Revising the District of Columbia Disorderly Conduct Statutes:
A Report and Proposed Legislation

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and Presented to
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* No judicial member of CCE or judicial officer participated in the formulation of this report or legislation.

THE NEED FOR ACTION

The existing D.C. disorderly conduct statutes, D.C. Code §§ 22-1307 and 22-1321, are outmoded. They date from 1892 and 1953, respectively. The courts have ruled that certain of their provisions are vague and ambiguous or that they improperly infringe on citizens' First Amendment rights. And the statutes may give too much discretion to police to determine what conduct is disorderly, thereby facilitating improper arrests for "contempt of cop" rather than conduct which threatens the public peace and good order. A 2003 study by the Citizen Complaint Review Board expressed concern that the rate of disorderly conduct arrests by the Metropolitan Police Department (MPD) is higher than the comparable nationwide and large city rates. Although the MPD subsequently changed its training and procedures in ways that have substantially reduced the number of arrests for disorderly conduct, it is desirable to revise and consolidate the statutes to more clearly define – for the benefit of the police and the citizenry – what conduct is prohibited.

Legislation to amend the existing disorderly conduct statutes was drafted by the American Civil Liberties Union (ACLU) and introduced before the D.C. Council in 2009, as Section 106 of Bill 18-151, and subsequently as Bill 18-425.[1]

INVOLVEMENT OF THE COUNCIL FOR COURT EXCELLENCE

The Council for Court Excellence (CCE) undertook to address the revision of the disorderly conduct statutes by bringing together the major stakeholder agencies, including the MPD, the Office of the Attorney General (OAG), the U.S. Attorney's Office, the Office of Police Complaints, and the Public Defender Service, as well as the ACLU and interested individuals with substantial experience in criminal law issues.

Founded in 1982, CCE is a nonpartisan, civic organization based in the District of Columbia whose purposes include identifying and promoting court reforms, improving public access to justice, and increasing public understanding and support of our justice system. The Council's Board of Directors is composed of members of the legal, business, civic, and judicial communities. We have worked closely with the D.C. Council and its Judiciary Subcommittee on many issues, including the 1994 Probate Reform Act, the Advisory Commission on Sentencing Establishment Act of 1998, the Truth in Sentencing Amendment Act of 1998, the Sentencing Reform Act of 2000, the Office of Administrative Hearings Establishment Act of 2001, and the Criminal Record Sealing Act of 2006.

CCE established a subcommittee to address revision of the disorderly conduct statutes, chaired by Leslie McAdoo Gordon and Cliff Keenan. This subcommittee was composed of CCE members with a broad range of experience in the D.C. criminal justice system, including defense counsel, former prosecutors, and a former member of the D.C. Council. In addition, the subcommittee included representatives of the major stakeholder agencies listed above. The subcommittee met on a number of occasions over the past nine months to examine and discuss the issues and to formulate proposed legislation.

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[1] The ACLU's proposal was modified in part by Subcommittee staff.

This report and the associated draft legislation reflect the views of the subcommittee as a group. They do not necessarily reflect the views of particular members or the positions of the stakeholder agencies that participated in the deliberations of the subcommittee. Policy and drafting issues were made by vote. Although the subcommittee worked together very cooperatively and was able to achieve a remarkable degree of consensus on many issues, unanimity was not achieved on every issue. Finally, we note that no judicial member of CCE participated in the formulation of this report or draft legislation.

CONSIDERATIONS THAT AFFECT ENFORCEMENT OF THE DISORDERLY CONDUCT STATUTES

At the outset, two limitations on the enforcement of the disorderly conduct provisions should be noted. First, the police can only make arrests for disorderly conduct that is committed in the presence of the officer. (They could obtain a warrant to arrest someone for disorderly conduct not committed in their presence, but this almost never happens). Disorderly conduct is not one of the misdemeanors listed in D.C. Code § 23-581 for which the police can make an immediate arrest based on information provided by other witnesses.

