First Draft of Report #10 Recommendations for Fraud and Stolen Property Offenses

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

This Draft Report has two parts: (1) draft statutory text for a new Title 22A of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report No. 10, *Recommendations for Fraud and Stolen Property Offenses*, is November 3, 2017 (twelve weeks from the date of issue). Oral comments and written comments received after November 3, 2017 will not be reflected in the Second Draft of Report No. 10. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Chapter 22. Fraud Offenses

RCC § 22A-2201. Fraud.

(a) *Offense.* A person commits the offense of fraud if that person:
  (1) Knowingly takes, obtains, transfers, or exercises control over;
  (2) The property of another;
  (3) With the consent of the owner;
  (4) The consent being obtained by deception; and
  (5) With intent to deprive that person of the property.

(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "property," "property of another," "consent," "deception," "deprive," and "value" have the meanings specified in § 22A-2001.

(c) *Gradations and Penalties*.

(1) *Aggravated Fraud.* A person is guilty of aggravated fraud if the person commits fraud and the property, in fact, has a value of $250,000 or more. Aggravated fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *First Degree Fraud*. A person is guilty of first degree fraud if the person commits fraud and the property, in fact, has a value of $25,000 or more. First degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Second Degree Fraud.* A person is guilty of second degree fraud if the person commits fraud and the property, in fact, has a value, of $2,500 or more. Second degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4)*Third Degree Fraud*. A person is guilty of third degree fraud if the person commits fraud and the property, in fact, has a value of $250 or more. Third degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) *Fourth Degree Fraud*. A person is guilty of fourth degree fraud if the person commits fraud and the property, in fact, has any value. Fourth degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Commentary

Explanatory Note. *This section establishes the fraud offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes a broad range of conduct in which a person obtains property of another by means of deception. The penalty gradations are based on the value of the property involved in the crime. The revised fraud offense is closely related to the revised theft and extortion offenses.*[1] *It differs from theft because in that offense the defendant lacks the owner's consent to take, obtain, transfer or exercise control over the owner's property. It differs from extortion because in that offense the defendant has the owner's consent obtained by using coercion, instead of deception. The revised fraud offense replaces both the general fraud statute*[2] *and, to the extent it criminalizes deceptive forms of theft, the theft statute*[3] *in the current D.C. Code.*

Section (a)(1) specifies alternative elements that a person must engage in—conduct that takes, obtains, transfers, or exercises control over something. Subsection (a)(1) also specifies the culpable mental state for subsections (a)(1)–(a)(4) of the offense to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire the elements in subsections (a)(1)-(4).

Subsection (a)(2) specifies that what defendant must take, obtain, transfer, or exercise control over is "property," a defined term meaning something of value which includes goods, services, and cash. Further, the property must be "property of another," a defined term which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the element in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item is property of another.

Subsection (a)(3) states that the proscribed conduct must be done with "consent" of the owner. The term consent requires some indication (by words or actions) of the owner's agreement to allow the defendant to take the property. "Owner" is also defined to mean a person holding an interest in property that the accused is not privileged to interfere with, and it specifically includes those persons who are authorized to act on behalf of another.[4] Per the rule of construction in 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the element "without the consent of the owner" in subsection (a)(3).

Subsection (a)(4) codifies the element that distinguishes fraud from the revised theft and extortion offenses—that the consent of the owner in subsection (a)(3) be obtained by deception, a term defined in RCC § 22A-2001. Deception includes a variety of ways of creating or reinforcing false impressions as to material information. Given the culpable mental state of "knowing" applies to subsection (a)(4), the deception must have been knowing. This means that the defendant must have known, or consciously desired, that the misimpression was actually false.

Subsection (a)(5) requires that the defendant had an "intent to deprive" the person of property. "Deprive" is a defined term in RCC § 22A-2001 meaning the owner is unlikely to recover the object or it is withheld permanently or long enough to lose a substantial part of its

[1] RCC § 22A-2101 and RCC § 22A-2701, respectively.
[2] D.C. Code § 22-3221.
[3] *Id.* Conduct in the current theft statute that constitutes "obtaining property by trick, false pretense [] or deception" is replaced by the revised fraud offense.
[4] Thus, for example, a store employee who is authorized to sell merchandise is an "owner," although the merchandise is in fact owned by the store company itself.

value or benefit. "Intent" also is a defined term in RCC § 22A-206 meaning the defendant believed his or her conduct was practically certain to "deprive," another defined term meaning a substantial loss of the property. It is not necessary to prove that such a deprivation actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that a deprivation would result.

Subsection (b) cross-references applicable definitions located elsewhere in the RCC.

Subsection (c) grades fraud according to the value of the property involved.[5] "Value" is a defined elsewhere in RCC § 22A-2001. "In fact" also is a defined term in RCC § 22A-2001 that is used in all of the fraud gradations to indicate that there is no culpable mental state requirement as to the value of the property. The defendant is strictly liable as to the value of the property.

Relation to Current District Law. *The revised fraud statute changes District law in five main ways to reduce unnecessary overlap with other offenses and improve the proportionality of penalties.*

First, the revised fraud statute requires that the defendant "takes, obtains, transfers, or exercises control over" the property of another, as in the theft statute. By contrast, the current fraud statute requires proof that the defendant "obtains property of another or causes another to lose property"[6] and the current theft statute refers to "obtaining property by trick, false pretense, false token . . . or deception[.]"[7] This change in the revised statute expands, and in another way may contract, the scope of current law. The revised statute is broader insofar as the defendant is liable for many actions besides actually gaining the property himself, the typical meaning of "obtain."[8] The phrase "takes, obtains, transfers, or exercises control over" is identical to language in the revised theft statute, which is to be construed broadly to include any unauthorized use or disposition of property.[9] Less clear is whether the revised statute's various alternate elements cover all the possibilities covered by the current "causes another to lose property." For instance, the revised statute would reach conduct that causes the transfer of the victim's property (and otherwise satisfies the elements of the offense), whether or not the transfer is to the defendant or received by the defendant. [10] The breadth of the new language in practice may cover all or nearly all fact patterns covered under the prior "causes another to lose" language.

Second, the revised offense eliminates the inchoate version of fraud currently codified as second degree fraud in favor of the standard approach to attempt liability and penalties in other revised offenses. The current first degree fraud statute requires that the defendant either obtains property or causes another to lose property, but second degree fraud, identical in every other element, requires neither.[11] In other words, second degree fraud in the current D.C. Code is akin

[5] For example, if the value of the property is less than $250, it is Fourth Degree Fraud; if the value of the property is $250,000 or more, it is Aggravated Fraud.

[6] D.C. Code § 22-3221.

[7] *Id.* Conduct in the current theft statute that constitutes "obtaining property by trick, false pretense [] or deception" is replaced by the revised fraud offense.

[8] https://www.merriam-webster.com/dictionary/obtain.

[9] As described in the commentary to the revised theft statute, language such as "unauthorized use" or "disposition" were not used in the current theft statute as duplicative and unnecessary, not to substantively change the broad scope of the offense.

[10] For example, a door-to-door salesman who uses deception to induce a homeowner to purchase items from the company the salesman works not only has caused a loss to the homeowner, but has knowingly engaged in conduct that causes the transfer of funds from the homeowner to the company.

[11] D.C. Code § 22-3221.

to an attempt to commit first degree fraud. However, it is unclear why the second fraud statute need separately criminalize what amounts to attempted first degree fraud, nor, as discussed below, is there justification for the unusual penalty proportionality that results from the current fraud statute's codification of an inchoate form of the offense. Under the revised fraud statute, if a person fails to obtain property, that person cannot be convicted of the completed offense, but still may be convicted of an attempt. The elimination of the inchoate version of fraud does not decriminalize any behavior. Rather the change makes the revised fraud offense consistent with other property offenses in how attempt liability affects the scope and punishment for the offense.

Third, the revised offense omits any reference to a "scheme or systematic course of conduct."[12] Construing this language, the D.C. Court of Appeals (DCCA) has held that a scheme or systematic course of conduct requires "at least two acts calculated to deceive, cheat or falsely obtain property."[13] By contrast, the revised fraud statute does not require proof of two or more acts constituting a scheme or systematic course of conduct. While this is a change in law, the practical significance of the change may be slight given the lack of any statutory or case law clarification as to what minimal conduct would satisfy the current "two acts" requirement. Under current law, the two acts might be robustly construed to require what would amount to two separate instances of theft by deception,[14] or could be minimally construed so as to constitute separate acts only in the most technical sense.[15] In either case, because the revised fraud statute is replacing theft by deception, the revised offense preserves the theft offense's requirement that only one act is sufficient to establish liability for fraud. This is not to say that each act that satisfies the requirements for fraud liability, however slight in distinction, must be charged separately, but they may be so charged if the harms are distinct. [16]

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[12] D.C. Code § 22-3221.

[13] *Youssef v. United States*, 27 A.3d 1202, 1207-08 (D.C. 2011).

[14] Notably, in *Warner v. United States*, 124 A.3d 79, 86 (D.C. 2015) the DCCA held that "one cannot commit second degree fraud without also committing attempted second degree theft by deception." The implication is that every fraud charge could, in the alternative, be charged as theft by deception. Lending support to this notion that fraud may be viewed as two instances of theft by deception, the legislative history of the current fraud statute states that, "[t]he gravamen of the offense of fraud which distinguishes it from theft, is that fraud involves a scheme or systematic course of conduct to defraud or obtain property of another." Committee Report to the Theft and White Collar Crime Act of 1982 at 40.

[15] Under a longstanding fork-in-the-road test, a defendant's momentary, entirely subjective consideration of another matter may be sufficient to break the defendant's conduct into two acts, cognizable as fraud. For example, a defendant convincing a victim to purchase unneeded home repair services (based on defendant's lie about the condition of the home) who pauses momentarily to mention the hot weather before resuming the conversation may be deemed to have engaged in a fresh, second act by continuing the conversation, thereby incurring liability for a "scheme."

[16] The holding in *Youssef v. United States*, to the extent it relied on the requirement of a scheme to determine the relevant unit of prosecution, is no longer compelled under the revised fraud statute. In *Youssef*, the defendant deposited several checks into his Chevy Chase bank account at several locations throughout the city. The accounts he drew on had insufficient funds to cover the checks. However, before the checks cleared, Chevy Chase still allowed him to draw funds from his Chevy Chase account. The defendant ultimately made twenty-nine withdrawals from his Chevy Chase account over a one week period. This scheme was prosecuted as a single count of first degree fraud, as it constituted a single scheme or systematic course of conduct. Under the revised fraud statute, it is possible that these distinct withdrawals could be prosecuted as separate counts. However, if these incidents were prosecuted as separate counts, the *Youssef* holding as to a special unanimity instruction would also no longer apply. On appeal, the defendant argued that because the single count of fraud was premised on allegations of several withdrawals, the trial judge should have instructed the jury that in order to convict, it must be unanimous as to which particular fraudulent transactions it believed occurred. The DCCA rejected this argument, holding that he jury need not be unanimous as to which facts satisfy the elements of the offense. *Youssef*, 27 A.3d at 1207.

Fourth, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised fraud offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses, including fraud, based on the same act or course of conduct.[17] However, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised fraud offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Fifth, the revised fraud statute increases the number and type of grade distinctions, while eliminating the anomalous grading currently used in the District's second degree fraud statute. The current fraud offense is divided into two grades, with first degree fraud requiring that the defendant actually obtained property or caused another to lose property.[18] Each grade of fraud is then divided into felony and misdemeanor versions. Felony first degree fraud requires that the defendant obtained property, or caused another to lose property, valued at $1,000 or more. Felony second degree fraud requires that the object of the fraud is $1,000 or more, and there is no requirement that the defendant actually obtained the property, or caused anyone to lose property. Misdemeanor versions of first and second degree fraud require that the property gained, property lost, or the object of fraud had any value, and have identical maximum allowable sentences.[19] By contrast, the revised fraud offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. In addition, by eliminating the inchoate version of fraud criminalized currently in the D.C. Code as second degree fraud, the penalty gradations for the revised offense will penalize attempted fraud more consistently, the same as in other offenses.

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

First, the revised fraud offense eliminates the "intent to defraud" means of proving fraud, and therefore requires that the defendant obtain property of another. The current fraud statute criminalizes engaging in a scheme "with intent to defraud *or* to obtain property of another[.]"[20] The use of the word "or" suggests that "intent to defraud" could include conduct other than obtaining property by deception. However, neither District statutory nor case law provides a definition of "defraud" and the DCCA has not determined whether the current fraud statute criminalizes conduct beyond obtaining property by deception.[21] Federal courts and courts in other jurisdictions have interpreted fraud statutes with "intent to defraud" elements to include

[17] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct."). Note, however, that the D.C. Court of Appeals has held that attempted theft is a lesser included offense of second degree fraud. *Warner v. United States*, 124 A.3d 79, 86 (D.C. 2015).

[18] D.C. Code § 22-3221.

[19] *Id.*

[20] *Id.*

[21] *But see*, *United States v. Lewis*, 716 F.2d 16 (D.C. Cir. 1983) (affirming convictions under prior version of D.C. Code § 22-1805a for conspiracy to defraud the District of Columbia, on theory that the defendants deprived the District of Columbia of right to "faithful services").

other fraud-type behavior that arguably go beyond the scope of the revised fraud offense.[22] However, it is unclear if these types of cases would be covered under current law. Moreover, some DCCA fraud case law indicates that the current fraud offense should be construed to cover only deceptive thefts.[23]

Second, the revised fraud statute uses a new definition of "deception" to cover conduct currently covered by the phrase "false or fraudulent pretense, representation, or promise" in the current fraud statute. The phrase is undefined in current District statutory or case law. The revised code's definition of deception is consistent with the scant District case law applying the phrase.[24] The definition of "deception" is intended to be construed broadly to allow fraud to cover conduct criminalized at common law as "larceny by trick . . . , and false pretenses."[25] For a detailed description of the definition of "deception," see the commentary entry to Title 22A-2001(7).

Third, the revised fraud statute requires that the defendant act knowingly with respect to the elements in subsections (a)(1)-(a)(4). The requirement of a knowledge culpable mental state is not intended to change existing law on fraud. The current fraud statute itself is silent as to the applicable culpable mental state requirements, although the current statute does explicitly reference knowledge or intent in a provision explaining liability for a false promise as to future performance.[26] The DCCA has recognized a knowledge requirement in this context, [27] although there is no other case law. Requiring knowing culpable mental states make fraud consistent with the current theft statute, which requires that the defendant knew he or she lacked consent to take

[22] So-called "honest services frauds" do not involve deceptive taking of property, but involve a public official, executive, or other person with a fiduciary duty, depriving another person of a right to honest services. For example, if a public official awards a government contract to a bidder, in exchange for a kickback, the official would have deprived the public to its right to honest services, but did not obtain property by deception. *See Skilling v. United States*, 561 U.S. 358 (2010) (holding that honest services frauds are limited to kick back or bribery schemes); *see generally* Judge Pamela Mathy, *Honest Services Fraud After Skilling*, 42 St. Mary's L.J. 645, 704 (2011). Second, obtaining property by means that do not involve deception as defined under the statute would also not constitute fraud. *See e.g., People v. Reynolds*, 667 N.Y.S.2d 591 (Sup. Ct. 1997) (defendants convicted of fraud had engaged in a scheme in which plaintiffs' attorneys who had won personal injury judgments paid kickbacks to expedite payment of the judgments by an insurance adjustor).

[23] See *Warner v. United States*, 124 A.3d 79, 86 (D.C. 2015) holding that "one cannot commit second degree fraud without also committing attempted second degree theft by deception." Although the DCCA was not considering the outer bounds of the current fraud statute, the *Warner* holding implies that schemes to deprive others of honest services or to obtain property by wrongful, but not deceptive conduct, are not covered by the current fraud statute.

[24] For example *Youssef v. United States*, 27 A.3d 1202, 1207 (D.C. 2011) (noting that fraud requires acts "calculated to deceive, cheat, or falsely obtain property"; *Cf. Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977) (holding that elements of common law civil fraud are "(1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation"); *see also*, Committee Report for the Theft and White Collar Crime Act of 1982 at 40 (The language 'intent to defraud' expresses the concept of an intent to deceive or cheat someone.").

[25] Conduct previously known as larceny by trust or embezzlement remains part of theft, except insofar as such conduct operates by means of deception and is therefore part of the revised fraud statute (22A-2201).

[26] D.C. Code 22-3221(c) ("Fraud may be committed by means of false promise as to future performance which the accused does not intend to perform or knows will not be performed. An intent or knowledge shall not be established by the fact alone that one such promise was not performed").

[27] *See Warner v. United States*, 124 A.3d 79 (D.C. 2015) (the trial judge noted that whether a promise is fraudulent or not depended on "whether or not at the time the defendant made the promise, he knew he was going to [fail to perform the promise.]"

property of another.[28] However, current practice in the District may apply a less stringent culpable mental state of recklessness[29] as compared with the revised fraud statute.

Fourth, the gradations in subsection (c), by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property. The current statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the current fraud value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[30] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[31] Clarifying that the value of the property is a matter of strict liability in the revised fraud gradations clarifies and potentially fills a gap in District law.

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

For instance, the elimination of the special fine enhancement which provides an alternative fine of "twice the value of the property obtained or lost, whichever is greater" for first and second degree fraud of property worth $1,000 or more does not affect available punishments. An equivalent provision already applies to all offenses through D.C. Code § 22–3571.02(b)(1), and an equivalent provision in RCC § 22A-804(d) provides an equivalent alternative fine too.

Relation to National Legal Trends. *The revised fraud offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

A majority of states' criminal codes do not include a general fraud offense similar to the District's current fraud statute. While many states have narrow fraud offenses that cover specific types of frauds[32], only six states have a separate, general fraud offense that broadly covers obtaining property by deception.[33] Instead, most states, and the American Law Institute's Model

[28] *Russell v. United States*, 65 A.3d 1177 (D.C. 2013) ("Thus, to be clear, in order to show that the accused took the property 'without authority or right,' the government must present evidence sufficient for a finding that 'at the time he obtained it,' he 'knew that he was without the authority to do so.'") (citations omitted); *Nowlin v. United States*, 782 A.2d 288, 291-293 (D.C. 2001); *Peery v. United States*, 849 A.2d 999, 1001 (D.C. 2004) (listing the elements of second degree theft and then stating that "The question we address is whether the government presented sufficient evidence to prove that, at the time *Peery* used the AMEX card for personal purchases, he knew that he was without the authority to do so.").

[29] *See,* D.C. Crim. Jur. Instr. § 5-200 ("A showing of reckless indifference for the truth will support a charge of fraud.").

[30] D.C. Crim. Jur. Instr. § 5.200.

[31] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").

[32] Many states have fraud offenses that only apply to specific situations. For example, Iowa's fraud statute specifies very specific types of frauds, such as "for the purpose of soliciting assistance, contributions, or other thing of value, falsely represents oneself to be a veteran of the armed forces of the United States, or a member of any fraternal, religious, charitable, or veterans organization, or any pretended organization of a similar nature, or to be acting on behalf of such person or organization." Iowa Code Ann. § 714.8.

[33] Alaska Stat. Ann. § 11.46.600 ; Ariz. Rev. Stat. Ann. § 13-2310; Fla. Stat. Ann. § 817.034; Mich. Comp. Laws Ann. § 750.218; N.M. Stat. Ann. § 30-16-6 ; N.Y. Penal Law § 190.65. Colorado also has an offense called "Charitable Fraud", though it is defined broadly enough that it could arguably be counted as a general fraud offense. Colo. Rev. Stat. Ann. § 6-16-111.

Penal Code (MPC) criminalize general frauds as theft by deception.[34] The RCC retains a separate fraud offense, but the revised fraud offense is similar to theft by deception offenses in other jurisdictions and the MPC.

Three of the substantive changes discussed above are consistent with the majority national trend of treating deceptive takings as a form of theft. First, limiting fraud to exclude causing a loss is consistent with national trends, as theft requires that the accused actually take, obtain, transfer, or exercise control over property; merely causing loss does not suffice.[35] Second, eliminating the inchoate version of fraud that is currently codified as second degree fraud is consistent with national trends, as theft requires that the accused actually take, obtain, transfer, or exercise control over property. Unsuccessful attempts to obtain property are not criminalized as completed offenses. Third, eliminating the "scheme or systematic course of conduct" element is also consistent with national trends, as theft does not require a "scheme or systematic course of conduct."[36]

Regarding the bar on multiple convictions for the revised fraud offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised fraud offense and other overlapping property offenses. For example, where the offense most like the revised fraud is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[37] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[38] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[39]

Increasing the number of penalty grades for fraud reflects national trends. Nearly all of the 29 states[40] that have comprehensively reformed criminal codes influenced by the MPC and have a general part[41] (hereafter "reformed code jurisdictions"), as well as the MPC[42] and

[34] MPC § 223.3.

[35] *E.g.*, Haw. Rev. Stat. Ann. § 708-830 (person commits theft if that person "obtained or exerts control over property;" or "obtains services[.]"; N.Y. Penal Law § 155.05 (person commits theft when that person "wrongfully takes, obtains, or withholds such property from an owner"; Tex. Penal Code Ann. § 31.03 (person commits theft if he "unlawfully appropriates property with intent to deprive the owner of property); MPC § 223.3. Theft by Unlawful Taking or Disposition (requiring that person "takes, or exercise unlawful control over, moveable property of another[.]" *See also*, Lafave, Wayne. 3 SUBST. CRIM. L. § 19.3 (2d ed.) ("Commission of the crime of larceny requires a taking (caption) and carrying away (asportation) of another's property.")

[36] *E.g.*, Haw. Rev. Stat. Ann. § 708-830; N.Y. Penal Law § 155.05; Tex. Penal Code Ann. § 31.03; MPC § 223.3.

[37] D.C. Code § 22-3203.

[38] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[39] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[40] Only two of the 29 reformed code jurisdictions use two or fewer penalty grades for either fraud or theft. Alaska Stat. Ann. § 11.46.600; Ariz. Rev. Stat. Ann. § 13-2310; N.Y. Penal Law § 190.65.

[41] *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). In addition, Tennessee reformed its criminal code after the publication of this article.

[42] MPC § 223.1(2) (establishing 3 grades of theft).

Proposed Federal Criminal Code[43] have more than two penalty grades for fraud or theft by deception.

The revised fraud statute's use of a new definition of deception, under RCC § 22A-2001 (8), is broadly supported by national legal trends. Of the 29 reformed criminal code jurisdictions, fifteen states,[44] and the MPC[45] include a definition of deception. The deception definition in the revised fraud offense is modeled on, and largely consistent with, the definitions adopted in these fifteen states and the MPC. Relying on a statutory deception definition, instead of a vague "intent to defraud" element is also consistent with national legal trends. Of the fifteen states that statutorily define deception, only two also require an intent to defraud.[46]

Requiring that the defendant knowingly deceive the other is consistent with law in the fifteen reformed code jurisdictions states that have statutorily defined "deception." Eleven of these states require that the defendant acted "knowingly,"[47] "intentionally,"[48] or "purposely"[49]; two states require "intent to defraud"[50]; and one state requires that the defendant made a representation which he or she "does not believe to be true"[51] Only one of these states does not specify a mental state as to deception.[52] However, requiring a knowing mental state for fraud departs from federal courts' interpretation of analogous federal fraud statutes.[53] Federal courts

[43] Proposed Federal Criminal Code § 1735 (establishing 5 grades of theft).

