First Draft of Report #11
Recommendations for Extortion, Trespass, and Burglary 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. 11, *Recommendations for Extortion, Trespass, and Burglary 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. 11. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Chapter 23. Extortion

Section 2301. Extortion.

RCC § 22A-2301. Extortion

(a) *Offense.* A person commits the offense of extortion 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 coercion; 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," "coercion," "deprive," and "value" have the meanings specified in § 22A-2001.

(c) *Gradations and Penalties*.
  (1) *Aggravated Extortion.* A person is guilty of aggravated extortion if the person commits extortion and the property, in fact, has a value of $250,000 or more. Aggravated extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Extortion*. A person is guilty of first degree extortion if the person commits extortion and the property, in fact, has a value of $25,000 or more. First degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Extortion.* A person is guilty of second degree extortion if the person commits extortion and the property, in fact, has a value of $2,500 or more. Second degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) *Third Degree Extortion*. A person is guilty of third degree extortion if the person commits extortion and the property, in fact, has a value of $250 or more. Third degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (5) *Fourth Degree Extortion*. A person is guilty of fourth degree extortion if the person commits extortion and the property, in fact, has any value. Fourth degree extortion 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 extortion offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes taking another person's property by inducing their consent by means of coercion. The penalty gradations are based on the value of the property involved in the crime. The revised extortion offense is closely related to the revised theft and fraud offenses.*[1] *It differs from theft because in extortion the defendant has the owner's consent obtained by using coercion. It differs from fraud because in that offense the defendant*

[1] RCC § 22A-2101 and RCC § 22A-2701, respectively.

has the owner's consent obtained by using deception. The revised extortion offense replaces the extortion[2] *and, to the extent that it involves conduct with intent to obtain property, blackmail*[3] *statutes in the current D.C. Code.*

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

Subsection (a)(2) provides that the defendant must take "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 subsection (a)(2), requiring the defendant 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 preference to allow the defendant to take the property. "Owner" is also defined to mean a person holding an interest in property that the defendant 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 RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(3), requiring the defendant to be aware to a practical certainty or consciously desire that the conduct is with the consent of the owner.

Subsection (a)(4) codifies the element that distinguishes extortion from the revised theft and fraud offenses—that the consent of the owner in subsection (a)(3) be obtained by coercion, a term defined in RCC § 22A-2001. Coercion includes a variety of threats that pressure a person to agree to give the defendant the property. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(4), requiring the defendant to be aware to a practical certainty or consciously desire that victim's consent is obtained by coercion.

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 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 the other of 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 occur.

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

Subsection (c) grades extortion according to the value of the property involved.[5] "Value" is defined elsewhere in RCC § 22A-2001. "In fact" also is a defined term in RCC § 22A-2001

[2] D.C. Code § 22-3251.

[3] D.C. Code § 22-3252.

[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.

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

that is used in all of the extortion 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 extortion statute changes District law in six main ways that enhance the clarity, consistency, and proportionality of the offense.*

First, the revised extortion statute no longer specially punishes attempts to commit the offense the same as the completed offense. The current extortion statute[6] states that it is an offense if the person "obtains or attempts to obtain" property, and the current blackmail statute[7] is an inchoate offense that does not require the defendant to actually obtain property. There is no clear rationale for such a special attempt provision for extortion as compared to other offenses. Under the revised extortion statute, the General Part's attempt provisions[8] will establish liability for attempted trespass consistent with other offenses. Differentiating conduct that does and does not result in depriving someone of property improves the proportionality of the offense.

Second, by its use of the new definition of coercion in RCC § 22A-2001 the revised extortion statute makes several changes to the means by which the defendant induces the victim's consent. The current extortion statute prohibits four means of obtaining consent: (1) the use of actual force or violence, (2) the threatened use of force or violence, (3) a wrongful threat of economic injury, and (4) under color or pretense of official right.[9] The current blackmail offense[10] prohibits additional means of obtaining consent, including threats "to accuse any person of a crime; to expose a secret or publicize an asserted fact, whether or true or false, tending to subject any person to hatred, contempt, or ridicule; or to impair the reputation of any person, including a deceased person."[11] The revised extortion statute is somewhat narrower than the current extortion and blackmail offenses insofar as actual use of force has been eliminated from the statute as a means of obtaining property to reduce overlap with robbery. However, the revised extortion offense also is broader than either the current extortion or blackmail statutes by including new conduct—threatening to notify law enforcement about a person's immigration undocumented or illegal immigration status, a threat to commit any other offense, and a threat "to perform any other act that is calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships."[12] These changes are intended to reduce unnecessary gaps and overlap among revised offenses.