Second, most persons arrested for disorderly conduct are given the option to resolve their case by posting and forfeiting collateral of $35 or $50 at the police station.[2] Posting and forfeiting collateral ends the arrest without any conviction.[3] (As a matter of policy, MPD and the OAG require that an arrestee have no prior arrests for the same charge within the preceding 12 months to qualify for a "post and forfeit" disposition). Most persons who are offered the opportunity to post and forfeit collateral do so. Thus, although the disorderly conduct statutes provide for a penalty upon conviction of up to a $250 fine, or imprisonment for up to 90 days, or both, in most instances the actual "sanction" for disorderly conduct is limited to the arrest itself and the collateral that is forfeited. While this "post and forfeit" procedure serves to quickly dispose of a large number of arrests for petty misconduct, it forestalls any prosecutorial and judicial oversight of these arrests. This lack of oversight may contribute to improper arrests for "contempt of cop" and furnishes an additional reason why it is desirable to define as clearly as possible what conduct is prohibited.

OBJECTIVES IN REVISING THE DISORDERLY CONDUCT STATUTES

Members of the subcommittee reviewed the existing D.C. disorderly conduct statutes and the comparable statutes of Maryland and Virginia, as well as disorderly conduct provisions in other states. They also reviewed the disorderly conduct provisions in the Model Penal Code. The subcommittee drew up a list of objectives that various members sought to achieve in revising the existing statutes. Not all members agreed with all of these objectives and some of them are in tension with each other. Nonetheless, these objectives are useful when considering revisions to the existing statute. We emphasize that these objectives were never ranked by the subcommittee and are presented here in no particular order:

(1) protecting free speech
(2) minimizing "contempt of cop" arrests
(3) protecting free passage in public spaces and conveyances

[2] *See* D.C. Code § 5-335.01.
[3] D.C. Code § 5-335.01(b) provides that the resolution of a criminal charge using the post-and-forfeit procedure is not a conviction of a crime and shall not be equated to a criminal conviction.

(4) protecting "quiet enjoyment" of public and private spaces
(5) protecting peaceful enjoyment of public and private spaces
(6) prohibiting specific criminal conduct (*e.g.* Peeping Tom)
(7) addressing certain outrageous behavior
(8) promoting transparency of the statute
(9) retaining local (*i.e.* OAG) control over prosecutions
(10) not "over-criminalizing" citizen behavior, even if it is misbehavior
(11) protecting public safety
(12) preserving disorderly conduct as an alternative charge to a more serious offense

Overall, the purpose of disorderly conduct statutes is to maintain public peace and good order. Some forms of "disorderly conduct" threaten the public safety. Other forms may be prohibited because they constitute a public nuisance even though they do not necessarily threaten public safety. There is little question that a person who engages in conduct which threatens the public safety should be subject to arrest, although there may be debate about precisely what conduct actually threatens the public safety. But conduct that is deemed a public nuisance presents a different issue: whether it should result in a criminal sanction, *i.e.* an arrest, or instead should be treated as a civil infraction that is punished by a ticket and a fine. A good example is presented by the issue of urinating in public, which is discussed below.

The District currently lacks an effective means of dealing with non-traffic civil offenses committed by an individual (as opposed to a business or someone holding a professional license). But this is not a good reason for criminalizing conduct that ought not to be criminal; rather, it is an argument for improving the civil infraction enforcement process.

The heart of the subcommittee's work was (1) to decide what conduct actually threatens the public safety and what conduct is such a nuisance that it merits arresting the offender, (2) to frame statutory provisions that cover this conduct but do not reach other conduct that does not merit an arrest, and (3) to define as clearly as possible – for the benefit of the police and the citizenry – what conduct is prohibited.