[44] Alaska Stat. Ann. § 11.81.900; Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 843; Del. Code Ann. tit. 11, § 844; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401; Wash. Rev. Code Ann. § 9A.56.010.

[45] MPC § 223.3.

[46] Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3. See also, N.Y. Penal Law § 190.65 ("A person is guilty of a scheme to defraud in the first degree when he or she: (a) engages in a scheme or systematic ongoing course of conduct with intent to defraud ten or more persons or to obtain property from ten or more persons by false or fraudulent pretenses, representations or promises, and so obtains property from one or more such persons[.]"); *See also*, 18 U.S.C. 1341("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.").

[47] Alaska Stat. Ann. § 11.81.900; Ala. Code § 13A-8-1; Ohio Rev. Code Ann. § 2913.01; Wash. Rev. Code Ann. § 9A.56.010

[48] Del. Code Ann. tit. 11, § 843; Me. Rev. Stat. tit. 17-A, § 354; 18 Pa. Stat. Ann. § 3922; Utah Code Ann. § 76-6-401

[49] N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4

[50] Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3.

[51] Mo. Ann. Stat. § 570.010.

[52] Tex. Penal Code Ann. § 31.01

[53] *Williams v. United States*, 979 F.2d 844 (1st Cir. 1992); *United States v. Hannigan*, 27 F.3d 890, 892 n.1 (3d Cir. 1994); *United States v. Wells*, 163 F.3d 889, 898 (4th Cir. 1998); *United States v. Hathaway*, 798 F.2d 902, 909 (6th Cir. 1986); *United States v. Cohen*, 516 F.2d 1358, 1367 (8th Cir. 1975); *United States v. Munoz*, 233 F.3d 1117, 1136 (9th Cir. 2000); *United States v. Welch*, 327 F.3d 1081, 1105 (10th Cir. 2003); *United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir. 1986).

have held that under the federal mail and wire fraud statutes, a person commits fraud by either "knowingly making false representations" or by making statements "with reckless indifference to their truth or falsity."[54]

In some respects the RCC's deception definition diverges from the majority approach amongst the fifteen states and the MPC. For instance, unlike the MPC definition, the deception definition requires that the false impression be as to a material fact. Only three of the fifteen states with statutory deception definitions also require materiality, [55] though traditionally, fraud and false pretenses required a misrepresentation as to a material fact.[56] Although the MPC and most states do not explicitly require materiality, the MPC and six states[57] require that the false impression must be of "pecuniary significance."[58] The materiality requirement may be both broader and narrower than the "pecuniary significance" requirement. Materiality may be broader in that it could include false impressions that would affect a reasonable person's decision, even without relating to pecuniary matters. The materiality requirement may be narrower however, by excluding false impressions of pecuniary significance, that are nonetheless so minor they would not affect a reasonable person's decision.

The RCC deception definition also does not include false impressions as to the actor's state of mind (except as it relates to intent to perform a promise). The MPC[59] and nine[60] of the fifteen states with deception definitions, by contrast, include false impressions as to the actor's state of mind. A false impression as to the defendant's state of mind can constitute deception under the RCC definition to the extent that the false impression as to the defendant's state of mind is used to create a false impression about some other material fact.[61]

The RCC deception definition is consistent with the MPC in including a failure to correct a false impression when the defendant has a fiduciary duty or is in any other confidential relationship with the other person from whom the defendant obtains property. However, most states with statutory deception definitions have not followed this approach. Only three states[62] with statutory deception definitions have criminalize failure to correct a false impression when the actor has a legal duty to do so.

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[54] *United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir. 1986).

[55] Mo. Ann. Stat. § 570.010 ; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[56] *Neder v. United States*, 527 U.S. 1, 22, (1999) (holing that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes"); *See generally*, Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1 (1998); LaFave, Wayne. 3 Subst. Crim. L. § 19.7.

[57] Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3.

[58] MPC § 223.3.

[59] MPC § 223.3.

[60] Alaska Stat. Ann. § 11.81.900; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4 ; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085 ; 18 Pa. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3.

[61] For example, if a salesman says "in my opinion, this cold coin is worth at least $1,000", when in fact the salesman does not hold that opinion, but lies about his opinion to deceive a buyer into believing the coin is worth that much, he could still be found guilty of fraud.

[62] Ala. Code § 13A-8-1; N.H. Rev. Stat. Ann. § 637:4; S.D. Codified Laws § 22-30A-3.

RCC § 22A-2202. Payment Card Fraud.

(a) *Offense.* A person commits the offense of payment card fraud if that person:
  (1) Knowingly obtains or pays for property;
  (2) By using a payment card:
    (A) Without the effective consent of the person to whom the payment card was issued;
    (B) After the payment card was revoked or cancelled;
    (C) When the payment card was never issued; or
    (D) For the employee's or contractor's own purposes, when the payment card was issued to or provided to an employee or contractor for the employer's purposes.

(b) *Definitions.* In this section:
  (1) "Revoked or canceled" means that notice, in writing, of revocation or cancellation either was received by the named holder, as shown on the payment card, or was recorded by the issuer.
  (2) The term "knowingly" has the meaning specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "payment card," and "property" have the meanings specified in §22A-2001.

(c) *Gradations and Penalties*.

(1) *Aggravated Payment Card Fraud.* A person is guilty of aggravated payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $250,000 or more. Aggravated payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *First Degree Payment Card Fraud*. A person is guilty of first degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $25,000 or more. First degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Second Degree Payment Card Fraud.* A person is guilty of second degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $2,500 or more. Second degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4)*Third Degree Payment Card Fraud*. A person is guilty of third degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $250 or more. Third degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) *Fourth Degree Payment Card Fraud*. A person is guilty of fourth degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has any value. Fourth degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Jurisdiction.* An offense under this section shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:

(1) The person to whom a payment card was issued or in whose name the payment card was issued is a resident of, or located in, the District of Columbia;
(2) The person who was the target of the offense is a resident of, or located in, the District of Columbia at the time of the fraud;
(3) The loss occurred in the District of Columbia; or
(4) Any part of the offense takes place in the District of Columbia.

Commentary

Explanatory Note. *This section establishes the payment card fraud offense and penalty gradations for the Revised Criminal Code (RCC). This offense criminalizes the use of a payment card, typically a credit card, to pay for or obtain property without the consent of the person to whom the card was issued, or the use of a payment card with knowledge that the card has already been canceled or revoked, or that the card had never actually been issued. It is also payment card fraud if the person uses a card that was issued to that person by an employer or contractor for his or her own purposes. The penalty gradations are determined by the value of the property obtained or amount paid using the payment card. The revised offense replaces the current credit card fraud*[63] *statute in the current D.C. Code.*

Section (a)(1) specifies the element that a person must obtain or pay for property. The term "property" is a defined term meaning "something of value" and includes goods, services, and cash. Subsection (a)(1) also specifies the culpable mental state for subsections (a)(1) – (a)(2) of the offense to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire the elements in subsections (a)(1) or (a)(2).

Subsection (a)(2) specifies that the defendant must use a payment card, or a number or description thereof, to pay for the property. "Payment card" is a defined term per § 22A-2001 that includes an instrument of any kind issued for use of the cardholder for obtaining or paying for property.[64]

Subsection (a)(2)(A) states that the proscribed conduct must be done "without the effective consent of the owner." The term "consent" requires some indication (by words or actions) of agreement, and may be given by a person authorized to do so. "Effective consent" means consent not obtained by means of coercion or deception. Lack of effective consent means there was no agreement, there was an agreement obtained by coercion, or there was an agreement obtained by deception. "Owner" is defined to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rule of construction in 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(2)(A), here requiring the accused to be aware to a practical certainty or consciously desire that he or she lacks effective consent of the owner.

Subsections (a)(2)(B)-(D) further specify additional elements that the defendant must have known of in order for the use of a payment card to constitute a crime. The defendant must have known either that he or she lacked consent of the person to whom the payment card was issued; that the payment card had been revoked or canceled; that the payment card had never actually been issued; or that a person used a payment card issued by an employer or contractor, for his or her own purposes.

[63] D.C. Code § 22-3223.
[64] The definition includes not only credit and debit cards, but common items such as gift cards, membership cards, and metro cards used to obtain or pay for goods, services, or any kind of property.

Subsection (b) defines when a payment card is deemed "revoked" or "canceled," and also cross-references applicable definitions located elsewhere in the RCC.

Subsection (c) grades payment card fraud based on the value of the property obtained or amount paid using the payment card. For example, if the defendant uses a payment card to obtain $250 or less for property, it is Fourth Degree Payment Card Fraud; if the defendant uses a payment card to pay $250,000 or more for property, it is Aggravated Payment Card Fraud. "In fact" also is a defined term in RCC § 22A-2001 that is used in all of the payment card fraud gradations to indicate that there is no culpable mental state requirement as to the value of the property. The defendant is strictly liable as to the value of the property.

Relation to Current District Law. *The revised payment card fraud statute changes District law in two main ways to reduce unnecessary overlap between offenses and to improve the proportionality of offense penalties*.

First, the revised payment card fraud statute increases the number of grade distinctions and dollar value cutoffs. Under the current statute, first degree payment card fraud involves property with a value of $1,000 or more and is punished as a serious felony; second degree payment card fraud involves property valued at less than $1,000 and is a misdemeanor.[65] By contrast, the revised payment card fraud offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.

Second, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised payment card fraud offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses, including credit card fraud, based on the same act or course of conduct.[66] However, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised payment card fraud offense and other closely-related offenses, 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Beyond these two main changes to current District law, four other aspects of the revised payment card fraud statute may constitute substantive changes of law.

First, the revised statute eliminates the current statute's requirement that the defendant acted "with intent to defraud."[67] The current statute does not define the term "defraud," and the D.C. Court of Appeals (DCCA) has never defined the meaning of the language in the credit card fraud statute. However, because the revised statute requires the accused actually obtain or come

[65] D.C. Code § 22-3223(d) ("(1) Except as provided in paragraph (2) of this subsection, any person convicted of credit card fraud shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 180 days, or both. (2) Any person convicted of credit card fraud shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, if the value of the property or services obtained or paid for is $1,000 or more.").

[66] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").

[67] D.C. Code § 22-3223 ("A person commits the offense of credit card fraud if, with intent to defraud, that person.").

very close to obtaining (by paying for) the property, and the accused must know one of the elements in subsection (a)(2) indicating that the use is unlawful, an additional "intent to defraud" element is not necessary to distinguish innocent from criminal conduct in the revised offense. Notably, the Redbook Jury Instructions do not include an "intent to defraud" element.[68] Eliminating "intent to defraud" clarifies the meaning of the statute.

Second, the revised statute requires that the defendant act knowingly with respect to the elements in subsection (a)(1). The current statute itself is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[69] Requiring a knowing culpable mental state also makes payment card fraud consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[70]

Third, the revised statute does not expressly criminalize using a "falsified, mutilated or altered" card.[71] The current statute does not define these terms, and there is no case law interpreting the provision. The other provisions of the revised offense in subsection (a)(2) cover many instances apparently criminalized under the eliminated "falsified, mutilated or altered" provision. Knowing uses of a "falsified mutilated or altered" card may also be criminalized under the revised forgery offense, RCC § 22A-2204. Eliminating the provision regarding use of a "falsified, mutilated or altered" card reduces offense overlap.

Fourth, the gradations in subsection (c), by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property obtained or paid for by using the payment card. The current statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the current payment card fraud value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[72] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[73] Clarifying that the value of the property is a matter of strict liability in the revised payment card fraud gradations clarifies and potentially fills a gap in District law.

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

Relation to National Legal Trends. The changes to the payment card fraud statute discussed above are broadly supported by national legal trends.

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[68] D.C. Crim. Jur. Instr. § 5.201.

[69] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that 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)").

[70] See, e.g., RCC § 22A-2201.

[71] D.C. Code § 22-3223 (3).

[72] D.C. Crim. Jur. Instr. § 5.201.

[73] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").

First, although increasing the number of penalty gradations follows a majority of jurisdictions nationwide, only five jurisdictions use as many as five penalty grades for payment card fraud.[74] Of those jurisdictions with fewer than five grades, a majority of jurisdictions use three[75] or four[76] penalty grades.

Second, regarding the bar on multiple convictions for the revised payment card fraud offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised payment card fraud offense and other overlapping property offenses. For example, where the offense most like the revised payment card fraud is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses.[77] Research has not identified any equivalent statutory provision to either the current Consecutive sentences[78] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[79] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[80]

In addition, it should be noted that most jurisdictions retain an intent to defraud clause in their comparable statutes, although several other jurisdictions have eliminated it.[81]

Requiring knowledge that the card was stolen, forged, revoked, canceled, issued to another and was used without that person's authorization, or that the card was not actually issued, is consistent with payment card fraud statutes in other jurisdictions[82], as well as the Model Penal Code.[83]

Also, not explicitly criminalizing the use of a mutilated or altered payment card is broadly supported by law in other jurisdictions. A majority of jurisdictions with reformed criminal codes,[84] as well as American Law Institute's Model Penal Code[85], do not explicitly criminalize use of a mutilated or altered payment card.

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[74] Colo. Rev. Stat. Ann. § 18-5-702; Minn. Stat. Ann. § 609.821; Minn. Stat. Ann. § 609.821; N.M. Stat. Ann. § 30-16-33; Tenn. Code Ann. § 39-14-118, Tenn. Code Ann. § 39-14-105.

[75] Alaska Stat. Ann. § 11.46.285; Ariz. Rev. Stat. Ann. § 13-2105; Del. Code Ann. tit. 11, § 903; Iowa Code Ann. § 715A.6; Kan. Stat. Ann. § 21-5828; Ky. Rev. Stat. Ann. § 434.650; N.H. Rev. Stat. Ann. § 638:5; N.D. Cent. Code Ann. § 12.1-23-11.

[76] Ark. Code Ann. § 5-37-207; Utah Code Ann. § 76-6-506.5; Wis. Stat. Ann. § 943.41.

[77] *Compare, State v. Bozelko*, 987 A.2d 1102, 1116 (Conn. App. Ct. 2010) (holding that convictions for identity theft and illegal use of a credit card based on a single course of conduct are permissible), with *State v. Thompson*, 2014 WL 265491 at 4 (holding that convictions for identity theft and credit card fraud merge when arising from the same act).

[78] D.C. Code § 22-3203.

[79] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[80] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[81] Ala. Code § 13A-9-14; Colo. Rev. Stat. Ann. § 18-5-702; Del. Code Ann. tit. 11, § 903; Iowa Code Ann. § 715A.6; Minn. Stat. Ann. § 609.821; Mo. Ann. Stat. § 570.130; N.H. Rev. Stat. Ann. § 638:5.

[82] E.g., Ala. Code § 13A-9-14; Ariz. Rev. Stat. Ann. § 13-2105; Ark. Code Ann. § 5-37-207; Colo. Rev. Stat. Ann. § 18-5-702; Del. Code Ann. tit. 11, § 903; Ind. Code Ann. § 35-43-5-4; Iowa Code Ann. § 715A.6; Mo. Ann. Stat. § 570.130; Mont. Code Ann. § 45-6-317; N.H. Rev. Stat. Ann. § 638:5; N.M. Stat. Ann. § 30-16-33.

[83] Model Penal Code § 224.6.

[84] Ala. Code § 13A-9-14; Alaska Stat. Ann. § 11.46.285; Ariz. Rev. Stat. Ann. § 13-2102; Ark. Code Ann. § 5-37-207; Colo. Rev. Stat. Ann. § 18-5-702; Conn. Gen. Stat. Ann. § 53a-128d; Del. Code Ann. tit. 11, § 903; Fla. Stat. Ann. § 817.61; Ga. Code Ann. § 16-9-33; Haw. Rev. Stat. Ann. § 708-8100; Ind. Code Ann. § 35-43-5-4; Iowa

Criminalizing use of a payment card issued or provided by an employer or contractor for the person's own purposes is consistent with payment card fraud statutes in other jurisdictions. Many jurisdictions include language that criminalizes any use of a payment card that is unauthorized by the issuer.[86]

Code Ann. § 715A.6; Ky. Rev. Stat. Ann. § 434.650; Minn. Stat. Ann. § 609.821; Mo. Ann. Stat. § 570.130 (explicitly criminalizes use of a forged payment card, but not of a mutilated or altered card); N.H. Rev. Stat. Ann. § 638:5; N.M. Stat. Ann. § 30-16-33.

[85] MPC § 224.6.

[86] *E.g.*, Ala. Code § 13A-9-14; Alaska Stat. Ann. § 11.46.285; Ark. Code Ann. § 5-37-207; Del. Code Ann. tit. 11, § 903; Iowa Code Ann. § 715A.6; Mo. Ann. Stat. § 570.130; N.H. Rev. Stat. Ann. § 638:5.

RCC § 22A-2203. Check Fraud.

(a) *Offense.* A person commits the offense of check fraud if that person:
  (1) Knowingly obtains or pays for property;
  (2) By using a check;
  (3) Which will not be honored in full upon its presentation to the bank or depository institution drawn upon.

(b) *Permissive Inference.* Unless the check is postdated, a fact finder may, but is not required to, infer that subsection (a)(3) is satisfied if:
  (1) The person who obtained or paid for property;
  (2) Failed to repay the amount not honored by the bank or depository institution and any associated fees;
  (3) To the holder of the check;
  (4) Within 10 days of receiving notice in person or writing that the check was not paid by the financial institution.

(c) *Definitions*. In this section:
  (1) "Credit" means an arrangement or understanding, express or implied, with the bank or depository institution for the payment of such check.
  (2) The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "property," "check," and "value" have the meanings specified in §22A-2001.

(d) *Gradations and Penalties*.
  (1) *First Degree Check Fraud*. A person is guilty of first degree check fraud if the person commits check fraud and, in fact: the amount of the loss to the check holder is $2,500 or more. First degree check fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Check Fraud.* A person is guilty of second degree check fraud if the person commits check fraud and, in fact: the amount of the loss to the check holder is any amount. Second degree check fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Commentary

Explanatory Note. *This section establishes the check fraud offense and penalty gradations for the Revised Criminal Code (RCC). The offense specifies certain conditions under which using, making, or signing a check constitutes check fraud. The penalty gradations are determined by the value of the loss to the check holder. The revised offense replaces the current making, drawing, or uttering check, draft, or order with intent to defraud* [87] *statute in the current D.C. Code.*

Subsection (a)(1) specifies that to commit check fraud a person must obtain or pay for property, a defined term in RCC § 22A-2001 meaning something of value.[88] Subsection (a)(1) also specifies the culpable mental state for subsections (a)(1) – (a)(3) of the offense to be knowledge, a term defined at RCC § 22A-206, here requiring the accused to be aware to a practical certainty or consciously desire that he or she obtains or pays for property.

[87] D.C. Code § 22-1510.
[88] E.g., the property received may be cash, goods, or services.

Subsection (a)(2) requires that the means of obtaining or paying for the property involved in the offense be a check. "Check" is a defined term in the statute that includes any written instrument for payment of money by a financial institution. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item is a check.

Subsection (a)(3) sets out the element that the bank or depository institution drawn upon will not honor the check in full. The specific basis of the bank or depository institution's decision not to honor the check is not specified in the offense, and any basis is sufficient.[89] The time of presentation to the financial institution may coincide with the use of the check to obtain or pay for property or be in the future.[90] Critically, however, not only must it be proven that the check will not be honored in full by the bank or depository institution, but the accused must know this at the time he or she uses the check. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(3), requiring the accused to be aware to a practical certainty or consciously desire that the bank or depository institution drawn upon will not honor the check in full.

Subsection (b) allows, but does not require, a fact finder to infer that the check used would not be honored in full by the bank or depository institution at the time of presentation, and that the accused knew this at the time he or she uses the check. To establish this permissive inference, it must be shown that the person who obtained or paid for property failed to repay the amount not honored by the bank or depository institution and any associated fees to the holder of the check within 10 days of receiving notice in person or writing that the check was not paid by the financial institution. The permissive inference does not apply if the check was dated for some date later than the day when used to obtain or pay for property.

Subsection (c) defines the term "credit" and also cross-references applicable definitions located elsewhere in the RCC.

Subsection (d) grades check fraud based on the amount of the loss to the check holder.[91] Unlike many revised property offenses, the number of gradations is only two, reflecting the relatively lesser seriousness of the offense. Practically, very high value checks are unlikely to be accepted by a person without bank verification, resulting in few or no instances of

[89] Typically, the person whose account is drawn upon by the check will have insufficient funds or credit (e.g., through over-draft protection or some other alternate source of credit). However, other bases for not honoring a check may include having a hold on an account.

[90] E.g., a person who knowingly tries to cash a check at his bank that draws upon his overdrawn account would be simultaneously "presenting" the check at the same time as he uses it to obtain property (cash). However, perhaps more typically, the accused would use the check to obtain property (goods) at a business which only later would present the check to the bank for deposit. The possibility of a time lapse between the time of using the check and it being presented to the financial institution may be important to proving the offense, because it may indicate the defendant did not have a culpable mental state. E.g., a person would not be liable when that person presents a check to a business owner that draws upon his overdrawn account, but lacks knowledge that the check will not be honored upon presentation to the financial institution because he or she plans to immediately go make a deposit in the account to cover the check. Similarly, a person who spoke with a merchant and was told her check wouldn't be deposited for two weeks would not be liable for check fraud if she then used a check that she knew would not be honored by the financial institution if presented that day, but she planned to take action to ensure the check would be honored in two weeks.

[91] E.g., if a person writes a check to a merchant for $2500 dollars, but upon presentation to the financial institution the bank honors the check for a value of $1000 and there is a $20 fee by the bank based on the fact that the account drawn upon was insufficient, the loss for purposes of grading would be $1520.

very high value check fraud. "In fact" also is a defined term in RCC § 22A-2001 that is used in both check fraud gradations to indicate that there is no culpable mental state requirement as to the amount lost to the check holder. The defendant is strictly liable as to the amount lost by the check holder.

Relation to Current District Law. *The revised check fraud statute changes District law in five main ways to reduce unnecessary overlap between offenses, to clarify the law and use apply consistent definitions, and to improve the proportionality of offense penalties*.