Otherwise, the means by which the defendant induces the victim's consent in revised extortion offense is generally the same as the current extortion and blackmail offenses. The current "threatened use of force or violence" prong is covered by the revised offense's inclusion of threats to "inflict bodily injury on another person, damage or destroy the property of another person, [and] kidnap another person."[13] The current statute's "wrongful threat of economic

[6] D.C. Code § 22-3251.
[7] *Id.* ("A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens….").
[8] RCC § 22A-301.
[9] D.C. Code § 22-3251. It is unclear what difference, if any, exists between "force" and "violence;" neither term is defined in the statute, and no DCCA case law has provided definitions.
[10] D.C. Code § 22-3252.
[11] *Id.*
[12] RCC § 22A-2001(4).
[13] RCC § 22A-2001(4)(A)-(C). *See also* Committee on the Judiciary, Report on Bill 4-193 at 69 ("The threat of force or violence may be against any person and is intended to cover threats that anyone will cause physical injury to

injury" has been included nearly verbatim in the revised statute.[14] And the final alternative in the current statute, involving obtaining property under color or pretense of right, also remains in the revised statute.[15] The revised extortion includes each of these forms of conduct via the definition of coercion.[16]

Third, the revised extortion statute requires that the defendant intend to deprive the victim of the property. Neither the current extortion statute nor the current blackmail statute have comparable provisions;[17] and case law does not address whether the current offenses require the person acting with intent to obtain or attempting to obtain the property must seek to do so for more than just a temporary length of time or to cause the owner to lose an insignificant benefit.[18] Instances where the defendant extorts property for temporary use or causes the owner to lose a slight benefit are covered by the revised unauthorized use of property offense, [19] which is a lesser-included offense of extortion. Inclusion of the "intent to deprive" element reduces unnecessary overlap between offenses, creates consistent offense definitions across extortion, theft,[20] and fraud,[21] and improves the proportionality of the offense.

Fourth, the revised extortion statute increases the number and type of grade distinctions, grading based on the value of the property extorted. The current extortion and blackmail offenses are not graded at all, and give a flat penalty that does not vary based on whether the offender obtains expensive property or merely attempts to obtain or intends to obtain an item of trivial value.[22] By contrast, the revised extortion offense has a total of five gradations based on the value of the property involved, 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.[23] The gradations in the revised offense also create consistency with the dollar-value distinctions in related theft and fraud offenses.

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or kidnapping of any person. The threat of force or violence also covers a threat of property damage or destruction.").

[14] RCC § 22A-2001(4)(H). A slight textual difference is that the current extortion offense refers to "wrongful threat of economic injury" while the definition of coercion refers to a threat of "wrongful economic injury." This is not intended to constitute a substantive change to law.

[15] RCC § 22A-2001(4)(I).

[16] RCC § 22A-2001(4)(E), (F). The current blackmail statute's reference to a threat "to impair the reputation of any person, including a deceased person" is modified slightly in the revised statute, but no change in the scope of the offense is intended. Harm to reputation is referenced with other harms in the final clause of the revised coercion definition. RCC § 22A-2001(4)(J). Impairing the reputation of a deceased person is meant to be covered by the revised coercion definition's reference to asserting a fact that would tend to subject a person to hatred, contempt, or ridicule. RCC § 22A-2001(4)(F).

[17] D.C. Code § 22-3251; D.C. Code § 22-3252.

[18] The definition of "deprive" in RCC § 22A-2101(7) generally requires using the property in a way that permanently deprives the owner of its use or causes the owner to lose a substantial portion of its benefit.

[19] RCC § 22A-2102.