D.C. CODE § 22-1307

The title of this statute is "Unlawful assembly; profane and indecent language." As currently written, it contains the following prohibitions:

1. A. It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble

    i. in any street, avenue, alley, road, or highway, or
    ii. in or around any public building or inclosure, or any park or reservation, or
    iii. at the entrance of any private building or inclosure,

    and

    B. engage in loud and boisterous talking

    C. or other disorderly conduct,

D. or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing,

E. or to crowd, obstruct, or incommode the free use of

i. any such street, avenue, alley, road, highway,
ii. or any of the foot pavements thereof,
iii. or the free entrance into any public or private building or inclosure;

2. It shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct

i. in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or
ii. in any other public place, or
iii. in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed,

under a penalty of not more than $250 or imprisonment for not more than 90 days, or both for each and every such offense.

Proposed Revisions[4]

1. Elimination of the invalid prohibition on profane and indecent language

Judicial decisions have essentially invalidated the "profane and indecent language" provision of this statute. The courts have ruled that the First Amendment generally prohibits law enforcement officials from arresting persons for the content of their speech. Even speech that is disrespectful, profane, and insulting is protected in most instances. A person's speech can be punished as disorderly conduct only if the words "by their very utterance" inflict injury or tend to incite an immediate breach of the peace, *i.e.* a likely outbreak of violence by one or more third parties (other than police officers) to whom the words were directed. The courts have rejected the notion that, absent a danger of violence, language can constitute a breach of the peace if it is, "under contemporary community standards, so grossly offensive to members of the public who actually overhear it as to amount to a nuisance."[5] Thus, this portion of the statute is invalid and is being removed.[6]

2. Revision of the prohibition on obstructing streets, sidewalks, and entrances

There was general agreement within the subcommittee about the need to retain some form of the current prohibition against crowding, obstructing, or incommoding the free use of any street, sidewalk, alley, or the entrance of a public or private building or enclosure. The majority believe that this prohibition should be limited to actions that block other persons from using a street, sidewalk, or entrance. The current prohibition against "crowding" was deemed to

[4] The proposed statute, as revised, is attached as Exhibit A.
[5] *See In re T.L.*, 996 A.2d 805 (D.C. 2010); *Martinez v. District of Columbia*, 987 A.2d 1199, 1202-03 (D.C. 2010).
[6] It would be possible to narrow this provision so that it complies with the First Amendment by prohibiting only "fighting words," but that would make it redundant of a prohibition in the other disorderly conduct statute, D.C. Code § 22-1321. The subcommittee believes that it is preferable to address the "fighting words" issue in § 1321.

be too vague. And there was agreement that the prohibition should not be framed so broadly that it can be used as an anti-loitering statute, which likely would be invalidated by the courts.[7]

The revised prohibition is broader than the current statute in one respect -- it prohibits blocking by even a single person. The current statute has been interpreted to require a minimum of three persons engaging in the obstructive conduct in order to constitute an offense.[8] This limitation does not appear to be necessary or desirable.

There was debate about whether the police should first have to warn a person to cease blocking and then arrest him or her only if the blocking continues. There are at least two advantages to imposing this requirement: (1) it prevents the arrest of individuals who are not intentionally trying to obstruct the passage of others and are prepared to alter their conduct when instructed to do so; and (2) it eliminates any problems in proving the improper intent of a person who persists in blocking after a warning to desist. The disadvantage to this requirement is that it gives persons who deliberately block a street, sidewalk or entrance "one free bite at the apple" by precluding their arrest if they cease their misconduct after the police arrive and warn them to stop. The majority of the subcommittee concluded that, on balance, it was preferable to require a warning before an arrest can be made. But the subcommittee was concerned that persons should not get more than "one free bite" if they resume their improper blocking. Thus, a provision was inserted providing that a warning by police to desist blocking remains effective for a reasonable period of time and that persons who resume unlawful blocking during that period may be arrested immediately.[9]

3. Elimination of the remaining prohibitions

The remaining prohibitions in § 1307 are also being eliminated. There was general agreement within the subcommittee that the prohibition of loud and boisterous talking or other disorderly conduct should be dropped because it is too vague and lends itself to abuse. Excessive <u>loudness</u> as a form of disorderly conduct, such as making a racket in the middle of the night, is addressed in the other disorderly conduct statute, D.C. Code § 22-1321.