First, the revised statute requires that the accused obtain or pay for property or services with the bad check. By contrast, under the current statute, merely making, drawing, uttering, or delivering a bad check is sufficient.[92] Such language is not defined by the current statute,[93] and case law provides no precise definition either. However, the plain language of the current statute appears to include a broad range of conduct that ordinarily would be considered inchoate in most property offenses because no actual harm to anyone is required.[94] By requiring that the defendant actually obtain or pay for property or services, the revised offense would significantly narrow liability for the completed offense to situations where the harm has been completed (i.e. the bad check has been used to obtain something of value) or is very nearly completed (i.e. payment is made, whether or not the property is obtained). Additional liability for *attempted* check fraud would continue to exist, potentially covering much of the conduct criminalized under the current statute.[95] The revised check fraud statute would be more consistent with other property offenses which require that the defendant actually obtain property, and improve the proportionality of the statute.

Second the revised offense provides a permissive inference of knowing the bank will not honor the check, under subsection (b), when the accused failed to repay the amount not honored by the bank or depository institution after 10 days of receiving notice. The current statute, by contrast, provides an inference of insufficient funds when the accused failed to repay the amount within 5 days of receiving notice.[96] The change from 5 days to 10 days permits more time to individuals who may have difficulty going to their bank to rectify an overdraft before the permissive inference as to an element distinguishing criminal from innocent conduct is allowed. Otherwise, since there is no relevant case law interpreting this language in the current statute, it is unclear how the permissive inference language in the revised statute would differ from the "prima facie" evidence described by the current statute. Notably, the revised language is

[92] D.C. Code § 22-1510 ("Any person within the District of Columbia who…shall make, draw, utter, or deliver….").
[93] However, "utter" is statutorily defined in the District's forgery statute. See D.C. CODE § 22-1510 ("Utter" means to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or certify.").
[94] *E.g.*, the ordinary meaning of "drawing" a check is to "create and sign" a check. Black's Law Dictionary (10th ed. 2014). Such conduct, when done with intent to defraud, knowing that insufficient funds are available to cover the check would complete the existing offense—even if the accused did it while at home alone one evening, communicating the drawn check to no one.
[95] *E.g.*, Drawing a check, with intent to defraud, knowing that insufficient funds are available to cover the check may well constitute attempted check fraud if the accused did so at the counter of a check cashing business while waiting for the clerk. *See*, generally, RCC § 22A-301 Criminal Attempt.
[96] D.C. Code § 22-1510. ("[T]he making, drawing…shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within 5 days after receiving notice in person, or writing, that such check, draft, order, or other instrument has not been paid.").

consistent with the Redbook Jury Instructions, which allow, but do not require, a fact finder to infer that the defendant had intent to defraud if he failed to pay the amount due on the check within after receiving notice that the check was not honored.[97]

Third, the revised check fraud statute changes the dollar value cutoffs and specifies that it is the value of the loss to the check holder that should be used to determine gradations. The current check fraud offense turns on the amount of the check, being a three-year felony if the offense is $1,000 or more, otherwise a misdemeanor.[98] The current statute's gradation based on the amount of the check may lead to counterintuitive liability in instances where there are nearly, but not fully, sufficient funds to cover a large value check.[99] The revised offense improves the proportionality of the offense and makes it consistent with the dollar value cutoff used in other revised offenses.

Fourth, the provision in RCC § 22A-2002, "Aggregation of Property Value To Determine Property Offense Grades," allows aggregation of value for the revised check fraud offense based on a single scheme or systematic course of conduct. The current check fraud offense is not part of the current aggregation of value provision for property offenses.[100] The revised check fraud statute permits aggregation for determining the appropriate grade of check fraud to ensure penalties are proportional to defendants' actual conduct.

Fifth, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised check fraud offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[101] However, the current making, drawing, or uttering check offense is not among those offenses and, as described in the commentary to section 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised check fraud offense and other closely-related offenses, 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

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[97] D.C. Crim. Jur. Instr. § 5-211.

[98] D.C. Code § 22-1510 ("Any person…shall, if the amount of such check, draft, order, or other instrument is $1,000 or more, be guilty of a felony and fined not more than the amount set forth in § 22-3571.01 or imprisoned for not less than 1 year nor more than 3 years, or both; or if the amount of such check, draft, order, or other instrument has some value, be guilty of a misdemeanor and fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both.").

[99] E.g., a person who writes a check for $1,001, knowing there is only $1,000 available to cover the check (and otherwise satisfying the elements of the offense) would be subject to a three year felony under current law. By contrast, a person who writes a check for $999, knowing there is no money available to cover the check (and otherwise satisfying the elements of the offense) would be subject to a 180-day misdemeanor under current law.

[100] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[101] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").

Beyond these five main changes to current District law, four other aspects of the revised check fraud statute may constitute substantive changes of law.

First, the revised statute requires that the defendant act knowingly with respect to the elements in subsections (a)(1) and (a)(2).[102] The current statute itself is silent as to the applicable culpable mental state requirements for its corresponding elements, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[103] Requiring a knowing culpable mental state also makes check fraud consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[104]

Second, the revised statute requires that the check will not be honored by the bank or depository institution, and that the accused knows this fact. By contrast, the current statute specifies that the accused know that he or she has insufficient funds or credit.[105] There is no case law interpreting the scope of this element. The revised statute clarifies that the offense creates liability in instances where the accused knows of other reasons[106]—besides insufficient funds or credit—why the bank or depository institution will deny payment. This clarifies the offense and may fill a gap in existing law.

Third, the revised statute eliminates the requirement that the defendant acted "with intent to defraud."[107] The current statute does not define the term "defraud," and the D.C. Court of Appeals (DCCA) has never defined the meaning of the language in the uttering a check, draft, or order with intent to defraud statute. As noted above, the current offense includes conduct that would ordinarily be considered inchoate (involving no completed harm to any person) and more specifically required knowledge of insufficient funds or credit. However, because the revised statute requires the accused actually obtain or come very close to obtaining (by paying for) the property, and the accused must know the bank will not honor the check for any reason, an additional "intent to defraud" element is not necessary to distinguish innocent from criminal conduct in the revised offense. Eliminating "intent to defraud" clarifies the meaning of the statute.

Fourth, the gradations in subsection (d), by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the loss to the check holder. The current statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the current check fraud value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[108] Applying no culpable mental state requirement to statutory elements that

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[102] There is some D.C. Court of Appeals case law suggesting that the culpable mental state of the current uttering offense is one of "specific intent." *Zanders v. United States*, 678 A.2d 556, 565–66 (D.C. 1996). However, in this case, the D.C. Court of Appeals was quoting the Redbook Jury Instructions, and not making an actual holding.

[103] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that 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)").

[104] See, e.g., RCC § 22A-2201.

[105] D.C. Code § 22-1510 ("…knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument….").

[106] E.g., if an account is frozen for legal or investigatory reasons, or the accused has closed the type of account the check purports to draw upon.

[107] D.C. Code § 22-3223 ("Any person within the District of Columbia who, with intent to defraud, shall….").

[108] D.C. Crim. Jur. Instr. § 5.211.

do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[109] Clarifying that the value of the loss to the check holder is a matter of strict liability in the revised check card fraud gradations clarifies and potentially fills a gap in District law.

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

Relation to National Legal Trends. *Two of the revised check fraud offense's above-mentioned substantive changes to current District law have mixed support in national legal trends*.

First, requiring for check fraud that the accused actually pays for or obtains property of another, appears to be a minority practice in other jurisdictions. Of the 34 states that have adopted a new criminal code influenced by the Model Penal Code (MPC)[110], only four jurisdictions require that the defendant obtained property of another.[111] The remaining states, and the MPC[112] do not require by statute that the defendant actually obtain property. Under the MPC check fraud statute[113], and many other jurisdictions' statutes[114], a person need only "issue" or "pass" a check. Issuing or passing a check can involve merely making or delivering a check.[115] However, case law in many jurisdictions have interpreted analogous check fraud statutes to require that the accused actually obtained property in exchange for the fraudulent check,[116] complicating an exact analysis of how many jurisdictions require obtaining property by use of the bad check.

Second, including a permissive inference is consistent with a slight majority of jurisdictions with reformed theft offenses, as well as the MPC.[117] Almost all states with reformed criminal codes have check fraud statutes allow some form of inference of wrongful knowledge or intent if a defendant fails to make payment after being notified that the check was not honored. Of these states, a slight majority use permissive inference language similar to that in the revised statutes[118], while a minority refer to "prima facie evidence" [119], similar to language in the current statute.

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[109] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").

[110] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[111] ALA. CODE § 13A-9-13.1. KY. REV. STAT. ANN. § 514.040 (check fraud is a form of theft); N.M. STAT. ANN. § 30-36-4, W. VA. CODE ANN. § 61-3-39.

[112] MPC § 224.5 (requiring that a person "issues or passes a check", but obtaining property not required).

[113] *Id.*

[114] *E.g.*, Alaska Stat. Ann. § 11.46.280; Ariz. Rev. Stat. Ann. § 13-1807; Me. Rev. Stat. tit. 17-A, § 708.

[115] *E.g.*, Colo. Rev. Stat. Ann. § 18-5-205 (1)(e) ("A person issues a check when he makes, draws, delivers, or passes it or causes it to be made, drawn, delivered, or passed.").

[116] *Com. v. Goren*, 72 Mass. App. Ct. 678, 682–83, 893 N.E.2d 786, 789–90 (2008) (noting that most states' statutes require that property or something of value be obtained in exchange for a fraudulent check, and cases decided under substantially all such statutes have concluded that the statute does not apply to a check tendered in payment of an antecedent debt) (internal citations omitted).

[117] MPC § 224.5.

[118] Ark. Code Ann. § 5-37-307; Colo. Rev. Stat. Ann. § 18-5-205; Conn. Gen. Stat. Ann. § 53a-128; 720 Ill. Comp. Stat. Ann. 5/17-1; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; Neb.

Third, the revised statute uses two penalty grades, but changes the value threshold for first degree check fraud from $1,000 to $2,500. Of the 34 states with codes influenced by the MPC, a slight majority use three or more penalty grades.[120] In most jurisdictions that determine penalty grades based on value[121], the minimum value threshold for felony check fraud is $1,000 or less,[122] and the minimum value threshold for the highest penalty grade is $2,000 or more.[123] However, there is considerable variation in the minimum value threshold required for the highest penalty grade, ranging from $25[124], to $500,000.[125]

Fourth, regarding the aggregation of values in a single scheme or systematic course of conduct, the revised check fraud offense follows many jurisdictions[126] which have statutes that closely follow the Model Penal Code (MPC)[127] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and

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Rev. Stat. Ann. § 28-611; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.11; 18 Pa. Stat. Ann. § 4105; Tenn. Code Ann. § 39-14-121; Tex. Penal Code Ann. § 32.41.

[119] Del. Code Ann. tit. 11, § 901; Fla. Stat. Ann. § 832.07; Ga. Code Ann. § 16-9-20; Haw. Rev. Stat. Ann. § 708-857; Ind. Code Ann. § 35-43-5-5; Iowa Code Ann. § 714.1; Kan. Stat. Ann. § 21-5821; Mont. Code Ann. § 45-6-316; N.M. Stat. Ann. § 30-36-7; N.Y. Penal Law § 190.10; Or. Rev. Stat. Ann. § 165.065; S.D. Codified Laws § 22-30A-27.

[120] Alaska Stat. Ann. § 11.46.280; Colo. Rev. Stat. Ann. § 18-5-205; Conn. Gen. Stat. Ann. § 53a-128; Ga. Code Ann. § 16-9-20; Iowa Code Ann. § 714.1; Ind. Code Ann. § 35-43-5-12; Kan. Stat. Ann. § 21-5821; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; N.D. Cent. Code Ann. § 6-08-16; Neb. Rev. Stat. Ann. § 28-611; N.H. Rev. Stat. Ann. § 638:4; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.11; 18 Pa. Stat. Ann. § 4105; S.D. Codified Laws § 22-30A-25; Tenn. Code Ann. § 39-14-121; Utah Code Ann. § 76-6-505.

[121] Two states do not grade their analogous check fraud offenses based on the value of the check. Oregon applies felony liability if the accused has one prior check fraud conviction in the prior 12 months. OR. REV. STAT. ANN. § 165.065. Texas applies felony liability if the fraudulent check was used for child support. TEX. PENAL CODE ANN. § 32.41

[122] Alaska Stat. Ann. § 11.46.280; Fla. Stat. Ann. § 832.05, Iowa Code Ann. §§ 714.1-714.2, 720 Ill. Comp. Stat. Ann. 5/17-1, Ind. Code Ann. § 35-43-5-12, Kan. Stat. Ann. § 21-5821, Ky. Rev. Stat. Ann. § 514.040, Me. Rev. Stat. tit. 17-A, § 708, Minn. Stat. Ann. § 609.535, Mo. Ann. Stat. § 570.120, N.D. Cent. Code Ann. § 6-08-16, N.H. Rev. Stat. Ann. § 638:4, N.J. Stat. Ann. § 2C:21-5, N.M. Stat. Ann. § 30-36-5, Ohio Rev. Code Ann. § 2913.11, S.D. Codified Laws §§ 22-30A-25, 22-30A-17, Tenn. Code Ann. § 39-14-121, Wash. Rev. Code Ann. § 9A.56.060, W. Va. Code Ann. § 61-3-39, Wyo. Stat. Ann. § 6-3-702.

[123] Alaska Stat. Ann. § 11.46.280; Ala. Code § 13A-9-13.1; Ark. Code Ann. § 5-37-302; Ariz. Rev. Stat. Ann. § 13-1807; Colo. Rev. Stat. Ann. § 18-5-205; Conn. Gen. Stat. Ann. § 53a-128; Iowa Code Ann. § 714.1; Ind. Code Ann. § 35-43-5-12; Kan. Stat. Ann. § 21-5821; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Neb. Rev. Stat. Ann. § 28-611; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.01; 18 Pa. Stat. Ann. § 4105; S.D. Codified Laws § 22-30A-24; Tenn. Code Ann. § 39-14-121; Utah Code Ann. § 76-6-505.

[124] N.M. Stat. Ann. § 30-36-5.

[125] S.D. Codified Laws § 22-30A-24, S.D. Codified Laws § 22-30A-17.

[126] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[127] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

receiving stolen property.[128] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[129]

Fifth, regarding the bar on multiple convictions for the revised check fraud offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised check fraud offense and other overlapping property offenses. For example, where the offense most like the revised check fraud offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[130] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[131] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[132]

In addition, eliminating the intent to defraud element in check fraud follows a strong majority of jurisdictions with reformed criminal codes. Most jurisdictions with reformed criminal codes[133] and the American Law Institute's Model Penal Code[134] (MPC) omit any reference to an "intent to defraud", and instead simply require that the defendant knew that the check would not be honored by the drawee. [135]

[128] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[129] See, e.g. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[130] D.C. Code § 22-3203.

[131] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[132] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[133] Ala. Code § 13A-9-13.1; Alaska Stat. Ann. § 11.46.280; Ark. Code Ann. § 5-37-307; Conn. Gen. Stat. Ann. § 53a-128; Del. Code Ann. tit. 11, § 900; Fla. Stat. Ann. § 832.05; Ga. Code Ann. § 16-9-20; Haw. Rev. Stat. Ann. § 708-857; 720 Ill. Comp. Stat. Ann. 5/17-1; Ind. Code Ann. § 35-43-5-12; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; Mont. Code Ann. § 45-6-316; Neb. Rev. Stat. Ann. § 28-611; N.J. Stat. Ann. § 2C:21-5; N.Y. Penal Law § 190.05; N.D. Cent. Code Ann. § 6-08-16; Or. Rev. Stat. Ann. § 165.065; 18 Pa. Stat. Ann. § 4105; Tex. Penal Code Ann. § 32.41; Utah Code Ann. § 76-6-505.

[134] MPC § 224.5.

[135] Ala. Code § 13A-9-13.1; Alaska Stat. Ann. § 11.46.280; Del. Code Ann. tit. 11, § 900; Ga. Code Ann. § 16-9-20; Haw. Rev. Stat. Ann. § 708-857; 720 Ill. Comp. Stat. Ann. 5/17-1; Ind. Code Ann. § 35-43-5-12; Iowa Code Ann. § 714.1; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; Mo. Ann. Stat. § 570.120; Mont. Code Ann. § 45-6-316; N.H. Rev. Stat. Ann. § 638:4; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.11; Or. Rev. Stat. Ann. § 165.065; 18 Pa. Stat. Ann. § 4105; Utah Code Ann. § 76-6-505.

RCC § 22A-2204. Forgery.

(a) *Offense.* A person commits the offense of forgery if that person:
- (1) Knowingly alters:
  - (A) A written instrument
  - (B) Without authorization; and
  - (C) The written instrument is reasonably adapted to deceive a person into believing it is genuine; or
- (2) Knowingly makes or completes;
  - (A) A written instrument;
  - (B) That appears:
    - (i) To be the act of another who did not authorize that act, or
    - (ii) To have been made or completed at a time or place or in a numbered sequence other than was in fact the case, or
    - (iii) To be a copy of an original when no such original existed; and
  - (C) The written instrument is reasonably adapted to deceive a person into believing the written instrument is genuine; or
- (3) Knowingly transmits or otherwise uses:
  - (A) A written instrument;
  - (B) That was made, signed, or altered in a manner specified in subsections (a)(1) or (a)(2);
- (4) With intent to:
  - (A) Obtain property of another by deception; or
  - (B) Harm another person.

(b) *Definitions*. The terms "knowingly," and "intent" having the meanings specified in § 22A-206, the term "in fact" has the meaning specified in 22A-207, and the terms "deception," "property," "property of another," and "value" have the meanings specified in §22A-2001.

(c) *Gradations and Penalties.*
- (1) *First Degree Forgery.*
  - (A) A person is guilty of first degree forgery if the person commits forgery and the written instrument appears to be, in fact:
    - (i) A stock certificate, bond, or other instrument representing an interest in or claim against a corporation or other organization of its property;
    - (ii) A public record, or instrument filed in a public office or with a public servant;
    - (iii) A written instrument officially issued or created by a public office, public servant, or government instrumentality;
    - (iv) A deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; or
    - (v) A written instrument having a value of [$10,000 or more].
  - (B) First degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (2) *Second Degree Forgery.*

(A) A person is guilty of second degree forgery if the person commits forgery and the written instrument appears to be, in fact:
  (i) A token, fare card, public transportation transfer certificate, or other article manufactured for use as a symbol of value in place of money for the purchase of property or services;
  (ii) A prescription of a duly licensed physician or other person authorized to issue the same for any controlled substance or other instrument or devices used in the taking or administering of controlled substances for which a prescription is required by law; or
  (iii) A written instrument having a value of [$1,000 or more].

(B) Second degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Third Degree Forgery.*

(A) A person is guilty of third degree forgery if the person commits forgery of any written instrument. Third degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Commentary

Explanatory Note. *This section establishes the forgery offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes making, completing, altering, using, or transmitting falsified written instruments, when the defendant has intent to use the written instrument to obtain property by deception, or to otherwise harm another person. The revised offense replaces the current forgery*[136] *statutes and the recordation of deed, contract, or conveyance with intent to extort money*[137] *in the current D.C. Code.*

Subsection (a)(1)-(3) define three alternative means of committing forgery.

Subsection (a)(1) provides that the defendant must have knowingly, a term defined at RCC § 22A-206, engaged in conduct that caused an alteration. When causing the alteration the accused must have also known that the item he or she altered was a written instrument, the accused must have known that he or she lacked authority to do so, and the accused must have known that the alteration was reasonably adapted to deceive a person into believing it is genuine. This subsection covers unauthorized alterations to written instruments even if they were originally genuine.

Subsection (a)(2) provides that that the defendant must have engaged in conduct knowing that it would cause a making or completion of an item. In addition, when making or completing the item, accused, must have known that the item made or completed is a written instrument that appears: to be the act of someone who did not authorize the making or creating; to have been made or completed at a time or place or in a numbered sequence other than was in fact the case; or to be a copy of an original when no such original existed. Further, under subsection (a)(2)(C), the written instrument must be reasonably adapted to deceive a person into believing the written instrument is genuine.

Subsection (a)(3) provides that that the defendant must have engaged in conduct, knowing that it would cause transmission or use of a written instrument that was made, altered,

[136] D.C. Code §§ 22-3241 - § 22-3242.
[137] D.C. Code §22-1402.

or completed as described in subsections (a)(1) and (a)(2). The defendant must have known he was transmitting or using the instrument, and known that the instrument was altered, made, or completed in a manner listed under subsections (a)(1) or (a)(2). Subsection (a)(3) codifies conduct previously known as "uttering."[138]

Subsection (a)(4) further requires that, whichever alternative means of committing the offense, the defendant also must act with intent to obtain property of another by deception, or to otherwise harm another person. "Intent" is a defined term meaning the defendant consciously desired, or believed to a practical certainty that his conduct would result in obtaining property of another by deception, or harming another person. In a forgery prosecution predicated on intent to obtain property by deception, the deception must relate to the *genuineness* of the written instrument, not false information contained within the instrument.[139] It is not necessary to prove that the defendant actually obtained property of another by deception, or that another person was actually harmed.

Subsection (b) cross-references applicable definitions located elsewhere in the RCC.

Subsection (c) grades forgery based on the type of written instrument used in the forgery or the value of the written instrument. Forging public records or documents of legal import, such as wills and contracts, are subject to the highest maximum sentence. Forging prescriptions and tokens, fair cards, public transportation transfer certificates, or other articles intended as symbols of value for use as payment for goods and services is subject to a lower maximum sentence. Forging any other kind of written instrument is third degree forgery. Alternatively, regardless of the type of instrument, forging written instruments with a value of $10,000 or more is first degree forgery. Forging written instruments with a value of $1,000 or more, but less than $10,000, is second degree forgery. Forging written instruments with a value of less than $1,000, while not specifically addressed in the grading scheme, would still constitute third degree forgery. "In fact" also is a defined term in RCC § 22A-2001 that is used in all of the forgery gradations to indicate that there is no culpable mental state requirement as to the type or the value of the forged written instrument. The defendant is strictly liable as to the type or value of the forged written instrument.

The revised forgery offense includes conduct previously criminalized as recordation of deed, contract, or conveyance with intent to extort money.

Relation to Current District Law. *The revised forgery statute changes District law in five main ways to reduce unnecessary overlap and gaps between offenses, to clarify the law and use apply consistent definitions, and to improve the proportionality of offense penalties.*

First, the revised offense makes forgery, by any means, one offense. By contrast, despite the fact that its text makes no indication of the matter, the current forgery statute has been recognized by the DCCA as codifying two separate legal offenses—forgery and uttering a forged document.[140] Under current law, a person can be convicted of both forgery and uttering, based

[138] D.C. Code § 22-3241(a)(2).

[139] *See* Lafave, Wayne, 3 Subst. Crim. L. § 19.7 (2d ed.) ("Though forgery, like false pretenses, requires a lie, it must be a lie about the document itself: the lie must relate to the genuineness of the document."); Commentary to MPC § 224.1 at 289 ("Where the falsity lies in the representation of facts, not in the genuineness of the execution, it is not forgery.)