[20] RCC § 22A-2101.

[21] *Id.*

[22] D.C. Code § 22-3251(b) ("Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.); D.C. Code § 22-3252(b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.")

[23] Under the revised extortion statute and both the current extortion and blackmail statutes, a wide range of behavior is punished equally. E.g., threats of both a trivial amount of property damage and threats of serious bodily harm equally satisfy the current and revised extortion statutes. However, grading based on the value of property involved may not only improve proportionality with respect to the property loss, but, indirectly, the seriousness of the

Fifth, the provision in RCC § 22A-2002, "Aggregation of Property Value To Determine Property Offense Grades," allows aggregation of value for the revised extortion offense based on a single scheme or systematic course of conduct. The current extortion and blackmail offenses are not part of the current aggregation of value provision for property offenses.[24] As noted above, the current extortion and blackmail offenses are not graded based on value of the property involved. The revised extortion statute permits aggregation for determining the appropriate grade of extortion to ensure penalties are proportional.

Sixth, the provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised extortion 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.[25] However, extortion is not among those offenses and, as described in the commentary to RCC § 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 extortion 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.

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

First, the revised extortion offense requires a culpable mental state of knowledge for subsections (a)(1)-(a)(4). The current extortion statute does not specify a culpable mental state and the blackmail statute only refers to an "intent to obtain property of another or to cause another to do or refrain from doing any act."[26] No case law exists on point, although legislative history suggests that the Council expected some mental state would apply via the use of the term "wrongful" in the current extortion statute's text.[27] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[28] Requiring a knowing culpable mental state also makes the revised extortion offense consistent with the revised fraud statute and other

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coercion. Relatively minor forms of coercion would seem inherently unlikely to be successful in causing a person to consent to giving up very high value property.

[24] 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.")

[25] 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.").

[26] D.C. Code § 22-3252(a).

[27] The Judiciary Committee's report, which accompanied the bill created the current extortion offense, states that the threat in extortion "must be 'wrongful,'" and that "the term 'wrongful' when used in criminal statutes implies an evil state of mind." Committee on the Judiciary, Report on Bill 4-164 at 69 citing *Masters v. United States*, 42 App. D.C. 350, 358 (D.C. Cir. 1914).

[28] *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)").

property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[29]

Second, the revised extortion offense uses the phrase "takes, obtains, transfers, or exercises control over."[30] The current extortion and blackmail statutes require proof of an attempt to, or intent to, "obtain" the property of another. No DCCA case law has clarified what the current term "obtains" means in either of these statutes, nor is a statutory definition provided. The current term "obtains" may be broad enough to encompass conduct that is significantly similar to the list of verbs provided in the revised extortion offense. Using the revised language of "takes, obtains, transfers, or exercises control over" improves the clarity of the statute, reduces possible unnecessary gaps, and makes the revised extortion offense consistent with the revised fraud statute and other property offenses.

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

First, the revised extortion offense uses the phrase "consent of the owner" in subsection (a)(3). The phrase "the other's consent" is used in the current extortion statute,[31] and is implicit in the blackmail statute insofar as it supposes the threat will cause a person to engage in conduct that results in the defendant obtaining property.[32] Per RCC § 22A-2001, "consent" is a defined term meaning with respect to subsection (a)(3) that the owner of the property gives words or actions that indicate a preference for particular conduct.

Second, the revised extortion offense specifies that "with intent" is the culpable mental state required as to subsection (a)(5)—"With intent to deprive that person of the property." The phrase "with intent" is used in the current blackmail statute,[33] and appears to be implicit in the current extortion statute, particularly as the statute includes "attempts to obtain the property of another".[34] Per RCC § 22A-206, "with intent" is a defined term meaning with respect to subsection (a)(5) that the defendant believes that his or her conduct is practically certain to cause the result of depriving the other of the property.