The provision that forbids rude or obscene gestures or comments to bypassers is also being dropped. This provision, as currently written, is invalid in whole or in part. As discussed above, the courts have ruled that even speech that is disrespectful, profane, and insulting is protected by the First Amendment in most instances. A person's speech can be punished as disorderly conduct <u>only</u> if the words constitute "fighting words" that are likely to trigger an outbreak of violence. The subcommittee believed that the issue of "fighting words" is best addressed under the other disorderly conduct statute, D.C. Code § 22-1321. Further, because of the way that § 1307 is currently written, it would apply only to groups of three or more who insulted others with the use of "fighting words."

Thus, as revised, § 1307 is narrowed to a prohibition on blocking streets, sidewalks, or entrances. There is no requirement that such conduct must be intended or likely to provoke a breach of the peace (*i.e.* outbreak of violence). The courts have ruled that a real or threatened breach of the peace is not necessary in order to criminalize this type of disorderly conduct.[10]

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[7] *See Chicago v. Morales*, 527 U.S. 41 (1999).
[8] *See Odum v. District of Columbia*, 565 A.2d 302 (D.C. 1989).
[9] There is a separate statute, D.C. Code § 22-1314.02, that prohibits a person from willfully or recklessly interfering with access to or from a medical facility. This provision is unaffected by the proposed changes to the disorderly conduct statute.
[10] *See Tetaz v. District of Columbia*, 976 A.2d 907 (D.C. 2009).

D.C. CODE § 22-1321

This statute, entitled "disorderly conduct," contains a series of different prohibitions:

Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

(1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

(2) congregates with others on a public street and refuses to move on when ordered by the police;

(3)
a. shouts or makes a noise
b. either outside or inside a building
c. during the nighttime
d. to the annoyance or disturbance of any considerable number of persons;

(4) interferes with any person in any place by:

a. jostling against such person, or
b. unnecessarily crowding such person, or
c. by placing a hand in the proximity of such person's pocketbook, or handbag; or

(5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by

a. running through it,
b. climbing through windows or upon the seats, or
c. otherwise annoying passengers or employees,

shall be fined not more than $250 or imprisoned not more than 90 days, or both.

Note that these prohibitions apply only if the conduct in issue is committed with intent to provoke a breach of the peace (*i.e.* an outbreak of violence) or under circumstances such that a breach of the peace may be caused. The courts have ruled that, where the conduct in issue consists of speech by the defendant, the focus ordinarily must be on the likelihood of a violent reaction by persons other than a police officer to whom the words were directed, because a police officer is expected to have a greater tolerance for verbal assaults and is especially trained to resist provocation by verbal abuse.[11] Thus, directing a stream of profane abuse at a police officer does not constitute disorderly conduct.[12]

Proposed Revisions[13]

1. Reformulating the "catch-all" provision

Subsection (1) of the current statute is a broadly framed "catch-all" provision that prohibits annoying, disturbing, interfering with, obstructing, or being offensive to others if the conduct in issue is committed with intent to provoke a breach of the peace (*i.e.* an outbreak of

[11] *See Shepherd v. District of Columbia*, 929 A.2d 417, 419 (D.C. 2007).
[12] *See In re T.L.*, *supra*, 996 A.2d at 812 n.14.
[13] The proposed statute, as revised, is attached as Exhibit B.

violence) or under circumstances such that a breach of the peace may be caused. This is the provision most commonly utilized in "contempt of cop" arrests. Although the courts have warned that the police are supposed to have thicker skins than civilians and that verbal abuse directed at a police officer does not constitute disorderly conduct, improper arrests continue to be made under this provision.