[140] *White v. United States*, 582 A.2d 774, 778 (D.C. 1990) ("it should be noted that forgery and uttering constitute two distinct offenses, albeit contained in a single statutory provision") *aff'd* 613 A.2d 869, 872 (D.C. 1992) (en banc). The DCCA ruling on this point follows apparent legislative intent. See COMMENTARY TO THEFT AND WHITE COLLAR CRIME ACT of 1982 at 60.

on forging and then using a single written instrument.[141] Multiple forgery convictions with respect to a single written instrument may still occur under the revised statute,[142] however the revised statute would change current law by barring convictions for both creating and using a forged document as part of the same act or course of conduct. The combined, revised offense eliminates unnecessary overlap in the current offenses without reducing the scope of the behavior criminalized.

Second, the revised statute replaces the "intent to defraud" element in the current statute with "intent to obtain property of another by deception." The current statute does not define the term "defraud," and the D.C. Court of Appeals (DCCA) has never defined the meaning of the language in forgery.[143] Consequently, the precise effect of the revision is unclear. However, instead of relying on this vague language, the revised statute requires that the defendant acted with intent to obtain property by deception. This revised language is intended to be broad enough to cover all, or nearly all, [144] the wrongful intentions that currently fall under the "intent to defraud" language in the current statute. Moreover, there remains the alternative of element of committing the offense "with intent to harm another person," which broadly criminalizes forgery with ill-intent. Besides clarifying the meaning of "intent to defraud," replacing such language with "an intent to obtain property of another by deception" makes use of a consistent definition across fraud offenses.

Third, the revised statute no longer grades forgery of payroll checks as first degree forgery. Under the revised statute, if a person commits forgery involving a payroll check, or an instrument that appears to be a payroll check, the gradation would be determined by the value of that instrument. This revision treats the forgery of payroll checks the same as forgeries of any other kinds of checks to improve the proportionality of the offense.

Fourth, the provision in RCC § 22A-2002, "Aggregation of Property Value To Determine Property Offense Grades," allows aggregation of value for the revised forgery offense based on a single scheme or systematic course of conduct. The current forgery offense is not part of the current aggregation of value provision for property offenses.[145] The revised forgery statute

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[141] *White v. United States*, 613 A.2d 869, 872 n.4 (D.C. 1992) (rejecting claim that uttering and forgery convictions should merge); *see also, Driver v. United States*, 521 A.2d 254, 256 (D.C. 1987) (defendant convicted of both forgery and uttering based on forging, and attempting to cash a single check).

[142] *E.g.*, If a person forges a written instrument, and uses it to obtain property from another, then as part of a different act or course of conduct, uses the same forged written instrument to obtain different property, then multiple convictions might be warranted. Multiple convictions with respect to a single forged instrument may or may not be appropriate depending on the facts of a particular case.

[143] Note though that other jurisdictions have held that intent to defraud includes "the purpose of causing financial loss to another," and to "prejudice . . . the rights of another[.]" People v. Lawson, 28 N.E.3d 210, 215–16 (Ill. Ct. App. 2015); *State v. Bourgeois*, 113 So. 3d 225, 230 (La. Ct. App. 2013).

[144] For example, a person could conceivably commit an "honest services fraud" by using forged documents. "Honest services fraud" does not involve obtaining property by deception, but instead involves depriving another of a right to honest or fair services. For example, if a public official used a forged document in an act of nepotism, this could constitute an honest services fraud, but would not involve obtaining property by deception. It is unclear if this type of conduct is covered by the current statute, but it would be excluded under the revised statute, except to the extent that it constituted an "intent to harm" another person.

[145] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

permits aggregation for determining the appropriate grade of forgery to ensure penalties are proportional to defendants' actual conduct.

Fifth, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised forgery offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[146] However, forgery is not among those offenses and, as described in the commentary to section 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised forgery offense and other closely-related offenses, 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Beyond these three main changes to current District law, two other aspects of the revised forgery statute may constitute a substantive change of law.

First, the revised statute requires that the defendant act knowingly with respect to the elements in subsections (a)(1)-(a)(3).[147] The current forgery statute itself is silent as to the applicable culpable mental state requirements, and no case law exists on point.[148] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[149] Requiring knowing culpable mental states also makes forgery consistent with the current fraud statute, which requires that the defendant knew he lacked consent to take property of another.[150]

Second, the revised statute clarifies that a person is strictly liable as to the type or value of written instrument for purposes of grading forgery. Under current law it is unclear what mental state, if any, is required as to the type or value of written instrument involved in the forgery, and no case law exists on point. While applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[151] the presumption that the defendant must have a subjective intent has not typically been applied to facts that merely distinguish the degree of

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[146] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").

[147] There is some D.C. Court of Appeals case law suggesting that the culpable mental state of the current forgery offense is one of "specific intent." *Zanders v. United States*, 678 A.2d 556, 565 (D.C. 1996). However, in this case, the D.C. Court of Appeals was quoting the Redbook Jury Instructions, and not making an actual holding.

[148] There is one possible exception. In *Ashby v. United States*, 363 A.2d 685 (D.C. 1976), the defendant was convicted of forgery for signing a false name to a check. On appeal, the defendant argued that there was insufficient to find that he had the requisite "intent to defraud." Although the D.C. Court of Appeals did not specifically define what is required for "intent to defraud," it noted that the defendant's "*awareness* that the name he affixed to the check for the purpose of cashing it was not his own" served as evidence of his "intent to defraud." *Ashby*, 363 A.2d at 687. At least in regards to the element under subsection (a)(1)(B)(i), there is some case law suggesting that a culpable mental state of "knowing" is appropriate.

[149] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that 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)").

[150] RCC § 22A-2201.

[151] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that 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)").

wrongdoing.[152] The particular type of written instrument that has been forged does not distinguish innocent from criminal conduct, so no culpable mental state is assumed to apply to that fact. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[153]

Other changes to the revised theft statute are clarificatory in nature and are not intended to substantively change District law. First, the revised forgery statute deletes the definition of "forged written instrument" and instead separately specifies conditions in which altering, making, completing, transmitting, or using a written instrument constitutes forgery. The current statute defines "forged written instrument" to include written instruments that have "been *falsely* made, altered, signed, or endorsed[.]"[154] The DCCA has clarified however that an instrument is falsely made, altered, or signed, when the person making, altering, or signing the instrument lacked authority to do so.[155] The revised statute includes this requirement; when a forgery prosecution is premised on the defendant altering an instrument, the defendant must have lacked authority to do so. The current definition of "forged written instrument" also includes instruments that "contain[] a false addition or insertion."[156] Again, the revised statute's reference to altering a written instrument without authorization is intended to cover all instruments that "contain a false addition or insertion" under the current statute. Finally, the current definition of "forged written instrument" also includes instruments that are a "combination of parts of 2 or more genuine written instruments."[157] Correspondingly, the revised statute's reference to making or completing a written instrument that appears to have been made or completed at a time or place or in a numbered sequence other than was in fact the case, is intended to cover cases in which two otherwise genuine instruments are combined. The DCCA has not precisely defined when an instrument has been falsely made, altered, signed, or endorsed, or when an addition or insertion is false. The direct integration into the revised offense of elements in the current definition of "forged written instrument," and the clarification of those requirements, is not intended to substantively alter the scope of the offense.

Second, the revised statute requires that the defendant "alters," "makes," "completes," "transmits," or "uses" a written instrument. These verbs are intended to encompass the words "makes, draws," or "utters"—the last being a term defined to mean, "to issue, authenticate,

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[152] *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 325 (2012) ("State and federal courts frequently cite the U.S. Supreme Court for this point. Relying on United States v. X-Citement Video, Inc., courts emphasize 'the presumption in favor of a scienter requirement should apply to each of the statutory elements [of an offense] that criminalize otherwise innocent conduct'--but no elements beyond those.").

[153] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").

[154] D.C. Code § 22-3241 (a)(1)(A) (emphasis added).

[155] *See, Martin v. United States*, 435 A.2d 395, 398 (D.C. 1981) (noting that "It is the unauthorized completion of the stolen money orders which renders the instruments "falsely made or altered"); *Hall v. United States*, 383 A.2d 1086, 1089–90 (D.C. 1978) ("to establish falsity in a forgery charge it must be made to appear not only that the person whose name is signed to the instrument did not sign it, but also it must be established by competent evidence that the name was signed by defendant without authority") (quoting Owen v. People, 195 P.2d 953 (Colo. 1948)).

[156] D.C. Code § 22-3241 (a)(1)(B).

[157] D.C. Code § 22-3241 (a)(1)(C).

transfer, publish, sell, deliver, transmit, present, display, use, or certify."[158] The verbs "draws," and "issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, [], or certify," appear to be duplicative[159] and their elimination is intended only to clarify, not change, current law.

Third, the revised statute requires that the forged instruments be "reasonably adapted to deceive a person into believing it is genuine." Although the current forgery statute does not include this language, the requirement is based on current DCCA case law. The DCCA has held that forgery requires that the forged written instrument "must be apparently capable of effecting a fraud."[160] The "reasonably adapted" language in the revised statute is intended to codify this element recognized in case law.

Fourth, the revised statute eliminates as a separate offense the current offense of recordation of deed, contract, or conveyance with intent to extort money under D.C. Code § 22-1402.[161] Under that statute, it is a crime for a person to cause any instrument purporting to convey or relate to land in the District to be recorded in the office of the Recorder of Deeds, when that person has no title or color of title to the land, and with intent to extort money or anything of value from the true owner. Insofar as it involves use of a forged instrument with intent to harm another, the conduct constituting an offense under §22-1402 would necessarily satisfy the elements under the revised forgery statute. Due to the complete overlap between § 22-1402 and the revised forgery statute, D.C. Code § 22-1402 is deleted as redundant.

Relation to National Legal Trends. *The revised forgery offense's above-mentioned substantive changes to current District law has mixed support in national legal trends, with the exception of deleting the "intent to defraud" element of forgery.*

First, combining forgery and uttering in a single statute follows a strong majority of jurisdictions nationwide. A majority of the 34 states that have adopted a new criminal code influenced by the Model Penal Code (MPC)[162] and the MPC[163] include both forgery and uttering in a single forgery statute. [164]

Second, replacing the intent to defraud element with an intent to obtain property of another by deception the revised offense does not follow the majority trend,[165] or the MPC.[166]

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[158] D.C. Code § 22-3241.

[159] *E.g*., anytime a person "endorses," a written instrument, that person would also have necessarily either altered, made, completed, transmitted, or otherwise used the written instrument.

[160] *Martin*, 435 A.2d at 398 (D.C. 1981); *Hall*, 383 A.2dat 1089–90 (D.C. 1978). *See also*, Commentary to 1982 Theft and White Collar Crime Act. ("The final element which must be proven is that the falsely made or altered writing was apparently capable of effecting a fraud.").

[161] D.C. Code §22-1402.

[162] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[163] MPC § 224.1.

[164] Alaska Stat. Ann. § 11.46.510; Ark. Code Ann. § 5-37-201; Ariz. Rev. Stat. Ann. § 13-2002; Colo. Rev. Stat. Ann. § 18-5-102; Conn. Gen. Stat. Ann. § 53a-139; Ga. Code Ann. § 16-9-1; Haw. Rev. Stat. Ann. § 708-851; 720 Ill. Comp. Stat. Ann. 5/17-3; Ind. Code Ann. § 35-43-5-2; Iowa Code Ann. § 715A.2; Kan. Stat. Ann. § 21-5823; Me. Rev. Stat. tit. 17-A, § 703; Mo. Ann. Stat. § 570.090 ; Mont. Code Ann. § 45-6-325; Neb. Rev. Stat. Ann. § 28-602; N.H. Rev. Stat. Ann. § 638:1; N.J. Stat. Ann. § 2C:21-1; N.M. Stat. Ann. § 30-16-10; N.D. Cent. Code Ann. § 12.1-24-01; Ohio Rev. Code Ann. § 2913.31; Or. Rev. Stat. Ann. § 165.007; 18 Pa. Stat. Ann. § 4101; Tex. Penal Code Ann. § 32.21; Utah Code Ann. § 76-6-501; Va. Code Ann. § 18.2-172; Wash. Rev. Code Ann. § 9A.60.020; Wyo. Stat. Ann. § 6-3-602.

[165] *E.g*. Alaska Stat. Ann. § 11.46.500, Fla. Stat. Ann. § 831.01, Haw. Rev. Stat. Ann. § 708-851.

[166] MPC § 224.1 (requiring a "purpose to defraud or injure anyone").

However, there are some other jurisdictions with forgery statutes that omit an intent to defraud element.[167] In addition, the Proposed Federal Criminal Code's forgery statute also omits an intent to defraud element.[168]

Third, omitting payroll checks, regardless of value, from first degree forgery follows a strong majority of jurisdictions nationwide. Every one of the 34 states that have adopted a new criminal code influenced by the MPC[169], as well as the MPC's forgery offense[170] does not treat forgery of payroll checks differently from ordinary checks for penalty purposes. The Proposed Federal Criminal Code also does not treat forgeries of payroll checks differently than forgeries of ordinary checks.[171]

Fourth, regarding the aggregation of values in a single scheme or systematic course of conduct, the revised forgery offense follows many jurisdictions[172] which have statutes that closely follow the Model Penal Code (MPC)[173] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[174] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[175]

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[167] Neb. Rev. Stat. Ann. § 28-602, N.D. Cent. Code Ann. § 12.1-24-01, Va. Code Ann. § 18.2-168.

[168] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS § 1751 (omitting intent to defraud, but requiring "intent to deceive or harm the government or another person").

[169]Ala. Code § 13A-9-2; Alaska Stat. Ann. § 11.46.500; Ark. Code Ann. § 5-37-201; Ariz. Rev. Stat. Ann. § 13-2001; Colo. Rev. Stat. Ann. § 18-5-102; Conn. Gen. Stat. Ann. § 53a-138; Del. Code Ann. tit. 11, § 861; Fla. Stat. Ann. § 831.01; Ga. Code Ann. § 16-9-1; Haw. Rev. Stat. Ann. § 708-853; 720 Ill. Comp. Stat. Ann. 5/17-3; Ind. Code Ann. § 35-43-5-2; Iowa Code Ann. § 715A.2; Kan. Stat. Ann. § 21-5823; Ky. Rev. Stat. Ann. § 516.020; Me. Rev. Stat. tit. 17-A, § 703; Minn. Stat. Ann. § 609.625; Mo. Ann. Stat. § 570.090; Mont. Code Ann. § 45-6-325; Neb. Rev. Stat. Ann. § 28-603; N.H. Rev. Stat. Ann. § 638:1; N.J. Stat. Ann. § 2C:21-1; N.M. Stat. Ann. § 30-16-10; N.Y. Penal Law § 170.10; N.D. Cent. Code Ann. § 12.1-24-01; Ohio Rev. Code Ann. § 2913.31; Or. Rev. Stat. Ann. § 165.013; 18 Pa. Stat. Ann. § 4101; S.D. Codified Laws § 22-39-36; Tex. Penal Code Ann. § 32.21; Utah Code Ann. § 76-6-501; Va. Code Ann. § 18.2-172; Wash. Rev. Code Ann. § 9A.60.020; Wyo. Stat. Ann. § 6-3-602.

[170] MPC § 224.1. It is worth noting however that the MPC, and many reformed jurisdictions, do grade forgery in part based on whether the instrument was "part of an issue of stock, bonds, or other instruments representing interests in or claims against any property or enterprise." *E.g.*, ALASKA STAT. ANN. § 11.46.500. Arguably, this language could include payroll checks, but not ordinary checks, in that a payroll check is an instrument representing a claim against property. However, the MPC commentary does not indicate that this language would necessarily include payroll checks.

[171] Proposed Federal Criminal Code § 1751.

[172] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[173] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[174] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[175] *See, e.g*. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

Fifth, regarding the bar on multiple convictions for the revised forgery offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised forgery offense and other overlapping property offenses. For example, where the offense most like the revised forgery is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses.[176] Research has not identified any equivalent statutory provision to either the current Consecutive sentences[177] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[178] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[179]

In addition, the clarificatory change defining forgery to include altering an instrument without authorization, or making or completing an instrument so that it appears to be the act of another who did not authorize that act follows a strong majority of jurisdictions nationwide. The MPC[180], and a large majority of jurisdictions' forgery statutes specify that altering, making, or completing instruments must be done without authorization.[181]

[176] *E.g., State v. Baldwin*, 78 P.3d 1005, 1010 (Wash. 2003) (en banc) (holding that convictions for forgery and identity theft do not merge, even when arising from the same act).
[177] D.C. Code § 22-3203.
[178] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[179] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[180] MPC § 224.1.
[181] Ala. Code § 13A-9-1; Alaska Stat. Ann. § 11.46.580; Ark. Code Ann. § 5-37-201; Ariz. Rev. Stat. Ann. § 13-2001; Colo. Rev. Stat. Ann. § 18-5-101; Conn. Gen. Stat. Ann. § 53a-137; Del. Code Ann. tit. 11, § 861; Haw. Rev. Stat. Ann. § 708-850; Iowa Code Ann. § 715A.2; Kan. Stat. Ann. § 21-5823; Ky. Rev. Stat. Ann. § 516.010; Me. Rev. Stat. tit. 17-A, § 701; Mont. Code Ann. § 45-6-325; Neb. Rev. Stat. Ann. § 28-601; N.H. Rev. Stat. Ann. § 638:1; N.J. Stat. Ann. § 2C:21-1; N.D. Cent. Code Ann. § 12.1-24-04; Ohio Rev. Code Ann. § 2913.31; Or. Rev. Stat. Ann. § 165.002; Utah Code Ann. § 76-6-501; Wash. Rev. Code Ann. § 9A.60.010; Wyo. Stat. Ann. § 6-3-602.

RCC § 22A-2205. Identity Theft.

(a) *Offense.* A person commits the offense of identity theft if that person:

(1) Knowingly creates, possesses, or uses;

(2) Personal identifying information belonging to or pertaining to another person;

(3) Without that other person's effective consent; and

(4) With intent to use the personal identifying information to:

(A) Obtain property of another by deception;

(B) Avoid payment due for any property, fines, or fees by deception; or

(C) Give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception.

(b) *Definitions.*

(1) In this section, the term "identifying information" shall include, but is not limited to, the following:

(A) Name, address, telephone number, date of birth, or mother's maiden name;

(B) Driver's license or driver's license number, or non-driver's license or non-driver's license number;

(C) Savings, checking, or other financial account number;

(D) Social security number or tax identification number;

(E) Passport or passport number;

(F) Citizenship status, visa, or alien registration card or number;

(G) Birth certificate or a facsimile of a birth certificate;

(H) Credit or debit card, or credit or debit card number;

(I) Credit history or credit rating;

(J) Signature;

(K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information;

(L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(M) Place of employment, employment history, or employee identification number; and

(N) Any other numbers or information that can be used to access a person's financial resources, access medical information, obtain identification, act as identification, or obtain property.

(2) The term "possess" has the meaning specified in § 22A-202, the terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "consent," "deception," "financial injury," "property," "property of another," and "value." have the meanings specified in § 22A-2001.

(c) Gradations and Penalties.

(1) Aggravated Identity Theft. A person is guilty of aggravated identity theft if the person commits identity theft and the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greater, in fact, is $250,000 or more. Aggravated identity theft is a

Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) First Degree Identity Theft. A person is guilty of first degree identity theft if the person commits identity theft and the value of the property sought to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $25,000 or more. First degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Second Degree Identity Theft. A person is guilty of second degree identity theft if the person commits identity theft and the value of the property sought to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $2,500 or more. Second degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) Third Degree Identity Theft. A person is guilty of third degree identity theft if the person commits identity theft and the value of the property sought to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $250 or more. Third degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) Fourth Degree Identity Theft. A person is guilty of fourth degree identity theft if the person commits identity theft and the value of the property sought to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is of any amount. Fourth degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) Unit of Prosecution and Calculation of Time to Commence Prosecution of Offense. Creating, possessing, or using a person's personal identifying information in violation of this section shall constitute a single course of conduct for purposes of determining the applicable period of limitation under § 23-113(b). The applicable time limitation under § 23-113 shall not begin to run until after the day after the course of conduct has been completed, or the victim knows, or reasonably should have known, of the identity theft, whichever occurs earlier.

(e) *Jurisdiction.* The offense of identity theft shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:

(1) The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia; or

(2) Any part of the offense takes place in the District of Columbia.

(f) *Police reports*. The Metropolitan Police Department shall make a report of each complaint of identity theft and provide the complainant with a copy of the report.

Commentary

Explanatory Note. *This section establishes the identity theft offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes possessing, using, or creating a wide array of personal identifying information, without consent of the owner, for*

specified wrongful ends. The penalty gradations are based on the value of property obtained, payment avoided, or the financial loss caused, by the identity theft. The revised identity theft offense replaces the criminal identity theft[182] statutes in the current D.C. Code.

Subsection (a)(1) specifies the culpable mental state for subsections (a)(1) – (a)(3) of the offense to be knowledge, a term defined at RCC § 22A-206. Subsection (a)(1) also describes three alternative elements—creating, possessing, or using—by which a person can commit identity theft.

Subsection (a)(2) specifies the element that what the defendant created, possessed, or used was "personal identifying information" belonging to or pertaining to another person. The term "personal identifying information" is defined in subsection (b) of the offense.

Subsection (a)(3) states that the proscribed conduct must be done "without the effective consent of the owner." The term "consent" requires some indication (by words or actions) of agreement, and may be given by a person authorized to do so. "Effective consent" means consent not obtained by means of coercion or deception. Lack of effective consent means there was no agreement, there was an agreement obtained by coercion, or there was an agreement obtained by deception. "Owner" is defined to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rule of construction in 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(3), here requiring the accused to be aware to a practical certainty or consciously desire that he or she lacks effective consent of the owner.

Subsection (a)(4) requires that the defendant had intent to use the identifying information accomplish one of three goals: obtain property of another by deception; avoid payment due for any property, fines, or fees by deception; or give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception and without that victim's consent. "Intent" is a defined term in RCC § 22A-206 meaning the defendant consciously desired, or was practically certain that he or she would achieve one of the goals listed in (a)(4)(A)-(C). It is not necessary to prove that the defendant actually achieved any of the goals listed in (a)(4)(A)-(C), just that the defendant consciously desired, or was practical certain, that he or she would achieve one of them.

Subsection (b) defines the terms "identifying information," and also cross references other terms defined elsewhere in the RCC.

Subsection (c) grades identity theft according to either the value of the property sought to be obtained, the amount of payment intended to be avoided, or the amount of financial loss caused, whichever is greater.[183] There are five gradations, with the same dollar value distinctions used in other property offenses. "In fact" also is a defined term in RCC § 22A-2001 that is used in all of the identity theft gradations to indicate that there is no culpable mental state requirement as to the value of the property sought to be obtained, amount of payment intended to be avoided, or the amount of financial injury caused. The defendant is strictly liable as to the as to the value of the property sought to be obtained, amount of payment intended to be avoided, or the amount of financial injury caused.

