCC failure to disperse offense.[210] This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute requires eight people to form riot. The District's current rioting statute states that a riot is a "public disturbance involving an assemblage of 5 or more persons..."[211] Legislative history indicates that the threshold of five people was a subjective judgment based, in significant part, on administrative considerations that it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and property offenses.[212] In contrast, the revised statute raises the number of people that must be involved in riotous conduct to eight. This number excludes many common types of group misconduct from being categorized as a riot,[213] focusing the offense on large-scale events that may give rise to a mob mentality and overwhelm the ability of a few law enforcement officers to control the scene. This change improves the proportionality of the revised offense and reduces an unnecessary overlap between the composite offense of rioting and common occurrences of predicate offenses.

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[206] *United States v. Matthews*, 419 F.2d 1177, 1184-85 (1969) ("The conduct involved must be something more than mere loud noise-making or minor breaches of the peace. The offense requires a condition that has aroused or is apt to arouse public alarm or public apprehension where it is occurring. It involves frightening group behavior. Tumultuous and violent conduct will usually be accompanied by the use of actual force or violence against property or persons. At the very least it must be such conduct as has a clear and apparent tendency to cause force or violence to erupt and thus create a grave danger of damage or injury to property or persons.").

[207] D.C. Code § 22-1322(d).

[208] The maximum imprisonment penalty for violations of subsection (b) and (c) is 180 days, compared to a 10-year maximum for a violation of subsection (d).

[209] The felony gradation in subsection (c) of the current rioting statute does not specify any culpable mental state as to the amount of overall injury resulting from the riot. Strict liability for the results of the riot would mean that a person would be liable even if a factfinder found that the defendant could not and should not have been expected to know that the bad results could occur—the defendant is liable even for unforeseeable accidents that may arise from the unanticipated actions of others in the disorderly group.

[210] RCC § 22E-4302.

[211] D.C. Code § 22-1322(a).

[212] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses."); *see also United States v. Bridgeman*, 523 F.2d 1099, 1113 (D.C. Cir. 1975) (finding that the District's rioting statute was a codification of common law rioting except for its requirement of 5 participants).

[213] Common examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

Third, the revised statute eliminates incitement as a distinct basis for rioting liability.[214] Subsection (c) of the current rioting statute separately criminalizes behavior that "incites or urges other persons to engage in a riot," and subsection (d) imposes heightened liability for conduct that "incited or urged others to engage in the riot" and serious bodily harm or property damage in excess of $5,000 resulted.[215] The terms "incite" and "urge" are not defined in the statute or in case law.[216] Legislative history suggests that Congress' targeting of incitement as a form of rioting may have been based on an assumption about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated.[217] Regardless, legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation."[218] In contrast, under the revised statute, a person who "incites" or "encourages" rioting is only liable if his or her conduct suffices to meet requirements for liability as an accomplice[219] or is part of a criminal conspiracy.[220] The revised statute relies on general provisions regarding accomplice and conspiracy liability to more precisely establish the limits of what instances of "incitement" or "urging" are criminal, and to provide a proportionate penalty for acting as an accomplice or co-conspirator. This change improves the clarity, consistency, and proportionality of the revised offense.

Fourth, the revised offense bars any attempt liability. Under current law, rioting or inciting to riot is subject to the general attempt statute.[221] In contrast, under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to rioting, that person has committed no offense under the revised code. Completed rioting is already an inchoate crime, closely related to predicate offenses involving bodily injury, taking of property, and damage to property, for which the RCC provides separate liability. This change improves the proportionality of the revised statute.

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[214] Speech that incites violence as punished as disorderly conduct. RCC § 22E-4001(a)(2)(B). Abusive speech that is likely to provoke violence is punished as disorderly conduct. RCC § 22E-4001(a)(2)(C).

[215] D.C. Code § 22-1322(c).

[216] *But see United States v. Jeffries*, 45 F.R.D. 110, 117 (D.D.C. 1968) ("In the District of Columbia riot statute speech is only regulated under (b) where it is so closely brigaded with illegal action as to be an inseparable part of it.") (citing *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, 426 (1966) (J. Douglas concurring)).

[217] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.

[218] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.

[219] *See* RCC § 22E-210.

[220] *See* RCC § 22E-303.

[221] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both.").

Beyond these changes to current District law, one other aspect of the revised rioting statute may be viewed as a substantive change of law.

The revised statute does not require that rioting occur in a public location. The current rioting statute defines rioting as a "public disturbance," but does not explain whether the term "public" refers to the character of the location of the riot or to the persons whose tranquility is disturbed. There is no case law on point.[222] In contrast, the revised statute provides that where eight or more people are simultaneously engaging in conduct that causes injury or damage, that group conduct amounts to a riot, irrespective of where it occurs. Such disturbances, whether in a sports arena or Congress,[223] run a similar risk of escalating into mob-like action. This change clarifies the revised statute and eliminates an unnecessary gap in liability.