The subcommittee was unwilling to eliminate a general, catch-all provision from the statute or to insert a limitation providing that verbal abuse, by itself, can never constitute disorderly conduct. This would leave the police powerless to arrest persons who are verbally abusing another civilian under circumstances where a breach of the peace may be caused, *i.e.* the true "fighting words" situation. And it could prevent the police from dealing with other sorts of disorderly conduct that are not spelled out in the statute. Instead, the subcommittee opted for revising the language of the statute in a manner that focuses it more clearly on the sorts of conduct that are prohibited.

The revised statute identifies three types of misconduct that are prohibited in public areas (including communal areas of public housing): (1) intentionally or recklessly putting another person in reasonable fear that a person or his/her property is likely to be harmed; (2) inciting or provoking public violence where there is a likelihood that such violence will ensue; and (3) using abusive or offensive language or gestures to another person (other than a law enforcement officer) in a manner likely to provoke immediate physical retaliation, *i.e.* the "fighting words" situation. The subcommittee believes that these prohibitions comply with the applicable limitations imposed by the courts and that they cover the great majority of misconduct that reasonable people would consider so disorderly that it should result in the arrest of the offender. At the same time, the revised statute makes clear that abusive or offensive language directed toward a police officer does <u>not</u> constitute disorderly conduct that justifies the arrest of the speaker. This should help to reduce considerably the number of improper "contempt of cop" arrests.

2. Elimination of the prohibition on congregating and failing to move on

Subsection (2) of the current statute prohibits a group from congregating and failing to move on when ordered by the police. As framed, this prohibition might be deemed an invalid anti-loitering provision,[14] although the MPD does not attempt to enforce it in this manner. The subcommittee majority agreed that the conduct legitimately targeted by this prohibition is the sort of "blocking" of streets and entrances that is covered by the revised § 1307. Accordingly, this provision is being dropped as unnecessary because it is addressed by the other statute.

3. Revision of the nighttime noise prohibition

Subsection (3) of the statute is directed at night time noise that disturbs other persons. The courts have ruled that a disorderly conduct charge may be predicated on speech that is offensive by virtue of its excessive <u>loudness</u> under the particular circumstances, for example, disturbing people in their homes by making a racket in the middle of the night.[15] This prohibition is being retained but is revised in several ways. First, the time period involved is specified, *i.e.* 10:00 p.m. until 7:00 a.m. Second, the requirement that the noise disturb "a <u>considerable number</u> of persons" is eliminated; the noise need only disturb "other persons."

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[14] *See Chicago v. Morales*, 527 U.S. 41 (1999).
[15] *See In re T.L., supra*, 996 A.2d at 814.

Third, the persons disturbed must be in their residences. Making loud noise at night in a non-residential area is not prohibited. Note that, unlike other provisions that require the conduct at issue to occur in a public area, there is no such requirement here. Thus, this prohibition also reaches individuals who make unreasonably loud noise on private property between 10:00 p.m. – 7:00 a.m. that disturbs persons in their homes or apartments.

It was proposed that this provision be expanded to prohibit excessive noise during the daytime and that it include commercial areas as well as residential areas. Members of the subcommittee agreed that excessively loud noise can be a nuisance during the day as well as at night and that it can disturb persons in their offices as well as their homes. But the majority believed that crafting and enforcing a criminal prohibition against daytime noise presents a number of issues that the subcommittee could not effectively consider and resolve in the limited time available to it.

4. Requiring pickpocketing to be prosecuted as a serious offense

Subsection (4) of the current statute is directed at pickpocketing. It was based on a similar disorderly conduct provision since repealed in the New York Penal Code.[16] The D.C. Court of Appeals has ruled that, as written, the conduct prohibited by this provision is essentially identical to attempted robbery, which is a felony.[17] A majority of the subcommittee concluded that attempted pickpocketing is a serious crime and should be prosecuted and punished either as attempted robbery (a felony) or attempted theft (a misdemeanor).[18] They believe that it is inappropriate to prosecute attempted pickpocketing as mere disorderly conduct. Thus, this section of the statute is being eliminated. It should be noted that this is the one instance in which the subcommittee's recommendation would result in the displacement of the OAG from its current enforcement role (because attempted robbery and attempted theft are both prosecuted by the U.S. Attorney's Office).[19]