[182] D.C. Code §§ 22-3227.01 - § 22-3227.04; D.C. Code §§ 22-3227.06 - § 22-3227.08. Provisions relating to record corrections due to identity theft are codified in RCC § 22A-2006 (Identity Theft Civil Provisions).

[183] For example, if the value of the property obtained, payment avoided, or amount of financial loss is less than $250, it is Fourth Degree Identity Theft; if the value of the property obtained, payment avoided, or amount of financial loss is $250,000 or more, it is Aggravated Identity Theft.

Subsection (d) clarifies that obtaining, creating, or possessing a single person's identifying information constitutes a single violation of this statute. A person who possesses multiple pieces of identifying information pertaining to a single person, with a required criminal purpose, is still only liable for one count of identity theft. Subsection (d) also specifies for purposes of the statute of limitations under D.C. Code § 23-113 that an identity theft offense is deemed to have been committed after the course of conduct has been completed or terminated.

Subsection (e) clarifies jurisdictional rules for prosecution of identity theft.

Subsection (f) specifically requires the Metropolitan Police Department (MPD) to report each complaint of identity theft and provide copies of such reports.

Relation to Current District Law. *The revised identity theft statute changes District law in four main ways to reduce unnecessary overlap and gaps between offenses, and to improve the proportionality of offense penalties.*

First, the revised statute eliminates reference to use of another person's identifying information to falsely identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension or prosecution for a crime—conduct included in the current identity theft statute.[184] Most such conduct already is criminalized under other offenses, including the obstructing justice,[185] false or fictitious reports to Metropolitan Police,[186] and false statements.[187] All such conduct is criminalized under other offenses in the RCC, including the revised obstructing justice[188] and revised false statements offenses.[189]

Second, the revised statute criminalizes creating, possessing, or using another person's identifying information, without consent, with intent to avoid payment due for any property, fines, or fees by deception. The current statute, does not criminalize use of identifying information with intent to avoid payments. The new language fills a possible gap in offense liability.

Third, the revised statute increases the number of grade distinctions. The current identity theft offense is limited to two gradations based solely on value. The current first degree identity theft offense involves property with a value, or a financial injury, of $1,000 or more and is punished as a serious felony; second degree identity theft offense involves property with a value, or a financial injury, of less than $1,000 and is a misdemeanor. By contrast, the revised identity theft offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.

Fourth, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised identity theft offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses, including identity theft,

[184] D.C. Code § 22-3227.02(3). Notably, while the current identity theft statute purports to criminalize use of another's personal identifying information without consent to identify himself at arrest, conceal a crime, etc., current D.C. Code § 22-3227.03(b) only provides a penalty for such conduct in the limited circumstance where it results in a false accusation or arrest of another person.

[185] D.C. Code § 22-722(6).

[186] D.C. Code § 5-117.05.

[187] D.C. Code § 22-2405. Further supporting treating this offense as more akin to false statements is the fact that under current law penalty for 22-3227.02(3) versions of identity theft is just 180 days.

[188] RCC § 22A-XXXX.

[189] RCC § 22A-XXXX.

based on the same act or course of conduct.[190] However, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised identity theft offense and other closely-related offenses, 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Beyond these four main changes to current District law, one other aspect of the revised forgery statute may constitute a substantive change of law.

The gradations in subsection (c), by use of the phrase "in fact," codify that no culpable mental state is required as to the value of property sought to be obtained, amount of payment intended to be avoided or the financial injury caused. The current statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the value of property of financial injury caused, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[191] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[192] Clarifying that the value of property sought to be obtained, amount of payment intended to be avoided, or the financial injury caused are matters of strict liability in the revised identity theft gradations clarifies and potentially fills a gap in District law.

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

First, the revised statute no longer explicitly refers to "obtaining" identifying information of another, as in the current statute. "Obtaining" is not defined in the current statute or case law. Instead the revised statute refers only to conduct that "creates, possesses, or uses" identifying information. "Obtaining" appears to be superfluous,[193] and no change in the scope of the statute is intended by that word's elimination from the revised statute.

Second, the revised statute no longer explicitly refers to obtaining property "fraudulently," as in the current statute. "Fraudulently" is not defined in the statute or, for this offense, in case law. Instead the revised statute refers only to intent to obtain property by deception, avoid payment of any fine by deception; or facilitate another person in obtaining property by deception. "Fraudulently" appears to be unnecessarily ambiguous and superfluous. No change in the scope of the statute is intended by that word's elimination from the revised statute.

Third, the revised statute eliminates the current statute's reference to using identifying information and actually obtaining property of another.[194] This provision of the current statute is duplicative given that it provides as an alternative basis of liability merely using identifying information to attempt to obtain property of another. There is no penalty difference in the

[190] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").
[191] D.C. Crim. Jur. Instr. § 5.220.
[192] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").
[193] E.g., person who obtains information would, at least temporarily, possess such information.
[194] D.C. Code § 22-3227.02(1).

current statute between actually obtaining or attempting to obtain property of another in this manner.

Fourth, the revised statute eliminates references in the current identity theft statutes to restitution[195] and fines at twice the amount of the financial injury.[196] Both provisions are superfluous under both current law[197] and the RCC[198]. No change in the scope of the statute is intended by elimination of these provisions.

Relations to National Legal Trends. *The revised identity theft offenses' above-mentioned substantive changes to current District law are broadly supported by national legal trends, with the exception of criminalizing intent to use another person's identifying information to avoid payment due for any property, fines, or fees by deception, and increasing the number of penalty grades.*

First, revising the identity theft offense to no longer cover possession of identifying information with intent to use identifying information to falsely identify himself or herself at an arrest, to facilitate or conceal his or her commission of a crime, or to avoid detection, apprehension or prosecution for a crime is consistent with national legal norms. Of the 34 states that have adopted a new criminal code influenced by the Model Penal Code (MPC)[199], only two explicitly criminalize possession of identifying information for these purposes,[200] while fourteen others more broadly criminalize possession of identifying information with intent to commit a crime, or for any unlawful purpose.[201]

Second, broadening identity theft to include use of another person's identifying information to avoid payment, does not follow clear national norms, though it is unclear whether the District would be an outlier in criminalizing this use of identifying information. Of the 34 states that have adopted a new criminal code influenced by the MPC, only two have identity theft statutes that explicitly include intent to avoid payment.[202] However, many other jurisdictions' identity theft statutes are likely broad enough to criminalize using identifying information to avoid payments. Many jurisdictions criminalize using identifying information either for an "unlawful purpose,"[203] with intent "to cause loss,"[204] to "subject [a] person to economic . . . harm";[205] or to generally "assume another person's identity."[206]

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[195] D.C. Code § 22-3227.04.
[196] D.C. Code § 22-3227.03(a).
[197] D.C. Code § 16-711 (Restitution or reparation); § 22–3571.02(b). (Applicability of fine proportionality provision).
[198] RCC § 22A-802(a)(4); RCC § 22A-804(c).
[199] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).
[200] Ky. Rev. Stat. Ann. § 514.160, N.J. Stat. Ann. § 2C:21-17.
[201] Alaska Stat. Ann. § 11.46.570, Ariz. Rev. Stat. Ann. § 13-2008, Del. Code Ann. tit. 11, § 854, Haw. Rev. Stat. Ann. §§ 708-839.6-839.8, 720 Ill. Comp. Stat. Ann. 5/16-30, Minn. Stat. Ann. § 609.527, Mont. Code Ann. § 45-6-332, Neb. Rev. Stat. Ann. § 28-639, N.M. Stat. Ann. § 30-16-24.1, N.D. Cent. Code Ann. § 12.1-23-11, 18 Pa. Stat. Ann. § 4120, Tenn. Code Ann. § 39-14-150, Wash. Rev. Code Ann. § 9.35.020, Wyo. Stat. Ann. § 6-3-901.
[202] Fla. Stat. Ann. § 817.568; N.J. Stat. Ann. § 2C:21-17.
[203] Minn. Stat. Ann. § 609.527; Mont. Code Ann. § 45-6-332; Neb. Rev. Stat. Ann. § 28-639; 18 Pa. Stat. Ann. § 4120; Tenn. Code Ann. § 39-14-150; Wyo. Stat. Ann. § 6-3-901.
[204] Neb. Rev. Stat. Ann. § 28-639.
[205] Kan. Stat. Ann. § 21-6107.
[206] Ind. Code Ann. § 35-43-5-3.5; N.H. Rev. Stat. Ann. § 638:26; Ohio Rev. Code Ann. § 2913.49.

Third, increasing the number of penalty grades to five also does not follow the majority practice in other jurisdictions. Of the 34 states that have adopted a new criminal code influenced by the MPC, five states' identity theft offenses use five grades[207], and a slight majority use two or one grade.[208]

Fourth, regarding the bar on multiple convictions for the revised identity theft offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised identity theft offense and other overlapping property offenses. For example, where the offense most like the revised identity theft offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[209] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[210] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[211]

In addition, deleting the requirement that property be obtained "fraudulently" is also consistent with the majority approach across reform jurisdictions. A majority of reform jurisdictions' identity theft offenses, when predicated on using identifying information to obtain property, do not require that the defendant acted "fraudulently."[212]

[207] 720 Ill. Comp. Stat. Ann. 5/16-30; Minn. Stat. Ann. § 609.527; Mo. Ann. Stat. § 570.223.

[208] Alaska Stat. Ann. § 11.46.565 ; Ariz. Rev. Stat. Ann. § 13-2008; Ark. Code Ann. § 5-37-227; Ariz. Rev. Stat. Ann. § 13-2008; Colo. Rev. Stat. Ann. § 18-5-902; Del. Code Ann. tit. 11, § 854; Ga. Code Ann. § 16-9-121, Ga. Code Ann. § 16-9-121.1; Idaho Code Ann. § 18-3126; Ind. Code Ann. § 35-43-5-3.5; Kan. Stat. Ann. § 21-6107; Ky. Rev. Stat. Ann. § 514.160; Me. Rev. Stat. tit. 17-A, § 905-A; N.D. Cent. Code Ann. § 12.1-23-11; N.H. Rev. Stat. Ann. § 638:26; N.M. Stat. Ann. § 30-16-24.1; Or. Rev. Stat. Ann. § 165.800, Or. Rev. Stat. Ann. § 165.803; S.D. Codified Laws § 22-40-8; Tenn. Code Ann. § 39-14-150; Utah Code Ann. § 76-6-1102; Wash. Rev. Code Ann. § 9.35.020; Wyo. Stat. Ann. § 6-3-901.

[209] D.C. Code § 22-3203.

[210] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[211] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[212] Ariz. Rev. Stat. Ann. § 13-2008; Ark. Code Ann. § 5-37-227; Colo. Rev. Stat. Ann. § 18-5-902; Conn. Gen. Stat. Ann. § 53a-129a; Del. Code Ann. tit. 11, § 854; Haw. Rev. Stat. Ann. § 708-839.8; Idaho Code Ann. § 18-3126; Ky. Rev. Stat. Ann. § 514.160; Me. Rev. Stat. tit. 17-A, § 905-A; Minn. Stat. Ann. § 609.527; Mont. Code Ann. § 45-6-332; Neb. Rev. Stat. Ann. § 28-639; N.J. Stat. Ann. § 2C:21-17; N.D. Cent. Code Ann. § 12.1-23-11; Ohio Rev. Code Ann. § 2913.49; 18 Pa. Stat. Ann. § 4120; Tenn. Code Ann. § 39-14-150; Wash. Rev. Code Ann. § 9.35.020; Wyo. Stat. Ann. § 6-3-901.

D.C. Code §22A-2206. Identity Theft Civil Provisions

(a) When a person is convicted, adjudicated delinquent, or found not guilty by reason of insanity of identity theft, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of §22A-2206.
(b) In all other cases, a person who alleges that he or she is a victim of identity theft may petition the court for an expedited judicial determination that a District of Columbia public record contains false information as a result of a violation of §22A-2206. Upon a finding of clear and convincing evidence that the person was a victim of identity theft, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of §22A-2206.
(c) Notwithstanding any other provision of law, District of Columbia agencies shall comply with orders issued under subsection (a) of this section within 30 days of issuance of the order.
(d) For the purposes of this section, the term "District of Columbia public record" means any document, book, photographic image, electronic data recording, paper, sound recording, or other material, regardless of physical form or characteristic, made or received pursuant to law or in connection with the transaction of public business by any officer or employee of the District of Columbia.

Commentary

Explanatory Note. This section establishes the identity theft offense civil provisions concerning record correction for the Revised Criminal Code (RCC). The revised identity theft civil provisions are identical to the identity theft corrections of police records[213] statute in the current D.C. Code.

[213] D.C. Code § 22-3227.05.

RCC §22A-2207. Unlawful Labeling of a Recording

(a) A person commits the offense of unlawful labeling of a recording if that person:
  (1) Knowingly possesses;
  (2) A sound recording or audiovisual recording;
  (3) That does not clearly and conspicuously disclose the true name and address of the manufacturer on its label, cover, or jacket;
  (4) With intent to sell or rent the sound recording or audiovisual recording.

(b) *Definitions*. In this section:
  (1) "Audiovisual recording" means a material object upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any;
  (2) "Sound recording" means a material object in which sounds, other than those accompanying a motion picture or other audiovisual recording, are fixed by any method now known or later developed, from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device; and
  (3) "Manufacturer" means the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording.
  (4) The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the term "possess" has the meaning specified in § 22A-202.

(c) *Exclusion from Liability.* Nothing in this section shall be construed to prohibit:
  (1) Any broadcaster who, in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation, transfers any sounds or images recorded on a sound recording or audiovisual work; or
  (2) Any person who, in his own home, for his own personal use, transfers any sounds or images recorded on a sound recording or audiovisual work.

(d) *Permissive Inference.* A fact finder may, but is not required to, infer that a person had an intent to sell, rent, or otherwise use the recording commercial advantage if the person possesses 5 or more recordings of the same sound or audiovisual material that do not clearly and conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets.

(e) *Gradations and Penalties*.
  (1) *First Degree Unlawful Labeling of a Recording*. A person is guilty of first degree unlawful labeling of a sound and audiovisual recording if the person commits the offense by possessing, in fact, 100 or more recordings. First degree unlawful labeling of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Unlawful Labeling of a Recording.* A person is guilty of second degree unlawful labeling of a recording if the person commits the offense by possessing, in fact, any number of recordings. Second degree unlawful labeling of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Forfeiture.* Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition

of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

Commentary

Explanatory Note. *This section establishes the unlawful labeling of a recording (ULR) offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes possession of a recording with a label that fails to identify the true manufacturer, with intent to sell or rent the recording. The penalty gradations are based on the number of recordings that the defendant possessed. The revised unlawful labeling of a recording offense replaces the deceptive labeling offense in the current D.C. Code.*[214]

Subsection (a)(1) specifies the culpable mental state for subsections (a)(1) – (a)(3) of the offense to be knowledge, a term defined at RCC § 22A-206. Subsection (a)(1) also specifies that a person must possess an item, a term defined at RCC § 22A-202(d) to mean exercising control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property. Subsection (a)(2) specifies that the item possessed must be a sound or audiovisual recording. The defendant must have known that the object he or she possessed was a sound or audiovisual recording. Subsection (a)(3) specifies that the label, cover, or jacket of the sound or audiovisual recording must fail to clearly and conspicuously disclose the true name and address of the manufacturer. The defendant must have known that the object did not have a label, jacket, or cover that clearly and conspicuously identified the name and address of the manufacturer. Subsection (a)(4) further requires that the defendant possessed such a recording with intent to sell or rent it. "Intent" is a defined term in RCC § 22A-206, meaning that the defendant must have either been practically certain, or consciously desired, that he would sell or rent the recording. It is not necessary to prove that the defendant actually sold or rented the recording.

Subsection (b) defines the terms "sound recording," "audiovisual recording," and "manufacturer." Sound and audiovisual recordings are discrete physical objects upon which sounds or images are fixed. The definition of "manufacturer" refers to the person or entity who actually affixed the sounds or images to the sound or audiovisual recording. The term "manufacturer" does not refer to the original artist, or person who holds the copyrights to the sound or audiovisual work. This subsection also cross references applicable definitions located elsewhere in the RCC.

Subsection (c) provides an exception from liability if a person is a broadcaster who transfers a recording as part of a broadcast transmission or for the purposes of archival preservation, or any person who transfers recordings at home for personal use.[215]

Subsection (d) provides a permissive inference that allows, but does not require, a fact finder to infer that the defendant had intent to sell or rent recordings if he or she possessed five or more copies of the same recording, which all lacked labels that accurately identified the name and address of the manufacturer.

Subsection (e) grades unlawful labeling according to the number of recordings possessed by the defendant. "In fact," a defined term, is used in both penalty gradations to indicate that there is no culpable mental state required as to the number of recordings.

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[214] D.C. Code § 22-3214.01.

[215] The exclusion regarding a person at home acting for personal use improves the notice of the statute, but is not otherwise necessary. As described below, any person who acts for his or her personal use rather than with intent to sell or rent the recording, would not satisfy the offense's elements.

Relation to Current District Law. *The unlawful labeling of a recording statute changes District law in six main ways to reduce an unnecessary gap between offenses, and to improve the proportionality of offense penalties.*

First, subsection (a)(4) of the revised ULR statute requires that the defendant had intent to rent or sell the recordings. Any other intended uses of the recordings do not constitute unlawful labeling. The current statute uses broader language, covering conduct committed for "commercial advantage or private financial gain[.]"[216] The statute does not define these terms and there is no case law this language. However, the current statute's language could arguably include possessing a sound recording for commercial advantage or financial gain by means that do not involve selling or renting the recording.[217] To the extent that the current statute is broad enough to cover these alternate means, the revised statute is narrower than the current statute. The revision is recommended to bring the District's statute more in line with national norms and to improve the proportionality of the offense.

Second, the ULR revised statute also includes a permissive inference that allows, but does not require, a fact finder to infer intent to sell or rent the sound or audiovisual recordings if the defendant possessed five or more copies of the same recording. The permissive inference would apply if the defendant possessed five or more copies of the same film or album which were improperly labeled. If the defendant possessed copies of five different films or albums, which were each improperly labeled, the permissive inference would not apply. The revision is recommended to make the offense definition more consistent with the revised unlawful creation or possession of a recording offense.[218]

Third, the revised ULR statute changes the penalty structure to equate penalties for unlawful labeling violations with respect to sound or audiovisual recordings. Under the current statute, a person commits a felony if he or she possessed 1,000 or more sound recordings, or 100 or more audiovisual recordings; the person commits a misdemeanor if he or she possessed fewer than 1,000 sound recordings, or fewer than 100 audiovisual recordings. Under the revised statute, sound recordings and audiovisual recordings are no longer treated differently, either for determining the unit of prosecution or for the penalty. The revised statute does not permit multiple convictions simply because a defendant possessed two different types of recordings, contrary to the DCCA's holding in *Plummer v. United States*, [219] which allowed for two convictions based on the defendant's possession of both sound and audiovisual recordings. Also, penalties are the same whether the recordings are sound or audiovisual recordings. A person commits first degree unlawful labeling if he or she possesses 100 or more improperly labeled sound or audio visual recordings with intent to sell or rent them, and second degree unlawful labeling if he or she possess fewer than 100 sound or audio visual recordings. The revision is recommended to improve the proportionality of the offense.

Fourth, the penalty provisions of the revised ULR statute also change law by no longer allowing the number of recordings to be aggregated across a 180 day period. Under the current statute, the penalty gradations are based on the number of sound or audiovisual recordings

[216] D.C. Code § 22-3214.01(b).

[217] *E.g.*, conduct covered under the current statute might include possession of improperly labeled recordings in a business where they are played out loud with intent to entertain customers shopping in the business.

[218] RCC § 22A-2105.

[219] 43 A.3d 260 (D.C. 2012). In *Plummer*, the DCCA reasoned that two convictions were warranted because the statute "explicitly treats audiovisual works as different from sound recordings" for sentencing purposes. *Id.* at 274.

possessed "during any 180 day period."[220] There is no case law regarding how the 180 day period is to be determined, and there is no legislative history on the provision. Under the revised statute, the penalty gradations are based solely on the number of recordings possessed at a single point in time, or as described immediately below, where the government aggregates the number of recordings involved in a single scheme or systematic course of conduct per RCC § 22A-2002, Aggregation of Property Value To Determine Property Offense Grades. The revision is recommended to improve the administration and proportionality of the offense.

Fifth, the provision in RCC § 22A-2002, "Aggregation of Property Value To Determine Property Offense Grades," allows aggregation of value for the revised ULR offense based on a single scheme or systematic course of conduct. The current ULR offense is not part of the current aggregation of value provision for property offenses,[221] however, as discussed immediately above, the current ULR statute has a special provision allowing the number of recordings to be aggregated across a 180 day period. The revised ULR statute permits aggregation for determining the appropriate grade of ULR to ensure penalties are proportional to defendants' actual conduct.

Sixth, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised ULR offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[222] However, the current deceptive labeling offense is not among those offenses and, as described in the commentary to section 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised ULR offense and other closely-related offenses, 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Beyond these six main changes to current District law, one other aspect of the revised ULR statute may constitute a substantive change of law.

The revised statute eliminates the phrase "that person knowingly advertises, offers for sale, resale, or rental, or sells, resells, rents, distributes, or transports" a sound or audiovisual recording. The verbs in this phrase are not statutorily defined and case law has not specifically addressed the meaning. Nonetheless, this language appears to be redundant, given that the revised statute requires that the defendant possesses a recording, with intent to sell or rent it. However, insofar as the current language creates liability for knowingly advertising or offering recordings for sale, but without actually possessing them, a person engaged in such conduct could likely be prosecuted for ULR as an accomplice or for attempted ULR. It is also possible that a person who advertises or offers for sale such recordings will have committed a conspiracy

[220] D.C. Code § 22-3214.01.

[221] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[222] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").

to commit ULR. Practically, there appears to be little or no change to current law in relying solely on conduct that results in possession of an improperly labeled recording.

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

The revised statute simplifies the definition of manufacturer to refer to "the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording." The current statute refers to "the person who authorizes or causes the copying, fixation, or transfer of sounds or images to sound recordings or audiovisual works subject to this section."[223] The elimination of "copying" and "transfer" is not intended to change the definition. Since a recording, as defined in the statute, is a material object, any copying or transfer that is relevant to the statute is necessarily a form of affixation.

Relation to National Legal Trends. *The revised unlawful labeling statute's above-mentioned substantive changes to current District law are broadly supported by national legal trends, with the exception of the addition of the permissive inference.*

First, of the 29 states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[224](hereafter "reformed code jurisdictions"), a majority have statutes that only criminalize possession of recordings with intent to sell or rent, and do not more broadly criminalize possessing recordings for "commercial advantage or private financial gain."[225]

Second, the District would be an outlier in including a permissive inference that allows fact finders to infer intent to rent or sell when the defendant possessed five or more copies of the same recording. Amongst reformed code jurisdictions, only one state includes a similar presumption of intent to sell or rent in their analogous offenses.[226]

Third, changing the penalty gradations to treat sound and audiovisual recordings the same is consistent with national trends. A large majority of reformed code jurisdictions' analogous unlawful labeling statutes do not differentiate between sound and audiovisual recordings for penalty purposes.[227]

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[223] D.C. Code § 22-3214.01(a)(2).