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

First, the revised statute clarifies that an unlawful taking of property may be a predicate for rioting liability. The current rioting statute[224] criminalizes "tumultuous or violent conduct or the threat thereof [that] creates grave danger of damage or injury to property or persons." District case law has established that this reference to "injury to property" includes "either actual physical damage to property or the taking of another's property without the consent of the owner."[225] The revised rioting statute specifically refers to conduct that not only involves unlawful "damage" to property but also unlawful "taking" of property. This change clarifies the revised statute.

Second, the revised rioting statute replaces the archaic term "assemblage" with a reference to other persons being in a location where the actor can perceive them at the time of the target conduct, and requires a culpable mental state of recklessness as to their activities. The current law defines a riot as an "assemblage of 5 or more persons,"[226] but does not define "assemblage." District case law, however, has held that an "assemblage" refers to a group of people in close physical proximity to the defendant such that the person could "could reasonably have been expected to see or to hear" their action.[227] The revised statute codifies and clarifies this requirement as to others nearby activities by using the standard culpable mental state definition of "reckless." The actor need not be practically certain as to the scope and nature of others' activities, but must be aware of a substantial risk as to the others' numbers and conduct. No special connection or common purpose is required of the other persons engaged in unlawful conduct. This change clarifies and improves the consistency of the revised statute.

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[222] *But see, e.g., Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct, with an element that location of the offense be open to the general public, where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).

[223] *See, e.g.*, United States House of Representatives, *The Most Infamous Floor Brawl in the History of the U.S. House of Representatives: February 06, 1858*, History, Art, and Archives (available at https://history.house.gov/Historical-Highlights/1851-1900/The-most-infamous-floor-brawl-in-the-history-of-the-U-S--House-of-Representatives/).

[224] DC Code § 22-1322.

[225] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969).

[226] D.C. Code § 22-1322(a).

[227] *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

Third, the revised statute requires a culpable mental state of knowledge for an actor engaging in the riotous conduct. The current rioting statute specifies that a person must "willfully" engage in, incite, or urge a riot,[228] however, the current statute does not define "willfully." District case law states that "willfulness" is required of each of the other riot participants also.[229] The RCC clarifies this culpable mental state requirement as to riotous activities by using the standard definition of knowledge[230] as the culpable mental state for paragraph (a)(1). Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[231] This change clarifies and improves the consistency of the revised statute.

Relation to National Legal Trends. *The revised rioting statute's above-mentioned substantive changes to current District law have mixed support in national legal trends.*

First, defining rioting as a form of group disorderly conduct is consistent with criminal codes in a minority of reform jurisdictions. Of the twenty-nine states (hereafter "reform jurisdictions") that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,[232] all but two have a rioting statute.[233] Six of these twenty-seven reform jurisdictions with a rioting statute explicitly define rioting as disorderly conduct in a group similar to the RCC.[234] Similarly, the MPC defines rioting as disorderly conduct in a group.[235] The remaining twenty-one rioting statutes do not reference "disorderly conduct",[236]

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[228] D.C. Code § 22-1322.

[229] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("[Willfully] means the Defendant and at least four members of the assemblage participated in the public disturbance on purpose, that is, that each knowingly and intentionally engaged in tumultuous and violent conduct consciously, voluntarily and not inadvertently or accidentally.").

[230] RCC § 22E-206.

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

[232] 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).

[233] All reform jurisdictions except Washington and Wisconsin criminalize engaging in a public riot. Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Me. Rev. Stat. tit. 17-A, § 503; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.J. Stat. 2C:33-1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Ohio Rev. Code Ann. § 2917.03; Or. Rev. Stat. Ann. § 166.015; 18 Pa. Cons. Stat. Ann. § 5501; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104. Washington has a related offense called Criminal Mischief. Wash. Rev. Code Ann. § 9A.84.010.

[234] Delaware, Hawaii, Maine, New Jersey, Ohio, and Pennsylvania. Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; Me. Rev. Stat. tit. 17-A, § 503; N.J. Stat. § 2C:33-1; Ohio Rev. Code Ann. § 2917.03; 18 Pa. Cons. Stat. Ann. § 5501.

[235] Model Penal Code § 250.1. Riot; Failure to Disperse.

[236] Case law research was not performed to determine how many states have held that disorderly conduct is a lesser-included offense of rioting.

but instead refer to "tumultuous or violent conduct" or a "disturbance of public peace" or similar language without specifying how such conduct relates to disorderly conduct.[237]

Second, eliminating incitement as a distinct basis for rioting liability is broadly supported by criminal codes in reform jurisdictions. Only eleven reform jurisdictions distinctly criminalize incitement to riot at all.[238] Nine of those eleven states punish incitement as a misdemeanor or lower-level felony as compared to the 10-year penalty in the District.[239] Only the Dakotas have a maximum penalty for incitement that is as high as the District of Columbia's current law.[240] The MPC rioting statute does not include an incitement provision.[241]

Third, the revised rioting statute's single gradation structure is consistent with approximately half of the criminal codes in reformed jurisdictions and the MPC.[242] Fifteen reform jurisdictions have multiple gradations of rioting in a public place.[243] Most of these jurisdictions grade more severely either on the presence or use of a dangerous weapon during the rioting,[244] or on the infliction of physical injury or substantial property damage.[245]

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[237] Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Or. Rev. Stat. Ann. § 166.015; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104.

