



D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, October 4, 2017 at 3:00PM

**CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001**

On Wednesday, October 4, 2017 at 3:00pm, the D.C. Criminal Code Reform Commission (CCRC) held a meeting of its Criminal Code Reform Advisory Group (Advisory Group). The meeting was held in Room 1107 at 441 Fourth St., N.W., Washington, D.C. The meeting minutes are below. For further information, contact Richard Schmechel, Executive Director, at (202) 442-8715 or richard.schmechel@dc.gov.

Commission Staff in Attendance:

Richard Schmechel (Executive Director)

Rachel Redfern (Chief Counsel for
Management & Legislation)

Michael Serota (Chief Counsel for Policy &
Planning)

Bryson Nitta (Attorney Advisor)

Jinwoo Park (Attorney Advisor) (via phone)

Advisory Group Members in Attendance:

Dave Rosenthal (Designee of the Attorney
General)

Donald Braman (Council Appointee)

Laura Hankins (Designee of the Director of
the Public Defender Service for the District
of Columbia)

Katerina Semyonova (Visiting Attendee of
the Public Defender Service for the District
of Columbia)

Chanell Autrey (Representative of the D.C.
Council Committee on the Judiciary and Public
Safety) (via phone)

I. Welcome.

- a. The Executive Director reminded the Advisory Group that future meetings up until the end of the calendar year (November 1st and December 6th) are scheduled to begin at 3pm, not the usual time of 2pm.
- b. The Executive Director also reminded the Advisory Group that written comments on the property offense draft reports are due November 3rd.
- c. The Executive Director encouraged members to contact staff between meetings to discuss any questions or concerns about the draft recommendations.

II. The Advisory Group discussed Report #9, Recommendations for Theft and Damage to Property Offenses.

- a. The Public Defender Service (PDS) representative raised a point about the calculation of damage in the new Criminal Destruction of Property offense. She noted that the Commentary makes clear that damage is calculated by examining the cost of repairing or replacing the property at issue. However, the PDS representative asked how a person reading the statute without the benefit of the Commentary would know that this is the way to calculate value? The PDS representative asked whether it would be possible to provide some guidance in the statute itself.
 - i. The Executive Director said the matter would be reviewed for the second draft.
- b. The PDS representative also asked what the expected status of the Commentaries will be after distribution to the Council. She said that the “other jurisdiction” analyses would not need be necessary, but the analysis of District law would be relevant to interpreting any resulting legislative changes. The Office of the Attorney General (OAG) agreed that the status of the Commentaries at the completion of the project is an important issue.
 - i. The Executive Director said that the completed version of the Commentary submitted to the Council would be viewed as legislative history by interpreting courts, absent a clear legislative expression to the contrary. However, it is not necessarily clear what status beyond that of any other legislative history the Commentary might have. The Executive Director noted that some states have an “Official Commentary” that follows the language of their criminal statutes, but this has not been done previously in the District of Columbia Code where, for example, there is an underlying commentary by the Uniform Law Commission. He also noted that there may be statutory changes made at the Committee or Council level that would need to be accounted for in any “official” commentary. The Executive Director said that the ultimate disposition and organization of the commentary would depend on the Council and

that, as the final version of the Commentary was being prepared, the agency would consult further with the Council's staff.

- ii. The PDS and OAG representatives both agreed that the status of the Commentaries is an important consideration to keep in mind as the project moves forward.
- c. The PDS representative asked a question concerning the lesser-included relationship between the draft Unlawful Use of Property (UUP) and theft offenses. She asked whether the element of "without effective consent" in UUP contains the "without consent" element in theft. Staff explained that "without effective consent" consists of three alternatives: without effective consent can mean, "without consent," or it can mean "with consent obtained by deception," or it can mean "with consent obtained by coercion." Thus, if a person commits the elements of theft, the person has taken property "without consent" and with an intent to deprive. Therefore, that person's conduct also satisfies the elements of UUP. Staff noted that this relationship between effective consent and consent can be difficult to parse at first glance. Staff noted that at the last meeting there had been discussion about unpacking the "without effective consent" in UUP to simply reflect all the forms of "without effective consent." This might make the LIO relationship clearer. The PDS representative alternatively suggested making reference in the definition of "consent" to the fact that consent can co-exist with deception and coercion - this would help clarify the relationship between consent and effective consent.
 - i. The OAG representative agreed that an additional sentence in the definition of consent, as suggested by the PDS representative, would be an acceptable solution.
- d. The PDS representative then made a suggestion for the drafting of the theft offense, specifically with respect to the proportionality of the offense. She said that it seems disproportionate to treat the value of someone's labor based solely on the actual cost of that labor. She pointed to an example involving stealing an hour's worth of labor from a high-paid attorney versus stealing an hour's worth of labor from a poorly paid housekeeper. If the theft is based solely on the value of the person's labor, then the law would more harshly punish the high-paid attorney compared to the housekeeper. She noted, however, that stealing from a poorly-paid person may in fact result in far more harm to that person than stealing from a wealthy person. The PDS representative indicated that one way to account for this disparity in treatment is to treat labor in a fashion similar to how the draft revised statutes treats payment cards: setting a flat value for an hour of labor, no matter the individual circumstances of the victim. This flat value could be based on the minimum wage in the District. She said that an additional alternative is to separate labor from the definition of "property" and create another offense that

addresses theft of labor. That offense could then be graded on the basis of hours stolen, not on the value of the labor.