[224] *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). In addition, Tennessee reformed its criminal code after the publication of this article.

[225] Ariz. Rev. Stat. Ann. § 13-3705; Alaska Stat. Ann. § 45.50.900; Conn. Gen. Stat. Ann. § 53-142c; 720 Ill. Comp. Stat. Ann. 5/16-7; Ky. Rev. Stat. Ann. § 434.445; Minn. Stat. Ann. § 325E.18; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-144; N.H. Rev. Stat. § 352-A:3; N.D. Cent. Code Ann. § 47-21.1-03; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. § 164.868; 18 Pa. Stat. Ann. § 4116; S.D. Codified Laws § 43-43A-3; Utah Code Ann. § 13-10-8; Wash. Rev. Code Ann. § 19.25.040.

[226] Or. Rev. Stat. Ann. § 164.868. *Cf.*, N.H. Rev. Stat. Ann. § 352-A:2 (A related offense criminalizing possession of copyrighted materials with intent to sell provides that "Possession of 5 or more duplicate copies or 20 or more individual copies of such recorded articles, produced without the consent of the owner or performer, shall create a rebuttable presumption that such articles are intended for sale or distribution in violation of this section.").

[227] Alaska Stat. Ann. § 45.50.900; Conn. Gen. Stat. Ann. § 53-142c; Ind. Code Ann. § 24-4-10-4; Ky. Rev. Stat. Ann. § 434.445; Md. Code Ann., Crim. Law § 7-309; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-144; N.H. Rev. Stat. Ann. § 352-A:3; N.D. Cent. Code Ann. § 47-21.1-03;N.Y. Penal Law § 275.35; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. § 164.868; S.D. Codified Laws § 43-43A-3; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. § 641.054; Utah Code Ann. § 13-10-8; Wash. Rev. Code Ann. § 19.25.040; Wis. Stat. Ann. § 943.209.

Fourth, removing the 180 day aggregation time period is also supported by national legal trends. Amongst reformed code jurisdictions only six states allow aggregating the number of recordings across a 180 day period for sentencing purposes.[228]

Fifth, regarding the aggregation of the number of recordings possessed in a single scheme or systematic course of conduct, the revised ULR offense follows many jurisdictions[229] which have statutes that closely follow the Model Penal Code (MPC)[230] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[231] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[232]

Sixth, regarding the bar on multiple convictions for the revised ULR offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised ULR offense and other overlapping property offenses. For example, where the offense most like the revised ULR offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[233] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[234] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[235]

[228] 720 Ill. Comp. Stat. Ann. 5/16-7; 18 Pa. Stat. Ann. § 4116; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. § 641.054; Utah Code Ann. § 13-10-8; Wash. Rev. Code Ann. § 19.25.040; Wis. Stat. Ann. § 943.209.

[229] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[230] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[231] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[232] *See, e.g. Commonwealth v. Young*, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); *People v. Brown*, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[233] D.C. Code § 22-3203.

[234] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[235] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

RCC §22A-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person

(a) A person is guilty of financial exploitation of a vulnerable adult or elderly person if that person:
  (1) Knowingly:
    (A) Takes, obtains, transfers, or exercises control over;
    (B) Property of another;
    (C) With consent of the owner;
    (D) Who is a vulnerable adult or elderly person;
    (E) The consent being obtained by undue influence; and
    (F) With intent to deprive that person of the property, or
  (2) Commits theft, extortion, forgery, fraud, or identity theft knowing the victim to be a vulnerable adult or elderly person.

(b) *Definitions.* In this section:
  (1) The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "property," "property of another," "coercion," "consent," "deprive," "vulnerable adult," "elderly person," and "value" have the meanings specified in §22A-2001.
  (2) The term "undue influence" means mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being.

(c) *Gradations and Penalties.*
  (1) *Aggravated Financial Exploitation of a Vulnerable Adult or Elderly Person.* A person is guilty of aggravated financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or of the amount of the financial injury, whichever is greater, in fact, is $250,000 or more. Aggravated financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Financial Exploitation of a Vulnerable Adult or Elderly Person*. A person is guilty of first degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is $25,000 or more. First degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Financial Exploitation of a Vulnerable Adult or Elderly Person.* A person is guilty of second degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is $2,500 or more. Second degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) *Third Degree Financial Exploitation of a Vulnerable Adult or Elderly Person*. A person is guilty of third degree financial exploitation of a vulnerable adult or

elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is $250 or more. Third degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) *Fourth Degree Financial Exploitation of a Vulnerable Adult or Elderly Person*. A person is guilty of fourth degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is of any amount. Fourth degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Restitution.* In addition to the penalties set forth in paragraphs (c)(1)-(5) of this section, a person shall make restitution, before the payment of any fines or civil penalties.

Commentary

Explanatory Note. *This section establishes the financial exploitation of vulnerable adults (FEVA) and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes acquisition or use of the property of a vulnerable adult by means of undue influence and with intent to deprive the person of the property. The offense also includes committing theft, extortion, forgery, fraud, or identity theft when the defendant knows that the victim is a vulnerable adult or elderly person. The penalty gradations are based on the value of the property involved in the crime, or by the amount of financial injury inflicted.*

Subsection (a)(1)(A) requires conduct that "takes, obtains, transfers, or exercises control over." Subsection (a)(1) also specifies the culpable mental state for subsections (a)(1)(A)-(E) of the offense to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct "takes, obtains, transfers, or exercises control over."

Subsection (a)(1)(B) specifies that the defendant must take, obtain, transfer, or exercise control over "property," a defined term meaning something of value, which includes goods, services, and cash. Further, the property must be "property of another," a defined term which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1)(A) also applies to subsection (a)(1)(B), requiring the accused to be aware to a practical certainty or consciously desire that the item is property of another.

Subsection (a)(1)(C) states that the proscribed conduct must be done with "consent" of the owner. The term consent requires some indication (by words or actions) of the owner's agreement to allow the defendant to take the property. "Owner" is also defined to mean a person holding an interest in property that the accused is not privileged to interfere with, and it specifically includes those persons who are authorized to act on behalf of another.[236] Per the rule of construction in 22A-207, the "knowingly" mental state in subsection (a)(1)(A) also applies to subsection (a)(1)(C), requiring the accused to be aware to a practical certainty or consciously desire that his or her conduct is "with the consent of the owner."

[236] Thus, for example, a store employee who is authorized to sell merchandise is an "owner," although the merchandise is in fact owned by the store company itself.

Subsection (a)(1)(D) specifies that the property must belong to a "vulnerable adult or elderly person", terms defined to mean a person who is either 18 years of age or older and has one or more substantial physical or mental impairments, or 65 years of age or older. Per the rule of construction in 22A-207, the "knowingly" mental state in subsection (a)(1)(A) also applies to the element in (a)(1)(D), requiring the accused to be aware to a practical certainty or consciously desire that the victim was a "vulnerable adult or elderly person."

Subsection (a)(1)(E) specifies that the defendant must have obtained consent by use of "undue influence," a term defined later in this section. Per the rule of construction in 22A-207, the "knowingly" mental state in subsection (a)(1)(A) also applies to subsection (a)(1)(E), requiring the accused to be aware to a practical certainty or consciously desire that the victim's consent is gained by undue influence.

Subsection (a)(1)(F) further requires that the defendant have an intent to deprive the vulnerable adult or elderly person of the property. "Deprive" is a defined term in RCC § 22A-2001 meaning the owner is unlikely to recover the object or it is withheld permanently or long enough to lose a substantial part of its value or benefit. "Intent" also is a defined term in RCC § 22A-206 meaning the defendant believed his or her conduct was practically certain to "deprive," another defined term meaning a substantial loss of the property. It is not necessary to prove that such a deprivation actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that a deprivation would result.

Subsection (a)(2) specifies also defines FEVA to include committing theft, extortion, forgery, fraud, or identity theft knowing the victim to be a vulnerable adult or elderly person.

Subsection (b) cross-references applicable definitions located elsewhere in the RCC, and provides a definition for the term "undue influence."

Subsection (c) grades FEVA according to the value of the property involved, or the amount of financial injury caused, whichever is greater. "Value" and "financial injury" are terms defined in RCC § 22A-2001. "In fact," is also defined a defined term in § 22A-206, and is used in all of FEVA gradations to indicate that there is no culpable mental state requirement as to the value of the property, or the amount of financial injury. The defendant is strictly liable as to the value of the property, or the amount of financial injury.

Subsection (d) specifies that if any restitution is ordered, the defendant must pay the restitution before paying any criminal or civil fines imposed for violation of this section.

Relation to Current District Law. *The revised FEVA statute make five changes to current District law that limit the scope of the offense, and improve proportionality of penalties.*

First, the revised FEVA statute applies a culpable mental state of "knowingly" to the element that the victim was a vulnerable adult or elderly person. The current statute does not specify any required mental state as to whether the person was an elderly or vulnerable adult, and there is no case law on point. However, the current statute provides an affirmative defense if the defendant "knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed."[237] Further, the statute states that "[t]his defense shall be established by a preponderance of the evidence."[238] Under the revised statute, the government would bear the burden of proving that the defendant knew that the victim was a vulnerable adult or elderly

[237] D.C. Code § 22-933.01 (b).
[238] *Id.*

person. This requires that the defendant either knew that the victim was 65 years or older, or was at least 18 years of age, and had one or more physical or mental limitations that substantially impair his or her ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[239] Requiring a knowing culpable mental state makes the revised FEVA offense consistent with the revised fraud and extortion statutes, and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[240] This change clarifies a culpable mental state element of the offense.

Second, the revised FEVA statute increases the number of penalty grade distinctions. The current FEVA statute is limited to two gradations based on the value of the property or legal obligation.[241] By contrast, the revised FEVA offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. In addition, the revised FEVA statute also grades penalties based on the value of the property involved, or the amount of financial injury caused, whichever is greater. The change improves the proportionality of the offense by graduating punishment according to the seriousness of the harm.

Third, the revised FEVA statute eliminates the special recidivist penalty authorized under current law.[242] Under current law, if a person with two prior FEVA convictions is convicted of FEVA, the maximum allowable sentence is 15 years, regardless of the value of property involved in either of the convictions. The revised FEVA statute no longer authorizes this increased penalty. This special enhancement is highly unusual in current District law, and there is no clear basis for singling out recidivist thefts as compared to other offenses of equal seriousness. The general recidivism enhancement in RCC § 22A-806 will provide enhanced punishment for recidivist FEVA violations, consistent with the treatment of recidivism in other offenses. This change reduces unnecessary overlap with other criminal provisions.

Fourth, the provision in RCC § 22A-2002, "Aggregation of Property Value To Determine Property Offense Grades," allows aggregation of value for the revised FEVA offense based on a single scheme or systematic course of conduct. The current FEVA offense is not part of the current aggregation of value provision for property offenses.[243] The revised FEVA statute

[239] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that 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)"). In violations of subsection (a), the victim's status as a vulnerable adult or elderly person does distinguish innocent from criminal behavior. However, in violations of subsection (b), the victim's status as a vulnerable adult or elderly person does not distinguish innocent from criminal behavior.

[240] *See, e.g.*, RCC § 22A-2201.

[241] D.C. Code § 22-936.01. Felony FEVA involves property or legal obligations with a value of $1,000 or more and is punished as a serious felony; misdemeanor FEVA involves property or legal obligations valued at less than $1,000 and subject to a 180 day maximum sentence

[242] D.C. Code § 22-936.01

[243] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

permits aggregation for determining the appropriate grade of FEVA to ensure penalties are proportional to defendants' actual conduct.

Fifth, the provision in RCC § 22A-2003, "Limitation on Conviction for Multiple Related Property Offense," bars multiple convictions for FEVA and other offenses in Chapters 21-24 based on the same property. Under current law, a defendant may be convicted of various overlapping property offenses based on the same act or course of conduct,[244] even though he or she must be concurrently sentenced for some of these convictions.[245] However, as described in the commentary to RCC § 22A-2003, even if the sentences run concurrent to one another, multiple imprisonment convictions for these substantially-overlapping offenses can result in collateral consequences. To improve the proportionality of the revised FEVA offense and these other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense if based on the same property.

Beyond these six substantive changes to current District law, five other aspects of the revised FEVA statute may be viewed as substantive changes to law.

First, in subsection (a) the revised statute specifies a culpable mental state of "knowingly" for all offense elements other than value of the property involved or the amount of financial loss. In contrast, the current statute requires that the defendant acted "intentionally and knowingly[.]"[246] The current statute does not define "intentionally" or "knowingly," and there is no case law on point. By applying a culpable mental state of "knowingly," the revised FEVA statute requires that the defendant was practically certain, or consciously desired, that he or she would take, obtain, or exercise control over property of a vulnerable adult or elderly person with consent obtained by undue influence. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[247] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud and extortion statutes, and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[248] This change clarifies multiple culpable mental state elements of the offense.

Second, the revised statute provides liability only for conduct with intent to deprive the vulnerable adult or elderly person of property. By contrast, the current statute also provides liability for conduct with intent to use the property "for the advantage of anyone other than the vulnerable adult or elderly person[.]"[249] There is no case law regarding this phrase. The term "deprive" is defined in the RCC to include withholding property permanently for "so extended a period or under such circumstances that a substantial portion of its value or a substantial portion of its benefit is lost" or "to dispose of the property, or use or deal with the property so as to make

[244] *Byrd v. United States*, 598 A.2d 386, 390 (D.C. 1991) (*en banc*) (establishing under District law the "elements test" for determining whether prosecution for two offenses violates the Double Jeopardy Clause prohibition on multiple punishments for the same offense).
[245] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").
[246] D.C. Code § 22-933.01.
[247] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that 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)").
[248] See, e.g., RCC § 22A-2201.
[249] D.C. Code § 22-933.01.

it unlikely that the owner will recover it."[250] Consequently, conduct for any reason, including intent to benefit another person, is already within the scope of an "intent to deprive" if would deny the property owner a substantial benefit of the property. The primary effect of the revised FEVA offense eliminating liability for otherwise criminal action "for the advantage of anyone other than the vulnerable adult or elderly person" is thus to bar prosecution for temporary unauthorized uses of the property. However, the revised unauthorized use of property[251] criminalizes even temporary uses of a person's property without effective consent. This change clarifies the statute and reduces unnecessary overlap among offenses.

Third, the revised offense no longer separately criminalizes causing a vulnerable adult or elderly person to assume a legal obligation. The current statute specifically criminalizes causing a vulnerable adult or elderly person to assume a legal obligation on behalf of, or for the benefit of, anyone other than the vulnerable adult or elderly person.[252] However, the revised FEVA statute already provides liability for engaging in conduct (with consent obtained by undue influence) that causes a transfer of property or involves exercising control over property believing that doing so will cause the victim to lose a substantial portion or benefit of the property. And the term "property" as defined in RCC § 22A-2001 includes anything of value, including real property and interests in real property, as well as credit.[253] Consequently, it appears that most, if not all, instances under the current statute of causing a vulnerable adult or elderly person to assume a detrimental legal obligation (with consent obtained by undue influence) are also covered by subsection (a) of the revised FEVA statute.[254] This change clarifies and reduces unnecessary overlap in provisions of the revised offense.

Fourth, the gradations in subsection (c), by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property or the amount of financial loss. The current statute is silent as to what culpable mental state applies to these elements. There is no District case law on point. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[255] Clarifying that the value of the property or the amount of financial loss are matters of strict liability in the revised FEVA gradations clarifies culpable mental state elements of the offense.

Fifth, the revised statute defines the word "coercion" as used in the definition of undue influence. The current statute defines the key term "undue influence,"[256] but does not provide

[250] RCC § 22A-2001 (7).
[251] RCC § 22A-2102.
[252] D.C. Code § 22-933.01.
[253] Commentary to RCC § 22A-2001.
[254] For example, a person who knowingly uses undue influence to cause an elderly person to take out a second mortgage and give over the proceeds may well be guilty under the revised FEVA statute. Such a defendant would have caused the transfer (subsection (a)(1)) of an interest in real property (subsection (a)(2)) with the consent of the owner (subsection (a)(3)), who is elderly (subsection (a)(4)), using undue influence (subsection (a)(5)), believing that in doing so he or she will cause the owner to lose a substantial portion of the property's value (subsection (a)(6)).
[255] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").
[256] D.C. Code § 22-933.01(c) ("For the purposes of this section, the term "undue influence" means mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and

further definition of the meaning of "coercion" within that definition. There is no case law on point. The RCC defines coercion as causing another person to fear one of several adverse consequences unless that person engages in particular conduct. The RCC "coercion" definition includes a broad array of consequences, ranging from inflicting bodily injury to performing any act calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships.[257] Under the revised statute, a person can commit FEVA by obtaining property of a vulnerable adult or elderly person with consent obtained by causing the vulnerable adult or elderly person to fear any of the consequences listed under the "coercion" definition. This change clarifies the revised offense, using a definition that is consistent across property offenses such as extortion.[258]

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

For example, the revised statute requires that the defendant use "undue influence" to obtain, take, transfer, or exercise control over property, but does not separately include use of "deception" or "intimidation" as does the current statute.[259] However, omitting these words is not intended to change current law. Obtaining property of a vulnerable adult or elderly person by use of deception or intimidation will still be covered by the revised FEVA statute. First, the definition of "coercion," includes placing a person in fear of bodily injury, damage to that person's property, or wrongful economic injury. The "coercion" definition is broad enough to criminalize any use of "intimidation." Second, FEVA is also defined as committing theft, extortion, forgery, fraud, or identity theft, knowing the victim to be a vulnerable adult or elderly person. Under the RCC, fraud is defined as taking, obtaining, transferring, or exercising control over property, with consent of the owner obtained by deception.[260] Taking property of a vulnerable adult or elderly person by deception is therefore still criminalized under the revised FEVA statute.

Relation to National Legal Trends. *Two of the main changes to the FEVA statute discussed above are broadly supported by national legal trends, but remaining four changes are not consistent with national legal trends.*

First, a majority of states do not specify the mental state as to whether the victim is a vulnerable adult or elderly person. At least four states require a culpable mental state less demanding than "knowingly." Two states require that the accused either "knows or reasonably should know" that the victim is an "elder or dependent adult,"[261] or that the victim is "at least 68 years old."[262] In addition, two states expressly state that it is not a defense if the "accused reasonably believed that the endangered adult or dependent was less than sixty (60) years of age at the time of the offense,"[263] or did not know the age of the victim.[264]

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causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being.").

[257] RCC § 22A-2001 (4).

[258] RCC § 22A-2301.

[259] D.C. Code § 22-933.01.

[260] RCC § 22A-2201.

[261] Cal. Penal Code § 368.

[262] Md. Code Ann., Crim. Law § 8-801.

[263] Ind. Code Ann. § 35-46-1-12.

[264] N.D. Cent. Code Ann. § 12.1-31-07.1.

a majority jurisdictions with analogous FEVA offenses do not criminalize causing a vulnerable adult or elderly person to assume a legal obligation. Analogous FEVA offenses in other jurisdictions require that the defendant expend, diminish, or use the property;[265] commit another property offense[266], or more generally requires that the defendant "exploits" the elderly person.[267] One exception, Minnesota, also criminalizes causing a vulnerable adult to establish a fiduciary relationship by use of undue influence, harassment, duress, force, compulsion, coercion, or other enticement.[268]

Second, increasing the number of penalty gradations is not supported by national legal trends. Of the jurisdictions with analogous FEVA offenses, a majority use either two, or one penalty grades.[269] Only four jurisdictions' analogous FEVA offenses include five or more penalty grades.[270]

Third, deleting the recidivist penalty provision is consistent with national trends. A majority of jurisdictions with analogous FEVA offenses do not include a recidivist penalty provision. Only seven states include such a provision.[271]

Fourth, regarding the aggregation of values in a single scheme or systematic course of conduct, the revised FEVA offense follows many jurisdictions[272] which have statutes that closely follow the Model Penal Code (MPC)[273] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and

[265] Ala. Code § 38-9-2; Ark. Code Ann. § 5-28-101; Del. Code Ann. tit. 31, § 3902; Fla. Stat. Ann. § 825.103; 720 Ill. Comp. Stat. Ann. 5/17-56; Ind. Code Ann. § 35-46-1-12; Kan. Crim. Code Ann. § 21-5417; La. Stat. Ann. § 14:67.21; Md. Code Ann., Crim. Law § 8-801; Mich. Comp. Laws Ann. § 750.174a.

[266] Cal. Penal Code § 368

[267] Idaho Code Ann. § 18-1505; Miss. Code. Ann. § 43-47-19;

[268] Minn. Stat. Ann. § 609.2335.

[269] Ala. Code § 38-9-7; Ala. Code § 38-9-2; Cal. Penal Code § 368; Colo. Rev. Stat. Ann. § 18-6.5-103; Idaho Code Ann. § 18-1505; Ind. Code Ann. § 35-46-1-12; Minn. Stat. Ann. § 609.2335; Miss. Code. Ann. § 43-47-19; Neb. Rev. Stat. Ann. § 28-358; Okla. Stat. Ann. tit. 21, § 843.4; Or. Rev. Stat. Ann. § 163.205; S.C. Code Ann. § 43-35-10; S.D. Codified Laws § 22-46-3; Tex. Penal Code Ann. § 32.53; Vt. Stat. Ann. tit. 13, § 1380; Wyo. Stat. Ann. § 35-20-102.

[270] Del. Code Ann. tit. 31, § 3902, Del. Code Ann. tit. 31, § 3913 ; Kan. Crim. Code Ann. § 21-5417; Mich. Comp. Laws Ann. § 750.174a; Mo. Ann. Stat. § 570.145.

[271] Del. Code Ann. tit. 31, § 3902, Del. Code Ann. tit. 31, § 3913; Fla. Stat. Ann. § 825.103; Kan. Crim. Code Ann. § 21-5417; Ky. Rev. Stat. Ann. § 209.990; La. Stat. Ann. § 14:67.21, La. Stat. Ann. § 14:93.4; Mich. Comp. Laws Ann. § 750.174a. Miss. Code. Ann. § 43-47-19.

[272] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[273] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

receiving stolen property.[274] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[275]

Fifth, regarding the bar on multiple convictions for the revised FEVA offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised FEVA offense and other overlapping property offenses. For example, where the offense most like the revised FEVA is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[276] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[277] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[278]

[274] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[275] See, e.g. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[276] D.C. Code § 22-3203.