The subcommittee considered whether one element of current subsection (4) – the prohibition of jostling – is conduct that, by itself, should be prohibited under the disorderly conduct statute. "Jostling" involves a rough physical touching of one individual by another and the deliberate jostling of another person could be disorderly conduct by itself where it is not part of an attempted pickpocketing. The subcommittee concluded, however, that there is no need for a specific anti-jostling prohibition because this sort of misconduct is covered by the more general prohibition against intentionally or recklessly putting another person in reasonable fear of harm to his/her person. In addition, deliberate jostling can be prosecuted as simple assault.

5. Revision of the prohibition of disturbances on public conveyances

Subsection (5) of the current statute prohibits conduct that causes a disturbance on a public conveyance. It specifically forbids running through the conveyance or climbing through windows or upon the seats, and it contains a catch-all prohibition against "otherwise annoying passengers or employees." This catch-all prohibition may be unenforceable because the courts might well deem the language vague and overly broad.

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[16] *See In re A.B.*, 395 A.2d 59, 62 (D.C. 1978).
[17] *See id.*
[18] *See Leak v. United States*, 757 A.2d 739, 741 (D.C. 2000).
[19] Neither of these agencies supported this change.

There is a separate statute, D.C. Code § 35-251, that defines and prohibits various forms of unlawful conduct on buses (with a capacity of 12 or more passengers) and subways and in Metro stations. This statute proscribes conduct such as smoking, consuming food or drink, spitting, discarding litter, and playing a radio (etc.) without earphones. It also prohibits causing vehicle doors to open by hitting the emergency switch, or impeding or tampering with escalators or elevators.

The subcommittee proposes to revamp the current prohibition so that it covers a variety of possible misconduct but is framed in terms that are more likely to be upheld by the courts. The subcommittee views persons using public conveyances as a "captive audience" who deserve more protection from abusive or disruptive conduct than persons using public streets or sidewalks, who can simply walk away from a disruption. Accordingly, the subcommittee reframed the prohibition to proscribe loud, threatening or abusive language, or disruptive conduct, which unreasonably impedes, disrupts, or disturbs the lawful use of the conveyance by other passengers.

6. Addition of a prohibition on disrupting public meetings or funerals

Another section of the D.C. Code, § 10-503.15(b), prohibits the disruption of Congress. It forbids loud, threatening or abusive language, or disorderly or disruptive conduct, with intent to impede, disrupt, or disturb the orderly conduct of Congress and its committees or subcommittees.[20] The courts have construed this prohibition to incorporate a "tourist standard," *i.e.* that the defendant's conduct must be more disruptive or more substantial than that normally engaged in by tourists.[21] The courts have ruled that the statute does not improperly infringe on citizens' rights under the First Amendment.[22]

Currently, there is no comparable provision that forbids disruption of the D.C. Council or other public meetings. This type of prohibition is common in the disorderly conduct statutes of many jurisdictions. For example, Virginia forbids the disruption of "any funeral, memorial service, or meeting of the governing body of any political subdivision of this Commonwealth or a division or agency thereof, or of any school, literary society or place of religious worship, if the disruption (i) prevents or interferes with the orderly conduct of the funeral, memorial service, or meeting or (ii) has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed."[23]

The subcommittee proposes to add a provision to § 22-1321 that forbids loud, threatening or abusive language, or disorderly or disruptive conduct, with intent to impede, disrupt, or disturb the orderly conduct of a religious service, a funeral, or a lawful public meeting.[24]

7. Addition of an invasion of privacy prohibition

"Peeping Tom" conduct is prosecuted as disorderly conduct though it is not specifically mentioned in the current statute. The courts have ruled that a person who stealthily peeps in