[238] Alabama, Arkansas, Colorado, Connecticut, Kansas, Kentucky, Montana, New York, North Dakota, South Dakota, and Tennessee. Ala. Code § 13A-11-4; Ark. Code § 5-71-203; Colo. Rev. Stat. Ann. § 18-9-102; Conn. Gen. Stat. Ann. § 53a-178; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. Ann. § 525.040; Mont. Code Ann. § 45-8-104; N.Y. Penal Law § 240.08; N.D. Cent. Code Ann. § 12.1-25-01; S.D. Codified Laws §§ 22-10-6, 22-10-6.1; Tenn. Code Ann. § 39-17-304.

[239] Alabama punishes incitement as a misdemeanor. Ala. Code § 13A-11-4. Arkansas punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Ark. Code § 5-71-203. Colorado punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Colo. Rev. Stat. Ann. § 18-9-102. Connecticut punishes incitement as a misdemeanor. Conn. Gen. Stat. Ann. § 53a-178. Kansas punishes incitement as a low-level felony. Kan. Stat. Ann. § 21-6201. Kentucky punishes incitement as a misdemeanor. Ky. Rev. Stat. Ann. § 525.040. Montana punishes incitement outside a correctional institution as a misdemeanor. Mont. Code Ann. § 45-8-104. New York punishes incitement as a misdemeanor. N.Y. Penal Law § 240.08. Tennessee punishes incitement as a misdemeanor. Tenn. Code Ann. § 39-17-304.

[240] The rioting statutes in the Dakotas each include an additional limitation. North Dakota punishes incitement as a Class B felony only if: (1) the person incites five or more people or (2) the riot involves 100 or more people. N.D. Cent. Code Ann. § 12.1-25-01. South Dakota punishes incitement as a Class 2 felony only if the person also engages in rioting himself. S.D. Codified Laws §§ 22-10-6, 22-10-6.1.

[241] Model Penal Code § 250.1. Riot; Failure to Disperse.

[242] *Id*.

[243] Arkansas, Colorado, Connecticut, Illinois, Indiana, Kentucky, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, South Dakota, Tennessee, and Utah. Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b); Ind. Code Ann. § 35-45-1-2(Sec. 2); Ky. Rev. Stat. § 525.020; Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); N.Y. Penal Law § 240.06; N.D. Cent. Code Ann. § 12.1-25-01(4); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3). Some states recognize that a penal institution is not a public place or punish prison rioting as a distinct offense. *See* N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-301(3); Wash. Rev. Code Ann. § 9.94.010.

[244] Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Ind. Code Ann. § 35-45-1-2(Sec. 2); Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Utah Code Ann. § 76-9-101(3).

[245] Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b)(3); Ky. Rev. Stat. § 525.020; N.H. Rev. Stat. § 644:1(IV); N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3).

Finally, there is strong support in revised statutes for requiring at least recklessness as to the predicate conduct. A majority of the 27 reform jurisdictions that outlaw rioting require at least recklessness as to whether the actor's conduct causes public alarm.[246]

[246] Ala. Code § 13A-11-3 ("intentionally or recklessly"); Ariz. Rev. Stat. Ann. § 13-2903 ("recklessly"); Ark. Code Ann. § 5-71-201 ("knowingly"); Conn. Gen. Stat. Ann. § 53a-176 ("intentionally or recklessly"); Del. Code Ann. tit. 11 § 1302 ("with intent to…"); Haw. Rev. Stat. Ann. § 711-1103 ("with intent to…" or with a weapon); 720 Ill. Comp. Stat. Ann. 5/25-1 ("knowing or reckless"); Ind. Code Ann. § 35-45-1-2 ("recklessly, knowingly, or intentionally"); Ky. Rev. Stat. § 525.030 ("knowingly"); Me. Rev. Stat. tit. 17-A, § 503 ("with intent to…" or with a weapon); Minn. Stat. Ann. § 609.71 ("by an intentional act"); Mo. Ann. Stat. § 574.050 ("knowingly"); Mont. Code Ann. § 45-8-103 ("purposely and knowingly"); N.H. Rev. Stat. § 644:1 ("purposely or recklessly"); N.J. Stat. 2C:33-1("with purpose to…"); N.Y. Penal Law § 240.05 ("intentionally or recklessly"); Ohio Rev. Code Ann. § 2917.03 ("with purpose to…"); Or. Rev. Stat. Ann. § 166.015 ("intentionally or recklessly"); 18 Pa. Cons. Stat. Ann. § 5501 ("with intent to…" or with a weapon); Tenn. Code Ann. § 39-17-302 ("knowingly"); Tex. Penal Code Ann. § 42.02 ("knowingly"); Utah Code Ann. § 76-9-104 ("knowingly or recklessly"). Case law research was not performed to determined the culpable mental states where statutes were silent in Alaska, Colorado, Kansas, North Dakota, and South Dakota.