[277] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[278] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

RCC § 22A-2209. Financial Exploitation of a Vulnerable Adult or Elderly Person Civil Provisions

(a) *Additional Civil Penalties.* In addition to other penalties provided by law, a person who violates § 22A-2207 shall be subject to the following civil penalties:
  (1) A fine of up to $5,000 per violation;
  (2) Revocation of all permits, certificates, or licenses issued by the District of Columbia authorizing the person to provide services to vulnerable adults or elderly persons; and
  (3) A temporary or permanent injunction.
  (4) Restitution under § 22A-2207 shall be paid before the payment of any fines or civil penalties under this section.

(b) *Petition for Injunctive Relief and Protections.* Whenever the Attorney General or the United States Attorney has reason to believe that a person has engaged in financial exploitation of a vulnerable adult or elderly person in violation of Section 22A-2207, the Attorney General or the United States Attorney may petition the court, which may be by ex-parte motion and without notice to the person, for one or more of the following:
  (1) A temporary restraining order;
  (2) A temporary injunction;
  (3) An order temporarily freezing the person's assets; or
  (4) Any other relief the court deems just.

(c) *Standard for Court Review of Petition.* The court may grant an ex-parte motion authorized by subsection (b) of this section without notice to the person against whom the injunction or order is sought if the court finds that facts offered in support of the motion establish that:
  (1) There is a substantial likelihood that the person committed financial exploitation of a vulnerable adult or elderly person;
  (2) The harm that may result from the injunction or order is clearly outweighed by the risk of harm to the vulnerable adult or elderly person if the inunction or order is not issued; and
  (3) If the Attorney General or the United States Attorney has petitioned for an order temporarily freezing assets, the order is necessary to prevent dissipation of assets obtained in violation of Section 22A-2207.

(d) *Effect of Order to Temporarily Freeze Assets.* (1) An order temporarily freezing assets without notice to the person pursuant to subsections (b)(3) and (c) of this section shall expire on a date set by the court, not later than 14 days after the court issues the order unless, before that time, the court extends the order for good cause shown.
  (2) A person whose assets were temporarily frozen under paragraph (1) of this subsection may move to dissolve or modify the order after notice to the Attorney General for the United States Attorney. The court shall hear and decide the motion or application on an expedited basis.

(e) *Appointment of Receiver or Conservator.* The court may issue an order temporarily freezing the assets of the vulnerable adult or elderly person to prevent dissipation of assets; provided, that the court also appoints a receiver or conservator for those assets. The order shall allow for the use of assets to continue care for the vulnerable adult or elderly person, and can only be issued upon a showing that a temporary injunction or temporary restraining order authorized by this section would be insufficient to safeguard

the assets, or with the consent of the vulnerable adult or elderly person or his or her legal representative.

Commentary

Explanatory Note. RCC § 22A-2209 is a combination of two current statutes, D.C. Code §§ 22-937 and 22-938. The text from the two current D.C. Code statutes has been copied verbatim, with the exception of technical changes to update cross-references, and to add headings to some subsections. However these changes are purely technical, and do not substantively alter current District law.

Chapter 24 Stolen Property Offenses

RCC § 22A-2401. Possession of Stolen Property

(a) *Offense.* A person commits the offense of receiving stolen property if that person:
  (1) Knowingly buys or possesses;
  (2) Property;
  (3) With intent that the property be stolen; and
  (4) With intent to deprive the owner of the property.

(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, the term "possess" has the meaning specified in § 22A-202, and the terms "property" and "deprive" have the meaning specified in §22A-2001.

(c) *Gradations and Penalties*.
  (1) *Aggravated Possession of Stolen Property.* A person is guilty of aggravated possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value of $250,000 or more. Aggravated possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Possession of Stolen Property*. A person is guilty of first degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value, of $25,000 or more. Second degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Possession of Stolen Property.* A person is guilty of second degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value, of $2,500 or more. Second degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) *Third Degree Possession of Stolen Property*. A person is guilty of third degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value of $250 or more. Third degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (5) *Fourth Degree Possession of Stolen Property*. A person is guilty of fourth degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has any value. Fourth degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Commentary

Explanatory Note. *This section establishes the possession of stolen property (PSP) offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly buying or possessing property, believing the property to be stolen, with intent to deprive the owner of the property. The five penalty gradations vary based on the value of the property. The revised PSP offense replaces the receiving stolen property*[279] *statute in the current D.C. Code.*

Section (a)(1) specifies alternative elements that a person must engage in—to buy or possess something. Possess is a term defined at RCC § 22A-202(d) to mean "exercising control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property." Subsection (a)(1) also specifies the culpable mental state for subsections (a)(1) – (a)(2) of the offense to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct would cause him or her to buy or possess an item.

Subsection (a)(2) clarifies that the item that the defendant must have bought or possessed is "property," a defined term meaning "something of value." Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the "property" element in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item be of some value.

Subsection (a)(3) requires that the defendant had intent that the property be stolen, where "intent" is a defined term meaning that the defendant consciously desired, or believed to a practical certainty, that the property was stolen. However, it is not necessary to prove that the property was actually stolen, just that the defendant believed to a practical certainty, or consciously desired that the property was stolen.

Subsection (a)(4) requires that the defendant also had an intent to deprive the owner of property. "Deprive" is a defined term in RCC § 22A-2001 meaning the owner is unlikely to recover the object or it is withheld permanently or long enough to lose a substantial part of its value or benefit. "Intent" also is a defined term in RCC § 22A-2001 meaning the defendant believed his or her conduct was practically certain to "deprive," another defined term meaning a substantial loss of the property. It is not necessary to prove that such a deprivation actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that a deprivation would result. If a person only intends to temporarily possess the stolen property, or to return it to its rightful owner or to law enforcement, he has not committed PSP.

Subsection (b) cross-references applicable definitions located elsewhere in the RCC.

Subsection (c) grades PSP according to the value of the property involved.[280] The value of the property that the defendant possessed or bought may be aggregated to determine the appropriate grade of the offense.[281] The value thresholds for each grade of PSP are the same as other property offenses, although the corresponding penalties may differ. "Value" is a defined elsewhere in RCC § 22A-2001. "In fact" also is a defined term in RCC § 22A-2001 that is used in all of the fraud gradations to indicate that there is no culpable mental state requirement as to the value of the property. The defendant is strictly liable as to the value of the property.

[279] D.C. Code § 22-3232.

[280] For example, if the defendant possesses property valued at less than $250, it is Fourth Degree PSP; if the value of the property is $250,000 or more, it is Aggravated PSP.

[281] RCC § 22A-2002.

Relation to Current District Law. *The revised PSP statute changes District law in three main ways that narrow the scope of the offense to exclude innocent possession of stolen property, and to reduce unnecessary overlap with other offenses and improve the proportionality of penalties.*

First, the revised PSP statute requires that the defendant have an "intent to deprive" the owner of the property.[282] Under the RCC definition of "deprive,"[283] the PSP offense's intent to deprive element requires that the defendant possessed or bought the property intending to permanently deprive the owner of the property or of a substantial benefit of the property. By contrast, the current statute has no intent to deprive element and a person commits a crime even if he or she only intends to temporarily possess the stolen property, even with intent to return the stolen property to its rightful owner. By including intent to deprive as a statutory element, the revised offense ensures that a person who possesses stolen property with intent to return it to its rightful owner is not liable for PSP and places the burden of proof as to the element of intent on the government.[284] This change clarifies and improves the proportionality of the offense.

Second, the revised statute increases the number of penalty grade distinctions. The current PSP offense is limited to two gradations based solely on value. Under current law, first degree PSP involves property with a value of $1,000 or more and is punished as a serious felony; second degree PSP involves property valued at less than $1,000 and is a misdemeanor. By contrast, the revised PSP offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.

Third, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised PSP offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses, including receiving stolen property, based on the same act or course of conduct.[285] However, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised PSP offense and other closely-related offenses, 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

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[282] Although requiring intent to deprive is a departure from current District law, it is worth noting that up until 2012, the District's receiving stolen property offense included an intent to deprive element. RECEIVING STOLEN PROPERTY AND PUBLIC SAFETY AMENDMENT ACT of 2011. D.C. Law 19-120. D.C. Act 19-262. The D.C. Court of Appeals, in interpreting this prior version of the statute, had held that receiving stolen property is a "specific intent" crime. *Lihlakha v. United States*, 89 A.3d 479, 489 n.26 (D.C. 2014).

[283] RCC § 22A-2001.

[284] Including an intent to deprive element is also intended to re-codify the return-for-reward defense recognized by the DCCCA in *Lihlakha v. United States*, 89 A.3d 479, 786-87 (D.C. 2014) (Four conditions must be satisfied for the accused to have a valid defense that he or she intended to return the property for a reward: (1) The reward had been announced, or was believed to have been announced, before the property was possessed or agreed to be possessed; (2) the person claiming the reward had nothing to do with the theft; (3) the possessor returned the property without unreasonable delay to the rightful owner or to a law enforcement officer; and (4) the possessor imposed no condition on return of the property.).

[285] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").

Beyond these three main changes to current District law, one other aspect of the revised PSP statute may constitute substantive changes of law.

The revised PSP offense requires a culpable mental state of knowledge for subsections (a)(1)-(a)(2). The current statute does not specify a culpable mental state for these elements and no case law exists on point. However, given the current and revised offenses' requirements that the accused at least believe the property to be stolen, a knowing culpable mental state as to the facts that the accused bought or possessed property appears appropriate. Requiring a knowing culpable mental state also makes the revised PSP offense consistent with the revised trafficking stolen property statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[286]

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

First, the revised statute criminalizes buying or possessing stolen property, but omits the words "receives" or "obtains control over" stolen property. Omission of these words is not intended to change the scope of the offense. The words "buys" and "possesses" are intended to be broad enough to cover every instance in which a person receives or obtains control over property.

Second, using the inchoate "with intent" mental state with respect to whether the property is stolen is intended to clarify that the defendant must have had an actual subjective belief, or conscious desire, that the property was stolen, but that the property need not have actually been stolen. The current statute requires that the defendant either knew, or "[had] reason to believe that the property has been stolen[.]"[287] Although this language might be interpreted to mean that the defendant *should* have known that the property was stolen, and a negligence mental state could suffice, the DCCA has rejected this interpretation. Instead, the DCCA has held that this language requires that the defendant had an actual subjective belief, even if erroneous, that the property was stolen.[288] Using the "with intent" inchoate mental state is consistent with this case law. The current statute's subsection (b) also specifies that the "stolen property" need not be actually stolen if the accused otherwise committed the elements of the crime and he or she "believed" the property to be stolen.[289] The elimination of the current offense's subsection (b) is consistent with the revised definition's use of "intent" to indicate that the property need not actually be stolen so long as the accused believed or consciously desired it to be so.

Relation to National Legal Trends. *The revised PSP offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, a majority of jurisdictions, including nearly all jurisdictions with reformed criminal codes, and the Proposed Revised Federal Criminal Code[290] have analogous PSP offenses that require intent to deprive.[291] Of the minority of jurisdictions with PSP offenses that do not

[286] *See, e.g.*, RCC § 22A-2101.
[287] D.C. Code § 22-3232.
[288] *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").
[289] D.C. Code § 22-3231(b).
[290] Proposed Federal Criminal Code § 1732(c). Note however that the Proposed Federal Criminal Code treats PSP as a version of theft, rather than a separate offense.
[291] Alaska Stat. Ann. § 11.46.190; Ala. Code § 13A-8-16; Ark. Code Ann. § 5-36-106; Ariz. Rev. Stat. Ann. § 13-1802; Colo. Rev. Stat. Ann. § 18-4-401; Del. Code Ann. tit. 11, § 851; Fla. Stat. Ann. § 812.014; Haw. Rev. Stat.

require intent to deprive[292], a slight majority have explicit statutory language providing for a defense if the defendant intended to return the property to its rightful owner, or law enforcement authorities;[293] and three others require proof of a "dishonest" or "criminal" purpose or intent.[294] The Model Penal Code's PSP statute also specifically excludes cases in which the property is possessed "with purpose to restore it to the owner."[295] Only six jurisdictions' PSP statutes do not require intent to deprive, other wrongful purpose, or do not provide explicit language excluding cases in which the defendant possessed stolen property with intent to return it to its rightful owner.[296]

Second, increasing the number of penalty gradations is also consistent with the national norms. A strong majority of jurisdictions use more than two penalty gradations.[297] Only nine states use just two grades[298], and one state, Oklahoma, uses just one grade.

Third, regarding the bar on multiple convictions for the revised PSP offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised PSP offense and other overlapping property offenses. For example, where the offense most like the revised PSP offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[299] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[300] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[301]

Ann. § 708-830; Idaho Code Ann. § 18-2403; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-4-2; Kan. Stat. Ann. § 21-5801; Mass. Gen. Laws Ann. ch. 266, § 60; Md. Code Ann., Crim. Law § 7-104; Me. Rev. Stat. tit. 17-A, § 359; Minn. Stat. Ann. § 609.53; Mo. Ann. Stat. § 570.080; Mont. Code Ann. § 45-6-301; N.D. Cent. Code Ann. § 12.1-23-02; N.H. Rev. Stat. Ann. § 637:7; Nev. Rev. Stat. Ann. § 205.275; N.Y. Penal Law § 165.40; Ohio Rev. Code Ann. § 2913.51; Okla. Stat. Ann. tit. 21, § 1713; Or. Rev. Stat. Ann. § 164.095; 18 Pa. Stat. Ann. § 3925; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-408; Wash. Rev. Code Ann. § 9A.56.140.

[292] Cal. Penal Code § 496 (but statute requires intent to temporarily deprive); Conn. Gen. Stat. Ann. § 53a-119; Ga. Code Ann. § 16-8-7; Ky. Rev. Stat. Ann. § 514.110; La. Stat. Ann. § 14:69; Mich. Comp. Laws Ann. § 750.535; Miss. Code. Ann. § 97-17-70; Neb. Rev. Stat. Ann. § 28-517; N.J. Stat. Ann. § 2C:20-7; N.M. Stat. Ann. § 30-16-11; N.C. Gen. Stat. Ann. § 14-71; 11 R.I. Gen. Laws Ann. § 11-41-2; S.C. Code Ann. § 16-13-180; S.D. Codified Laws § 22-30A-7; Va Code Ann. § 18.2-108; Vt. Stat. Ann. tit. 13, § 2561; Wisconsin, Wis. Stat. Ann. § 943.34; W. Va. Code Ann. § 61-3-18; Wyo. Stat. Ann. § 6-3-403.

[293] Connecticut, Georgia, Kentucky, Louisiana, Mississippi, Nebraska, New Jersey, New Mexico, South Dakota, and Vermont.

[294] North Carolina, Virginia, and West Virginia.

[295] MPC § 223.6.

[296] California, Michigan, Rhode Island, South Carolina, Wisconsin, and Wyoming.

[297] Ten states use 3 grades; eleven states use 4 grades; nine states use 5 grades; four states use 6 grades; three states use 7 grades, and one state each uses 9 and 10 grades. On average, these forty states use 4.675 gradations.

[298] Cal. Penal Code § 496; Del. Code Ann. tit. 11, § 851 (West); Idaho Code Ann. § 18-2403; Mass. Gen. Laws Ann. ch. 266, § 60; N.C. Gen. Stat. Ann. § 14-71; Okla. Stat. Ann. tit. 21, § 1713; Vt. Stat. Ann. tit. 13, § 2561; Va. Code Ann. §18.2-108; W. Va. Code Ann. § 61-3-18; Wyo. Stat. Ann. § 6-3-403.

[299] D.C. Code § 22-3203.

[300] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[301] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

Although it is difficult to generalize as to whether multiple convictions for PSP and other property offenses would be permitted in other jurisdictions, barring convictions for both PSP and theft based on possession of the same property follows a strong national legal trend. Only one other jurisdiction, Oklahoma, allows convictions for both theft and PSP for a single piece of property.[302] The law is somewhat unclear in three other jurisdictions: Michigan, Missouri, and Pennsylvania. In all other jurisdictions, there is either case law barring convictions for both theft and RSP of the same property,[303] statutory language barring convictions for both theft and PSP of the same property,[304] or PSP and other theft-type offenses have been consolidated into a single theft offense.[305]

[302] *Nowlin v. State*, 34 P.3d 654, 655-56 (Okla. Crim. App. 2012).

[303] Alabama, *George v. State*, 410 So. 2d 476, 478 (Ala. Crim. App. 1982); Colorado, *People v. Griffie*, 610 P.2d 1079, 1080-81 (Colo. App. 1980); Georgia, *Redding v. State*, 384 S.E.2d 910, 912 (Ga. Ct. App. 1989); Illinois, *People v. Miller*, 146 N.E. 501, 503 (Ill. 1925); Indiana, *Gibson v. State*, 643 N.E.2d 885, 892 (Ind. 1994); Kentucky *Phillips v. Com.*, 679 S.W.2d 235, 236-37 (Ky. 1984); Louisiana, *State v. Franklin*, 142 So. 3d 295, 305 (La. Ct. App. 2014); Massachusetts, *Com. v. Obshatkin*, 307 N.E.2d 341, 343-44 (Mass. App. Ct. 1974); Minnesota, *State v. Banks*, 358 N.W.2d 133, 135 (Minn.App.1984); Mississippi, *Young v. State*, 908 So. 2d 819, 829 (Miss. Ct. App. 2005); Montana, *State v. Hernandez* 689 P.2d 1261, 1262 (Mont. 1984); Nevada, *Stowe v. State*, 857 P.2d 15, 17 (Nev. 1993); New Hampshire, *State v. Chaisson*, 458 A.2d 95, 98 (N.H. 1983), New Mexico, *Territory v. Graves*, 125 P. 604, 604 (N.M. 1912); New York, *People v. Colon*, 267 N.E.2d 577, 582 (N.Y. 1971); Ohio, *City of Maumee v. Geiger*, 344 N.E.2d 133, 137 (Ohio 1976); Rhode Island, *State v. Grant*, 840 A.2d 541, 549 (R.I. 2004); South Carolina, *State v. Tindall*, 50 S.E.2d 188, 189 (S.C. 1948); South Dakota, *State v. Howell*, 354 N.W.2d 196, 198 (S.D. 1984); Tennessee, *State v. Kennedy*, 7 S.W.3d 58, 70 (Tenn. Crim. App. 1999); Vermont, *State v. Bleau*, 428 A.2d 1097, 1099 (Vt. 1981); Washington, *State v. Hancock*, 721 P.2d 1006, 1007-08 (Wash. Ct. App. 1986); West Virginia, *State v. Koton*, 202 S.E.2d 823, 828 (W. Va. 1974); Wisconsin, *State v. Godsey*, 75 N.W.2d 572, 573 (Wis. 1956); Wyoming, *Garcia v. State*, 777 P.2d 1091, 1094 (Wyo. 1989).

[304] California, Cal. Penal Code § 496 (West); Delaware, Del. Code Ann. tit. 11, § 856 (West).

[305] Alaska, Arizona, Arkansas, Connecticut, Florida, Hawaii, Iowa, Idaho, Kansas, Maryland, Maine, North Carolina, Nebraska, New Jersey, North Dakota, Oregon, Texas, Utah, Virginia.

RCC § 22A-2402. Trafficking of Stolen Property

(a) *Offense.* A person commits the offense of trafficking of stolen property if that person:
  (1) Knowingly buys or possesses;
  (2) Property;
  (3) On two or more separate occasions;
  (4) With intent that the property be stolen; and
  (5) With intent to sell, pledge as consideration, or trade the property.

(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, the term "possess" has the meaning specified in § 22A-202, and the term "property" has the meaning specified in §22A-2001.

(c) *Gradations and Penalties*.
  (1) *Aggravated Trafficking of Stolen Property.* A person is guilty of aggravated trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $250,000 or more. Aggravated trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Trafficking of Stolen Property*. A person is guilty of first degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $25,000 or more. Second degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Trafficking of Stolen Property.* A person is guilty of second degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $2,500 or more. Second degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) *Third Degree Trafficking of Stolen Property*. A person is guilty of third degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $250 or more. Third degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (5) *Fourth Degree Trafficking of Stolen Property*. A person is guilty of fourth degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has any value. Fourth degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Commentary

Explanatory Note. *This section establishes the trafficking in stolen property (TSP) offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly buying or possessing stolen property, on two or more occasions, with intent to sell, trade, or pledge the property in exchange for anything of value. The five penalty gradations are based on the aggregate value of the property involved in the crime. The revised TSP offense replaces the trafficking stolen property[306] statute in the current D.C. Code.*

[306] D.C. Code § 22-3231.

Section (a)(1) specifies alternative elements that a person must engage in—to buy or possess something. Possess is a term defined at RCC § 22A-202(d) to mean "exercising control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property." Subsection (a)(1) also specifies the culpable mental state for subsections (a)(1) – (a)(3) of the offense to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct would cause him or her to buy or possess an item.

Subsection (a)(2) clarifies that the item that the defendant must have bought or possessed is "property," a defined term meaning "something of value." Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the "property" element in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item be of some value.

Subsection (a)(3) specifies that the accused must have bought or possessed property on two or more occasions, an element that distinguishes TSP from the possession of stolen property (PSP) revised offense. TSP is direct at the conduct of habitual fences, who provide a market for stolen goods and thereby create further incentive for theft. An isolated incident of possessing stolen property with intent to sell, trade, or pledge it shall not constitute a violation of this section. Even if a person sells multiple pieces of stolen property in a single transaction, this shall not constitute two separate occasions required under the revised statute. The two occasions must be based on possession of different pieces of property at different points in time.[307] Per the rule of construction in 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the "two or more separate occasions" element in (a)(3).

Subsection (a)(4) requires that the defendant had intent that the property be stolen, where "intent" is a defined term meaning the defendant either consciously desired, or was practically certain that the property was stolen. However, it is not necessary to prove that the property was actually stolen, just that the defendant believed to a practical certainty, or consciously desired that the property was stolen.

Subsection (a)(5) requires that the defendant possessed the property with intent to sell, pledge as consideration, or trade the property. It is not required that the defendant actually sells, pledges, or trades the property, but he must have consciously desired, or been practically certain that he would do so. If a defendant possesses or buys stolen property on two separate occasions, but in only one of those occasions had intent to sell, pledge, or trade the property, that is insufficient for a TSP conviction.

Subsection (b) cross-references applicable definitions located elsewhere in the RCC.

Subsection (c) grades TSP according to the value of the property involved.[308] The value of the property that the defendant bought or possessed with intent to sell or trade may be aggregated to determine the appropriate grade of the offense.[309] The words "in fact" are a

[307] *See also* D.C. Crim. Jur. Instr. § 5-305.

[308] For example, if the value of the property is less than $250, it is Fourth Degree TSP; if the value of the property is $250,000 or more, it is Aggravated TSP.