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[20] There is another provision, D.C. Code § 22-3311, that prohibits "disorderly and unlawful conduct in or about the public buildings and public grounds belonging to the United States within the District of Columbia," as well as injury to or destruction of United States property.
[21] *See Hasty v. United States*, 669 A.2d 127 (D.C. 1995).
[22] *See Smith-Caronia v. United States*, 714 A.2d 764 (D.C. 1998).
[23] VA Code § 18.2-415.
[24] There is another provision, D.C. Code § 22-1314, which already prohibits disturbing a religious congregation.

windows to observe women engages in disorderly conduct under the catch-all subsection (1) of D.C. Code § 22-1321.[25] The subcommittee believes that Peeping Tom conduct is usually a form of voyeurism and that some forms of it should be prohibited and punished under the (more serious) voyeurism statute, D.C. Code § 22-3531, rather than being treated merely as disorderly conduct. The voyeurism statute, as currently written, prohibits a person from secretly filming or recording the private area of another individual. The subcommittee proposes that the voyeurism statute be amended to also prohibit secretly "viewing" the private area of another individual.[26]

Some instances of Peeping Tom conduct fall outside the scope of the voyeurism statute because they do not involve spying on naked or partially clothed individuals; instead, they involve spying into residences to see the inhabitants (fully clothed) or to determine whether the residence is occupied, *i.e.* to "case" the residence for a potential burglary. The subcommittee proposes to address this misconduct as an invasion of privacy. Both Virginia and Maryland prohibit invasions of privacy by looking into a dwelling structure, as do other states including New Jersey, Minnesota, Nevada, Ohio, and South Carolina. The amended disorderly conduct statute prohibits persons from stealthily looking into a window or other opening of a dwelling for the purpose of invading the privacy of another, and under circumstances in which an occupant (who need not be present) would have a reasonable expectation of privacy. It is not clear whether the current disorderly conduct statute covers all such situations, so this new provision broadens and/or clarifies the types of conduct that are prohibited.

8. Addition of a prohibition on urinating in public

Although urinating or defecating in public are not specifically forbidden by the current statute, the courts have ruled that they constitute disorderly conduct under the catch-all subsection (1) of D.C. Code 22-1321.[27] This conduct also can be punished as defacing public or private property in violation of D.C. Code § 22-3312.01.[28]

Because the new catch-all provisions of the revised statute (discussed above) would not cover this conduct, a proposal was made to add a provision that specifically forbids urinating or defecating in public. This became a hotly debated topic and resulted in the subcommittee being split almost evenly. The issue was not whether such conduct should be proscribed – almost everyone agreed that it should be – but whether it should be a criminal offense that results in arrest or instead be treated as a civil infraction that is punished by a ticket and a fine.

As noted above, the District currently lacks an effective means of dealing with non-traffic civil offenses committed by an individual (as opposed to a business or someone holding a professional license). Some members of the subcommittee view this as a reason for retaining a criminal prohibition. Other members believe that this is not a good reason for continuing to criminalize conduct that ought not to be criminal; rather, it is an argument for improving the civil infraction enforcement process.

It was also argued that the impact of a criminal prohibition is particularly harsh on homeless persons. But a review of MPD statistics showed that 300 – 400+ persons are arrested each year for urinating in public and the great majority are not homeless. It appears that most

[25] *See District of Columbia v. Jordan,* 232 A.2d 298 (D.C. 1967).
[26] The proposed revisions to the voyeurism statute are attached as Exhibit C.
[27] *See Scott v. United States*, 878 A.2d 486, 488 & n.5.
[28] *See id.* This offense, however, is prosecuted by the U.S. Attorney's Office and not the OAG.

arrests are resolved by posting and forfeiting collateral, and that the few remaining cases generally are no papered by the OAG. Thus, few or no cases proceed to trial or sentence. The homeless might be "punished" more severely than other defendants if they remain locked up after arrest, but the MPD advises that the homeless are now eligible for citation release following arrest. It was also argued a criminal prohibition has a disproportionate effect on the homeless and mentally ill because they are more likely than other persons to urinate in public and so end up with an arrest record (and possibly multiple arrests) as a result.