- e. The OAG representative said that the value of labor varies just as the value of property does. It makes sense to base the loss of an hour of time based on the value of that time, because that is the loss that property offenses address.
- f. The Executive Director noted that the Model Penal Code does have a “theft of services” offense that is distinct from its other consolidated theft offenses. Some jurisdictions have followed the MPC and codified a separate provision concerning theft of services. The Executive Director also noted that Sentencing Guidelines could address these issues within the relevant statutory maxima.
- g. The OAG representative then asked a question concerning the elements of Unlawful Use of Vehicle (UUV). He said that the revised offense is graded on the basis of whether a person is a passenger or a driver. But he noted that it is often the case that passengers and drivers switch, and that cases of UUV generally involve group behavior. Under the draft revised UUV offense, the person who is driving when the police catch the group is punished more severely, although he or she may be equally culpable compared to the passengers in the vehicle. He suggested simply making the offense one grade, and treating passengers and drivers alike for this reason. He noted that under current case law, passengers and drivers are treated alike.
 - i. The PDS representative said that at one point in the past, however, the difference between a passenger and a driver made a difference in the punishment of juveniles.
 - ii. The OAG representative said he believed that practice has not continued.
 - iii. Staff noted that the group behavior in UUV also raises questions about complicity and aiding and abetting liability. The Executive Director noted that the District’s UUV statute has never referenced passengers and that the liability for passengers arose through a rather tangled line of case law. He also noted that another solution would be to eliminate any separate UUV liability for passengers and rely on accessory liability, where appropriate, which would provide penalties equivalent to that of the principal (driver).
- h. The OAG representative also asked about the scope of the revised shoplifting offense. He noted that it appeared to only cover merchandise that is offered for sale at the moment the merchandise is stolen. He wondered whether the scope of the offense should be expanded to include merchandise that is stored in a warehouse outside the store itself, where that merchandise was previously offered for sale.
 - i. Staff pointed out that the revised shoplifting statute accords with the scope of the statute under existing law, and that expanding it would expand,

rather than reduce, unnecessary overlap with theft offenses. Additional overlap could lead to issues of proportionality with respect to theft, for example where one defendant is charged with the more lenient shoplifting and another for a stricter theft charge, based on the same underlying conduct. The Executive Director noted that penalties for low value thefts and shoplifting have not yet been discussed, but that if the concern was over the label applied to very minor thefts, that issue of re-labeling the low-level theft offense could be addressed without expanding shoplifting. The rationale for shoplifting being distinct from theft is primarily to provide an offense with a lower evidentiary burden (e.g., basing liability on exchanging sales tags), although the offense has a lower penalty.

- ii. The PDS representative noted that the lowest degree of theft covers people who steal up to \$250; the person who steals \$249 is punished just as much as the person who steals a candy bar which seems unjust.
- i. The OAG representative asked about language in the Unlawful Creation of a Recording offense. He asked whether there is a difference between “commercial gain” and “commercial advantage,” and whether they are duplicative. The OAG representative also asked about the omission of making a visual (but not an audiovisual) recording of a live performance, and whether the omission was intentional.
 - i. Staff explained that the phrases “commercial gain” and “commercial advantage” are part of current law, and gave some examples of how case law has differentiated the terms in other jurisdictions. Regarding omission of a purely visual (i.e., silent) live performance from liability, staff explained that federal copyright law preempts some of the categories of intellectual property offenses that states may constitutionally codify. Staff said the draft language was intended to follow most jurisdictions, but that staff would reexamine whether the offense could be extended to silent live performances without running into preemption issues.
- j. The OAG representative asked why the grades of arson did not include a grade for burning a motor vehicle where the defendant knows that a person is inside. Given the high of risk and harm that is involved, the OAG representative said that it might make sense to include occupied motor vehicles as an aggravated form of arson.
 - i. The Executive Director noted that the current statute does not include arson of cars at all, and that the agency was extending such liability to cars for the first time, albeit at a lower level than buildings. He noted that the very high risk of harm when setting fire to a car when one knows or is subjectively aware of a risk that someone is inside would likely give rise to other charges (e.g. attempted aggravated assault or even attempted

murder). He noted that, whereas it may be harder to prove an intent to harm for purposes of assault or murder when setting a fire in a building where the person is in another room, intent to inflict harm may be easier for an occupied car. Staff also noted that arson of a motor vehicle used as a dwelling could be prosecuted as aggravated arson.

- k. Finally, the OAG representative asked whether the “place of worship” in Criminal Destruction of Property is intended to set a floor for liability. If so, the OAG representative suggested adding some language making it clear that the provision is only intended to set a floor, and not a ceiling.
 - i. The Executive Director said the “place of worship” and similar language was intended as a floor. The Executive Director agreed to review the language to ensure parallelism in the drafting and treatment of these grading factors in criminal damage to property and the treatment of motor vehicles as a floor in theft.

III. Adjournment.

- a. The meeting was adjourned at 5:00pm. Audio recording of the meeting will be made available online for the public.