Relation to National Legal Trends. *The above-mentioned substantive changes to current District burglary law are broadly supported by national legal trends.*

As a general matter, states take two approaches to extortion. Either states incorporate coercion and extortion into the structure of their theft offenses, or they codify extortion as a standalone offense that shares few, if any, elements with their theft offenses. Those states that adopt a theft-like approach to extortion tend to have similar elements to the elements of RCC extortion, while those that adopt a *sui generis* version of extortion are less likely to have similar elements.[35]

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[29] *See, e.g.*, RCC § 22A-2201.
[30] RCC § 22A-2701(a)(1).
[31] D.C. Code § 22-3251(a).
[32] D.C. Code § 22-3252(a).
[33] *Id.* ("A person commits the offense of blackmail, if, with intent to obtain property . . . .").
[34] *Id.*
[35] The states that include extortion as a means or a type of theft include Ark. Code Ann. § 5-36-103; Conn. Gen. Stat. Ann. § 53a-119; Kan. Stat. Ann. § 21-5801; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; N.Y. Penal Law § 155.05; S.D. Codified Laws § 22-30A-4. Additionally, as with the current blackmail offense, many states codify a "coercion" offense that punishes using coercive threats to induce a person to act or refrain from acting. Such offenses seemingly overlap with extortion. The statutes of reform jurisdictions that staff examined, however, were limited to those offenses involving the taking or obtaining of property.

First, of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"), only one state punishes attempted extortion and completed extortion the same.[36]

Second, the types of coercion that are predicates for extortion vary widely. The relationship between the factors the Revised Criminal Code uses in the definition of "coercion" and the practice of reformed jurisdictions is discussed in more detail in the RCC Commentary to "coercion." However, the three new types of threats that may provide the basis for an extortion conviction (threats to report a person's immigration status, threats to commit any offense, and threats to cause material harm to a person's interests) are supported by national legal trends.[37]

Third, the inclusion of the "intent to deprive" element in extortion is also common to reform code jurisdictions. Twelve states require it,[38] while thirteen do not.[39]

Fourth, grading on the basis of value is also common to jurisdictions. Eleven states include value as a basis for grading extortion.[40] Of the states that do not, three states grade on the basis of the seriousness of the coercive threat.[41] One state grades on the basis of the victim, punishing those who extort money from the elderly more seriously.[42] Last, eight states do not grade the offense at all.[43]

Fifth, regarding the aggregation of values of property in a single scheme or systematic course of conduct, the revised extortion offense follows many jurisdictions[44] which have statutes that closely follow the Model Penal Code (MPC)[45] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently,

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[36] Wash. Rev. Code Ann. § 9A.04.110. However, one other jurisdiction punishes attempted extortion the same as completed extortion if the property taken (or the property the defendant attempted to take) was anhydrous ammonia or liquid nitrogen. Mo. Ann. Stat. § 570.030.

[37] *See* RCC § 22A-2001(4), Commentary.

[38] Ala. Code § 13A-8-13; Ark. Code Ann. § 5-36-103; Kan. Stat. Ann. § 21-5801; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; N.D. Cent. Code Ann. § 12.1-23-02; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406; Wis. Stat. Ann. § 943.30.

[39] Alaska Stat. Ann. § 11.41.520; Ariz. Rev. Stat. Ann. § 13-1804; Conn. Gen. Stat. Ann. § 53a-119; Haw. Rev. Stat. Ann. § 707-764; Kan. Stat. Ann. § 21-6501; Ky. Rev. Stat. Ann. § 514.080; N.J. Stat. Ann. § 2C:20-5; Ohio Rev. Code Ann. § 2905.11; Or. Rev. Stat. Ann. § 164.075; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Tenn. Code Ann. § 39-11-106; Wash. Rev. Code Ann. § 9A.04.110.

[40] Ark. Code Ann. § 5-36-103; Conn. Gen. Stat. Ann. § 53a-119; Kan. Stat. Ann. § 21-5801; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; N.D. Cent. Code Ann. § 12.1-23-02; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Tex. Penal Code Ann. § 1.07. Some of these states include other, additional bases for grading extortion.

[41] Ark. Code Ann. § 5-36-103; Ala. Code § 13A-8-13; Ariz. Rev. Stat. Ann. § 13-1804; Wash. Rev. Code Ann. § 9A.04.110. Note that Arkansas grades on both the value of the property taken and the type of threat issued against the victim.

[42] Del. Code Ann. tit. 11, § 846.