[309] RCC § 22A-2002. The revised TSP statute allows for considerable prosecutorial discretion in determining how many counts to charge if the defendant has trafficked in stolen property on several occasions. For example, if a person traffics in stolen property on four separate occasions, and the value of the stolen property in each occasion is $525, the defendant could be charged with a single count of fourth degree TSP, since the aggregate value of the property is $2100, which falls within the value threshold for fourth degree TSP. This person at most could be convicted of a single count with a maximum [] sentence. However, the defendant could also be charged with *two* counts of fourth degree TSP, with each count relying on two occasions of trafficking stolen property with an

defined term in the RCC, and are used in every penalty gradation to specify that there is no culpable mental state as to the aggregated value of the property. The defendant is strictly liable as to the aggregated value of the property.

Relation to Current District Law. *The revised TSP statute changes District law in two main ways that improves the proportionality of penalties.*

First, the revised statute increases the number and type of grade distinctions. The current TSP offense is limited to one penalty, irrespective of the value of the property involved.[310] By contrast, the revised TSP offense has a total of five gradations which span the same range in value as the possession of stolen property (PSP) offense and other property offenses, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.

Second, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised TSP offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[311] However, TSP is not among those offenses and, as described in the commentary to section 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised TSP offense and other closely-related offenses, 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

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

The revised TSP offense requires a culpable mental state of knowledge for subsections (a)(1)-(a)(3). The current statute does not specify a culpable mental state for these elements and no case law exists on point. However, given the current and revised offenses' requirements that the accused at least believe the property to be stolen, a knowing culpable mental state as to the facts that the accused bought or possessed property appears appropriate. Requiring a knowing culpable mental state also makes the revised TSP offense consistent with the revised possession of stolen property statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[312]

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

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aggregate value of $1050, which also falls within the value threshold for fourth degree TSP. Due to charging decisions, the person could face two convictions, and a maximum allowable sentence of six years. In these cases, even if the government could prove each occasion of trafficking and obtain two convictions, the sentencing judge would still retain discretion to merge the convictions if a single conviction were sufficient given the severity of the defendant's conduct. Alternatively, even if the defendant were convicted and sentenced on multiple counts, the sentencing judge could also order that the sentences be served concurrently.

[310] D.C. Code § 22-3231(d). Whether a person traffics in $1 stolen pens, or $1000 stolen watches, the current statute authorizes a ten year maximum sentence.

[311] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").

[312] *See, e.g.*, RCC § 22A-2101.

First, the revised statute requires that the defendant either possess or buy property, with intent to sell, pledge as consideration, or trade the property. This is in contrast to the current statute, which, defines "trafficking" as "to buy, receive, possess, or obtain control of property with intent to [sell, pledge, transfer, distribute, dispense, or otherwise dispose of property to another]."[313] The revised offense eliminates redundant wording. The words "sell, pledge as consideration, or trade" in the revised offense are intended to be broad enough to cover conduct covered by "transfer, distribute, dispense, or otherwise dispose of property" as used in the current statute. Similarly, "buys" and "possesses" in the revised offense are intended to be broad enough to cover every instance in which a person receives or obtains control over property. Moreover, because anyone who engages in conduct to "transfer, distribute, dispense, or otherwise dispose of property" must necessarily exercise control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property—the definition of possession,[314] the revised offense makes no change to the statute's scope by only requiring proof the accused buys or possesses property with intent to sell, pledge as consideration, or trade it.

Second, using the inchoate "with intent" mental state with respect to whether the property is stolen is intended to clarify that the defendant must have had an actual subjective belief, or conscious desire, that the property was stolen, but that the property need not have actually been stolen. The current statute requires that the defendant either knew, or "[had] reason to believe that the property has been stolen[.]"[315] Although this language might be interpreted to mean that the defendant *should* have known that the property was stolen, and a negligence mental state could suffice, the DCCA appears to rejected this interpretation for identical language in the current receiving stolen property statute. [316] The DCCA held that such language requires that the defendant had an actual subjective belief, even if erroneous, that the property was stolen.[317] Using the "with intent" inchoate mental state is consistent with this case law. The current TSP statute's subsection (c) also specifies that the "stolen property" need not be actually stolen if the accused otherwise committed the elements of the crime and he or she "believed" the property to be stolen.[318] The elimination of the current offense's subsection (c) is consistent with the revised definition's use of "intent" to indicate that the property need not actually be stolen so long as the accused believed or consciously desired it to be so.

Relation to National Legal Trends. *The major changes the revised statutes makes to current District law are not consistent with national legal trends.* The District is one of just six jurisdictions that codify an offense like TSP.[319]

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[313] D.C. Code § 22-3231.
[314] RCC § 22A-202(d).
[315] D.C. Code § 22-3231.
[316] D.C. Code § 22-3232.
[317] *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").
[318] D.C. Code § 22-3231(b).
[319] Only five other jurisdictions specifically criminalize trafficking or dealing in stolen property. Ariz. Rev. Stat. Ann. § 13-2307; N.J. Stat. Ann. § 2C:20-7.1; N.D. Cent. Code Ann. § 12.1-23-08.3; Va. Code Ann. § 18.2-108.01; Wash. Rev. Code Ann. § 9A.82.050. The Model Penal Code does not have a specific TSP statute, but its receiving stolen property statute includes a presumption of knowledge that the property was stolen if it was possessed by a dealer who is found in possession of stolen property on two or more occasions; has received stolen property in another transaction within the preceding year; or acquires the property for consideration which he knows is far

First, among the handful of jurisdictions with TSP offenses, none use five penalty grades. One state uses a single grade[320], with value being irrelevant, four states use two grades[321], and one state uses four grades.[322] Using five penalty grades will make the revised TSP offense consistent with other revised property offenses, but this change will not follow a majority practice in other jurisdictions. Nationally, the District is an outlier in penalizing all trafficking with a possible ten year sentence. Only five states have TSP-type offenses, and only two of those authorize sentences of 10 years or greater for trafficking in low value property.[323] In each of the states that have comprehensively reformed criminal codes influenced by the MPC and have a general part,[324] and that do not have a separate TSP offense, trafficking in low value property on two separate occasions would only constitute two counts of misdemeanor possession of stolen property.[325]

Second, regarding the bar on multiple convictions for the revised TSP offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised TSP offense and other overlapping property offenses. For example, where the offense most like the revised TSP is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[326] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[327] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[328]

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below its reasonable value. In addition, the Brown Commission's Final Report of the National Commission on Reform of Federal Criminal Laws did not include a TSP offense.

[320] Va. Code Ann. § 18.2-108.01.

[321] Del. Code Ann. tit. 11, § 852A; Fla. Stat. Ann. § 812.019 ; N.D. Cent. Code Ann. § 12.1-23-08.3; Wash. Rev. Code Ann. § 9A.82.050.

[322] N.J. Stat. Ann. § 2C:20-7.1; *State v. Portuondo*, 649 A.2d 892, 896 (N.J. Super. Ct. App. Div. 1994) (holding that § 2C:20-7.1 uses same penalty structure as theft offense).

[323] Ariz. Rev. Stat. Ann. § 13-2307; Fla. Stat. Ann. § 812.019.

[324] *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).

[325] Alaska Stat. Ann. § 11.46.190 (West); Ala. Code § 13A-8-16; Ark. Code Ann. § 5-36-106; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119 ; Del. Code Ann. tit. 11, § 851; Haw. Rev. Stat. Ann. § 708-830; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-4-2; Kan. Stat. Ann. § 21-5801; Ky. Rev. Stat. Ann. § 514.110; Me. Rev. Stat. tit. 17-A, § 359; Minn. Stat. Ann. § 609.53; Mo. Ann. Stat. § 570.080; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:7; N.J. Stat. Ann. § 2C:20-7; N.Y. Penal Law § 165.40; N.D. Cent. Code Ann. § 12.1-23-02; Ohio Rev. Code Ann. § 2913.51; Or. Rev. Stat. Ann. § 164.095; 18 Pa. Stat. Ann. § 3925; S.D. Codified Laws § 22-30A-7; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-408; Wash. Rev. Code Ann. § 9A.56.140; Wis. Stat. Ann. § 943.34.

[326] D.C. Code § 22-3203.

[327] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[328] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

RCC § 22A-2403. Alteration of Motor Vehicle Identification Number

(a) A person commits the offense of altering a vehicle identification number if that person:
  (1) Knowingly alters;
  (2) An identification number;
  (3) Of a motor vehicle or motor vehicle part;
  (4) With intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part.

(b) *Definitions.* In this section, "identification number" means a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for purposes of identification. The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the term "motor vehicle" has the meaning specified in § 22A-2001.

(c) *Gradations and Penalties*.
  (1) *First Degree Altering Vehicle Identification Number*. A person is guilty of first degree altering a vehicle identification number if the person commits the offense and the value of the motor vehicle or motor vehicle part, in fact, is $1,000 or more. First degree altering a vehicle identification number is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Altering Vehicle Identification Number*. A person is guilty of second degree altering a vehicle identification number if the person commits the offense and the value of the motor vehicle or motor vehicle part, in fact, has any value. Second degree altering a vehicle identification number is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Commentary

Explanatory Note. *This section establishes the altering vehicle identification number (AVIN) offense and penalty for the Revised Criminal Code (RCC). This offense criminalizes knowingly altering a vehicle identification number (VIN) with intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. The revised AVIN offense replaces the existing offense of altering or removing motor vehicle identification numbers*[329] *in the current D.C. Code.*

Subsection (a)(1) specifies that a person must engage in conduct that causes an alteration of something. Alteration is an undefined term, intended to be broadly construed. Subsection (a)(1) also specifies the culpable mental state for subsections (a)(1) – (a)(3) of the offense to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct would cause an alteration.

Subsection (a)(2) describes the element that the thing altered is an identification number, a term defined in this section to mean "a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for purposes of identification," Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the "property" element in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item is an identification number.

[329] D.C. Code § 22-3233.

Subsection (a)(3) describes the element that the identification number must be on a motor vehicle or motor vehicle part. "Motor vehicle" is a defined term that includes a non-operational vehicle that is being restored or repaired.[330] Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the "property" element in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item be on a motor vehicle or motor vehicle part.

Subsection (a)(4) further specifies that the defendant must alter a VIN with intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. "Intent" is a defined term meaning the defendant consciously desired, or believed his or her conduct was practically certain to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. It is not required that the defendant actually conceal or misrepresent the identity of the motor vehicle or motor vehicle part, but he must have consciously desired, or been practically certain that he would do so.

Subsection (b) defines the term "identification number" and cross-references applicable definitions located elsewhere in the RCC.

Subsection (c) provides the penalty for AVIN. There are two grades of the offense based on whether the value of the motor vehicle or motor vehicle part is $1,000 or less. The words "in fact" are a defined term in the RCC, and are used in every penalty gradation to specify that there is no culpable mental state as to the value of the motor vehicle or motor vehicle part. The defendant is strictly liable as to the value of the motor vehicle or motor vehicle part.

Relation to Current District Law. *The revised AVIN statute changes District law in three main ways that improve the proportionality of penalties.*

First, the revised AVIN statute requires that the defendant have an intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. By contrast, under the current statute, it appears that a person commits an offense by merely knowingly altering a VIN, regardless of the purpose for doing so.[331] No case law exists as to whether a person would be guilty under the current statute for altering a VIN for some other purpose. The revised statute eliminates liability for a person who alters[332] a VIN for purposes besides concealment or misrepresentation of identity. The change improves the proportionality of the offense.

Second, the provision in RCC § 22A-2002, "Aggregation of Property Value To Determine Property Offense Grades," allows aggregation of value for the revised AVIN offense based on a single scheme or systematic course of conduct. The current AVIN offense is not part of the current aggregation of value provision for property offenses.[333] The revised AVIN statute

[330] RCC § 22A-2001.

[331] D.C. Code § 22-3233.

[332] *E.g.* knowingly painting over or cutting off an automobile part with a VIN from one's own vehicle is criminal under the plain language of the current statute, but, without evidence of intent to conceal or misrepresent the identity thereof, such conduct would not be criminal under the revised offense.

[333] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

permits aggregation for determining the appropriate grade of AVIN to ensure penalties are proportional to defendants' actual conduct.[334]

Third, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised AVIN offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[335] However, altering or removing motor vehicle identification numbers is not among those offenses and, as described in the commentary to section 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised AVIN offense and other closely-related offenses, 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

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

For instance, the current statute makes it a crime to "remove, obliterate, tamper with, or alter" a VIN.[336] The revised statute only uses the word "alter," omitting the words "remove," "obliterate," or "tamper with." The word "alter" is intended to be broadly construed to cover removing, obliterating, or tampering with a VIN. The change is not intended to narrow the scope of the offense.

Relation to National Legal Trends. *The revised AVIN offense's above mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, a majority of jurisdictions only criminalize alteration of a VIN when there is an additional evidence of wrongful intent. Of the 29 states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[337] (hereafter "reformed code jurisdictions") that have analogous AVIN statutes, a majority require some wrongful intent[338], lack of authorization from a government agency[339], or recognize a defense that the defendant was the owner of the vehicle, or had consent of the vehicle.[340] However, three of the states that

[334] Inclusion of AVIN in RCC § 22A-2002 does not suggest however that multiple convictions are categorically barred when the accused alters multiple VINs, on multiple motor vehicles or motor vehicles parts, even when the alterations occur as part of a single act or course of conduct.

[335] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").

[336] *Id*.

[337] *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). In addition, Tennessee reformed its criminal code after the publication of this article.

[338] Ala. Code § 32-8-86; Alaska Stat. Ann. § 11.46.260; Ariz. Rev. Stat. Ann. § 28-4593; Ark. Code Ann. § 27-14-2211; Colo. Rev. Stat. Ann. § 18-4-420; Del. Code Ann. tit. 21, § 6705; Ky. Rev. Stat. Ann. § 514.120; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; N.D. Cent. Code Ann. § 39-05-28; N.J. Stat. Ann. § 2C:17-6; Ohio Rev. Code Ann. § 4549.62; Tenn. Code Ann. § 55-5-112; Wash. Rev. Code Ann. § 9A.56.180.

[339] S.D. Codified Laws § 32-4-9.

[340] Tex. Penal Code Ann. § 31.11.

require intent to conceal or misrepresent the identity of the vehicle or part only require this intent for the felony grade of the offense.[341]

Second, regarding the aggregation of value in a single scheme or systematic course of conduct, the revised AVIN offense follows many jurisdictions[342] which have statutes that closely follow the Model Penal Code (MPC)[343] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[344] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[345] Notably, of reformed code jurisdictions with analogous AVIN offenses, a majority use only a single penalty grade, and the value of the motor vehicle or motor vehicle part is irrelevant.[346]

Third, regarding the bar on multiple convictions for the revised AVIN offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised AVIN offense and other overlapping property offenses. For example, where the offense most like the revised AVIN offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses.[347] Research has not identified any equivalent statutory provision to either the current Consecutive sentences[348] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[349] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[350]

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[341] Ala. Code § 32-8-86; Ariz. Rev. Stat. Ann. § 28-4593; Del. Code Ann. tit. 21, § 6705.

[342] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[343] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[344] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[345] See, e.g. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[346] Ark. Code Ann. § 27-14-2211; Colo. Rev. Stat. Ann. § 18-4-420; Conn. Gen. Stat. Ann. § 14-149; 625 Ill. Comp. Stat. Ann. 5/4-103; Kan. Stat. Ann. § 8-113; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 301.400; Mont. Code Ann. § 45-6-326; N.D. Cent. Code Ann. § 39-05-28; N.H. Rev. Stat. Ann. § 262:9; N.J. Stat. Ann. § 2C:17-6; N.Y. Penal Law § 170.65; 18 Pa. Stat. Ann. § 7703; S.D. Codified Laws § 32-4-9; Tenn. Code Ann. § 55-5-112; Tex. Penal Code Ann. § 31.11; Wash. Rev. Code Ann. § 9A.56.180; Wis. Stat. Ann. § 342.30.

[347] *Rogers v. State*, 656 So. 2d 245, 247 (Fla. Dist. Ct. App. 1995) (holding that theft and alteration of vehicle identification numbers do not merge);

[348] D.C. Code § 22-3203.

[349] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[350] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

RCC § 22A-2404. Alteration of Bicycle Identification Number

(a) A person commits the offense of altering bicycle identification numbers if that person:
  (1) Knowingly alters;
  (2) An identification number;
  (3) Of a bicycle or bicycle part;
  (4) With intent to conceal or misrepresent the identity of the bicycle or bicycle part.

(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206. Definitions for the terms "bicycle" and "identification number" are provided in section D.C. Code § 50-1609.

(a) *Penalty.* Alteration of a bicycle identification number is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Commentary

Explanatory Note. *This section establishes the alteration of bicycle identification number (ABIN) offense and penalty for the Revised Criminal Code (RCC). This offense criminalizes knowingly altering a bicycle identification number (BIN), with the intent to conceal or misrepresent the identity of the bicycle or bicycle part. The revised ABIN offense replaces the existing offense of altering or removing bicycle vehicle identification numbers*[351] *in the current D.C. Code.*

Subsection (a)(1) specifies that a person must engage in conduct that causes an alteration of something. Alteration is an undefined term, intended to be broadly construed. Subsection (a)(1) also specifies the culpable mental state for subsections (a)(1) – (a)(3) of the offense to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct would cause an alteration.

Subsection (a)(2) describes the element that the thing altered is an identification number, a term defined in D.C. Code section 50-1609(1A).[352] Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the "property" element in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item is an identification number.

Subsection (a)(3) describes the element that the identification number must be on a bicycle or bicycle part. "Bicycle" is a defined term that includes a non-operational vehicle that is being restored or repaired.[353] Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the "property" element in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item be on a bicycle or bicycle part.

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[351] D.C. Code § 22-3234.

[352] D.C. Code § 50-1609(1A) ("'Identification number' means a numbered stamp, sticker, or other label or plate issued for a bicycle for the purpose of identifying the bicycle as having been registered, including any sticker or label provided by the National Bike Registry or a registry established by the Mayor for the purpose of bicycle registration. The term 'identification number' shall also include a serial number that is originally inscribed or affixed by the manufacturer to a bicycle frame or a bicycle part for the purpose of identification.")

[353] D.C. Code § 50-1609(1) ("'Bicycle' means a human-powered vehicle with wheels designed to transport, by pedaling, one or more persons seated on one or more saddle seats on its frame. 'Bicycle' also includes a human-powered vehicle, and any attachment to the vehicle designed to transport by pedaling when the vehicle is used on a public roadway, public bicycle path or other public right-of-way. The term 'Bicycle' also includes a 'tricycle,' which is a 3-wheeled human-powered vehicle designed for use as a toy by a single child under 6 years of age, the seat of which is no more than 2 feet from ground level.").

Subsection (a)(4) further specifies that the defendant must alter a BIN with intent to conceal or misrepresent the identity of the bicycle or bicycle part. "Intent" is a defined term meaning the defendant consciously desired, or believed his or her conduct was practically certain to conceal or misrepresent the identity of the bicycle or bicycle part. It is not required that the defendant actually conceal or misrepresent the identity of the bicycle or bicycle part, but he must have consciously desired, or been practically certain that he would do so.

Subsection (b) cross-references applicable definitions located elsewhere in the RCC and the current D.C. Code.

Subsection (c) specifies the penalty for this offense. There is only one grade of ABIN, and the value of the bicycle or bicycle part is irrelevant.

Relation to Current District Law. *The revised ABIN statute changes District law in two main ways that improve the proportionality of penalties.*

First, the revised ABIN statute requires that the defendant have an intent to conceal or misrepresent the identity of the bicycle or bicycle part. By contrast, under the current statute, it appears that a person commits an offense by merely knowingly altering a BIN, regardless of the purpose for doing so.[354] No case law exists as to whether a person would be guilty under the current statute for altering a BIN for some other purpose. The revised statute eliminates liability for a person who alters[355] a BIN for purposes besides concealment or misrepresentation of identity. The change improves the proportionality of the offense.

Second, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised ABIN offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[356] However, altering or removing bicycle identification numbers is not among those offenses and, as described in the commentary to section 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised ABIN offense and other closely-related offenses, 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

In addition to this change, the revised statute also includes one clarificatory change that is not intended to substantively change District law.

The current statute makes it a crime to "remove, obliterate, tamper with, or alter" a BIN.[357] The revised statute only uses the word "alter," omitting the words "remove," "obliterate," or "tamper with." The word "alter" is intended to be broadly construed to cover removing, obliterating, or tampering with a BIN. The change is not intended to narrow the scope of the offense.

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[354] D.C. Code § 22-3234.

[355] *E.g*. knowingly painting over or cutting off an automobile part with a VIN from one's own vehicle is criminal under the plain language of the current statute, but, without evidence of intent to conceal or misrepresent the identity thereof, such conduct would not be criminal under the revised offense.

[356] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").

[357] D.C. Code § 22-3234.

Relation to National Legal Trends. *The revised ABIN offense's above mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, adding an element that the accused had intent to conceal or misrepresent the identity of the bicycle is supported by national legal trends. Of the 29 states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[358] (hereafter "reformed code jurisdictions"), nineteen have analogous offenses.[359] Of these nineteen states, a majority require some wrongful intent.[360]

Second, regarding the bar on multiple convictions for the revised ABIN offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised ABIN offense and other overlapping property offenses. For example, where the offense most like the revised ABIN is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[361] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[362] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[363]

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[358] *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). In addition, Tennessee reformed its criminal code after the publication of this article.

[359] Ala. Code § 13A-8-22; Alaska Stat. Ann. § 11.46.260 ; Colo. Rev. Stat. Ann. § 18-5-305; Conn. Gen. Stat. Ann. § 53-132a; Del. Code Ann. tit. 21, § 6705; Haw. Rev. Stat. Ann. § 293-1; 720 Ill. Comp. Stat. Ann. 5/17-30; Ky. Rev. Stat. Ann. § 514.120; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.085; Mont. Code Ann. § 45-6-326; N.Y. Penal Law § 170.65; N.D. Cent. Code Ann. § 12.1-23-08.1; Ohio Rev. Code Ann. § 4549.62; S.D. Codified Laws § 22-30A-39; Tenn. Code Ann. § 39-14-134; Wash. Rev. Code Ann. § 9A.56.180; Wis. Stat. Ann. § 943.37. Note however, that only Hawaii's statute is specific to bicycles. The other statutes apply more broadly to alteration of identification numbers on any machine, vehicle, or product. For example, Connecticut's statute applies to a "number or other mark which identifies any product, other than a motor vehicle, and distinguishes it from other products of like model and kind produced by the same manufacturer[.]". Conn. Gen. Stat. Ann. § 53-132a.

[360] Ala. Code § 13A-8-22; Alaska Stat. Ann. § 11.46.260; Colo. Rev. Stat. Ann. § 18-5-305; Conn. Gen. Stat. Ann. § 53-132a; Ky. Rev. Stat. Ann. § 514.120; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.085; N.D. Cent. Code Ann. § 12.1-23-08.1; Ohio Rev. Code Ann. § 4549.62; 18 Pa. Stat. Ann. § 7703; Tenn. Code Ann. § 39-14-134; Wash. Rev. Code Ann. § 9A.56.180; Wis. Stat. Ann. § 943.37.

[361] D.C. Code § 22-3203.

[362] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[363] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.