It was suggested that the penalty for urinating in public should be reduced considerably, a step that other jurisdictions have taken. But, as discussed above, almost no one is actually being convicted and sentenced for this offense, so a change in the penalty would be academic.

The ultimate issue boils down to whether urinating in public should continue to be a criminal offense that results in arrest or instead should be changed to a civil infraction that is punished by a ticket and a fine. A bare majority of the subcommittee favored retaining the criminal prohibition in the disorderly conduct statute, and several of those persons were very sympathetic to the arguments in favor of changing this offense to a civil infraction. If the D.C. Council takes a different view and decides to de-criminalize urinating in public, then not only should the proposed prohibition be omitted from the revised disorderly conduct statute but a corresponding change will also need to be made to D.C. Code § 22-3312.01, which prohibits defacing public or private property and has also been interpreted to cover urinating in public.

9. Consideration of a provision addressing sex in public

The MPD sometimes has charged persons having sex in public places with disorderly conduct under the catch-all subsection of current § 22-1321. The subcommittee considered whether a specific prohibition of this conduct should be added to the revised statute. The majority of the subcommittee concluded that this was unnecessary because another statute, D.C. Code § 22-1312, already prohibits "the indecent exposure of human genitalia."[29]

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[29] *See Duvallon v. District of Columbia,* 515 A.2d 724, 728 (D.C.1986).

EXHIBIT A

Proposed revision of D.C. Code 22-1307; Blocking passage

It shall not be lawful for any person within the District of Columbia to block the use of any sidewalk, street, alley, or the entrance of any public or private building or enclosure or the use of or passage through any public conveyance after being instructed to cease the blocking by a law enforcement officer. An instruction by a law enforcement officer to cease the blocking shall remain in effect for a reasonable period of time, during which time a resumption of the blocking shall constitute a violation of this section. Whoever violates this section shall be fined not more than $250 or imprisoned for not more than 90 days, or both.

EXHIBIT B

Proposed revision of D.C. Code 22-1321. Disorderly conduct

(a) In any place open to the general public, and in the communal areas of public housing, it is unlawful for a person to

(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;

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

(3) use abusive or offensive language or gestures to 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.

(b) It is unlawful for a person to engage in loud, threatening or abusive language, or disruptive conduct, with the intent to impede, disrupt, or disturb the orderly conduct of a religious service, a funeral, or a lawful public meeting.

(c) It is unlawful for a person to engage in loud, threatening or abusive language, or disruptive conduct, which unreasonably impedes, disrupts, or disturbs the lawful use of a public conveyance by other passengers.

(d) It is unlawful for a person to make unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb other persons in their residences.

(e) It is unlawful for a person to urinate or defecate in public, other than in a toilet or urinal.

(f) It is unlawful for a person to stealthily look into a window or other opening of a dwelling, as defined in D.C. Code § 6-101.07, without just cause to do so, for the purpose of invading the privacy of another, and under circumstances in which an occupant would have a reasonable expectation of privacy. It is not necessary that the dwelling be occupied at the time the person looks into the window or other opening.

(g) Whoever violates any provision of this section shall be fined not more than $250 or imprisoned not more than 90 days, or both.

EXHIBIT C

Proposed amendment of D.C. Code 22-3531; Voyeurism

D.C. Code § 22-3531 is amended to add section (a)(3) and to add the underlined language to section (d):

(a) (3) "View" means the looking upon of another person, with the unaided eye or with any device designed or intended to improve visual acuity, for the purpose of arousing or gratifying the sexual desire of any person.

* * *

(d) Except as provided in subsection (e) of this section, it is unlawful for a person to knowingly view, or to intentionally capture an image of, a private area of an individual, under circumstances in which the individual has a reasonable expectation of privacy, without the individual's express and informed consent.