[43] Alaska Stat. Ann. § 11.41.520; Kan. Stat. Ann. § 21-6501; Me. Rev. Stat. tit. 17-A, § 355; N.J. Stat. Ann. § 2C:20-5; Ohio Rev. Code Ann. § 2905.11; Or. Rev. Stat. Ann. § 164.075; Tenn. Code Ann. § 39-11-106; Wis. Stat. Ann. § 943.30.

[44] 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.

[45] 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.")

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.[46] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[47]

Sixth, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised extortion 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. However, extortion is not among those offenses and, as described in the commentary to RCC § 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 extortion 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.

In addition, it is notable that states typically apply either knowledge or a default mental state to extortion. Eight states require proof of the defendant's knowledge.[48] Sixteen use the default mental state, typically recklessness.[49] Interestingly, however, of the states that rely on default rules of construction, seven then require proof that the defendant "intend" to deprive the victim of the property.[50] This suggests that the mental state in practice is actually more like knowledge than recklessness in these jurisdictions. One state makes use of the mental state of malice.[51]

[46] 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.

[47] *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).

[48] Ala. Code § 13A-8-13; Ariz. Rev. Stat. Ann. § 13-1804; Kan. Stat. Ann. § 21-6501; Ky. Rev. Stat. Ann. § 514.080; Mont. Code Ann. § 45-6-301; N.J. Stat. Ann. § 2C:20-5; N.D. Cent. Code Ann. § 12.1-23-02; 18 Pa. Stat. and Cons. Stat. Ann. § 3923.

[49] Alaska Stat. Ann. § 11.41.520; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Kan. Stat. Ann. § 21-5801; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.030; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; Ohio Rev. Code Ann. § 2905.11; Or. Rev. Stat. Ann. § 164.075; S.D. Codified Laws § 22-30A-4; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406; Wash. Rev. Code Ann. § 9A.04.110.

[50] Kan. Stat. Ann. § 21-5801; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.030; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406.

[51] Wis. Stat. Ann. § 943.30.

Chapter 26. Trespass Offenses

Section 2601. Trespass.
Section 2602. Trespass of a Motor Vehicle.
Section 2603. Criminal Obstruction of a Public Road or Walkway.
Section 2604. Unlawful Demonstration.
Section 2605. Criminal Obstruction of a Bridge to Virginia.

RCC § 22A-2601. Trespass

(a) *Offense*. A person commits the offense of trespass when that person:
  (1) Knowingly enters or remains in;
  (2) A dwelling, building, land, or watercraft, or part thereof;
  (3) Without the effective consent of the occupant or, if there is no occupant, the owner.

(b) *Permissive Inference.* A jury may infer that a person lacks effective consent of the occupant or owner if the person enters or remains in a dwelling, building, land, or watercraft that:
  (1) Is vacant and secured in a manner that reasonably conveys that it is not to be entered; or
  (2) Displays signage that is reasonably visible from the person's point of entry, and that sign says "no trespassing" or reasonably indicates that the person may not enter.

(c) *Definitions.* The term "knowingly" has the meaning specified in § 22A-206, and the terms "dwelling," "building," "effective consent," "occupant," and "owner" have the meanings specified in § 22A-2001.

(d) *Gradations and Penalties.*
  (1) *First Degree Trespass.* A person is guilty of first degree trespass if that person commits trespass knowing the location is a dwelling. First degree trespass is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Trespass.* A person is guilty of second degree trespass if the person commits trespass. Second degree trespass is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Jury Trial*. If the District of Columbia or federal government is alleged to be the occupant of the building or land entered upon, then the defendant may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

Commentary.

Explanatory Note. *This section establishes the trespass offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly entering or remaining in certain locations without effective consent of the occupant*[52] *(or owner, if there is no occupant). The two penalty gradations vary based on whether the location is a dwelling or other*

[52] "Occupant" is a defined term in RCC § 22A-2001 that refers to a person holding a possessory interest in property. The term does not refer to any person physically present at the location. Physical presence at the location is irrelevant to whether a location has an occupant as defined.

location. The revised trespass offense is closely related to the trespass to motor vehicle offense, except that the revised trespass offense concerns real property and watercraft.[53] *The revised trespass offense is also closely related to burglary, except that trespass does not require that the defendant intend to commit a crime inside the premises.*[54] *The revised trespass offense replaces the unlawful entry on property*[55] *statute in the current D.C. Code.*

Subsection (a)(1) requires that the defendant "enters or remains in" a given place. The "enters" element requires that a person bodily[56] enter a given physical space. The statute does not require complete or full entry of the body, and evidence of partial entry of the body is sufficient proof for a completed trespass. The "remaining" element creates liability for a person who remains on property with knowledge that he or she has no permission to be there. A person who has been asked to leave the premises must have a reasonable opportunity to do so before he or she can be found guilty of a remaining-type trespass. Subsection (a)(1) also specifies the culpable mental state for subsection (a) to be knowledge, a term defined at RCC § 22A-206 and here requiring that the defendant must be aware to a practical certainty or consciously desire that his or her conduct "enters or remains in."

Subsection (a)(2) describes the places where a trespass can occur. These include a dwelling, the basis for first-degree trespass (see subsection (d)(1)), as well as buildings, land, watercraft, and vehicles which form the basis for second-degree trespass (see subsection (d)(2)). As noted within subsection (c), the terms "dwelling" and "building" each have definitions provided in RCC § 22A-2001. 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 defendant to be aware to a practical certainty or consciously desire that the location is a dwelling, building, land, or watercraft.

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 defendant is not privileged to interfere with. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(3), here requiring the defendant to be aware to a practical certainty or consciously desire that he or she lacks effective consent of the owner.

Subsection (b) specifies a permissive inference that allows a jury to infer that the defendant does not have effective consent of the occupant (or owner, if there is no occupant) when either of two facts are proved beyond a reasonable doubt. The first is that the premises in question are vacant and secured in a manner that reasonably conveys that the public is not to enter.[57] The second fact is the presence of a sign that is reasonably visible from the defendant's point of entry, and that says "No Trespassing" or otherwise reasonably communicates that the

[53] RCC § 22A-2602.
[54] RCC § 22A-2701.
[55] D.C. Code § 22-3302.
[56] Entry of an instrument, alone, does not constitute trespass under the statute.
[57] *E.g.*, boarding up the property or locking a gate or entryway to the property may be means of reasonably conveying that the public is not free to enter.

defendant may not enter. Such a property need not be vacant for the permissive inference to apply.

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

Subsection (d) grades the offense according to whether the location involved is a dwelling (first degree) or other area specified in the offense definition (second degree). First-degree trespass (subsection (d)(1)) includes dwellings only. A knowing mental state applies to dwelling; therefore the defendant must be practically certain or desire that he or she is entering a building or dwelling. Second-degree trespass (subsection (d)(2)) includes dwellings, building, land, or watercraft. A knowing mental state applies to dwelling; therefore the defendant must be practically certain or desire that he or she is entering a building or dwelling.

Subsection (e) is a special procedural provision that permits a defendant to request a jury trial if the occupant in a case is the United States or the District of Columbia.

Relation to Current District Law. *The revised trespass statute changes existing District trespass law in four ways that specify the culpable mental states applicable to an offense element and improve the proportionality of penalties.*

First, the revised trespass statute provides that knowledge is the mental state that applies to the final element in subsection (a)(3), the absence of effective consent. No mental state is provided in the statute currently defining trespass with respect to this or any elements, and applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[58] However, the DCCA has held that the government must prove that the defendant "knew or *should have known* that his entry was unwanted."[59] Further, the court has said that the fact that the owner did not wish for the defendant to be on the owner's property need not be "subjectively understood by the defendant," and accordingly, the mental state applicable to the element is not one of "purpose or actual knowledge."[60] On the other hand, the DCCA has also recognized the existence of a "bona fide belief" defense whereby the defendant can assert that he or she "lacks the requisite criminal intent for unlawful entry."[61] While the contours of the "bona fide belief" defense are unclear, the existence of the defense suggests that under current District law a culpable mental state akin to negligence in the RCC exists as to the lack of effective consent. [62]

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[58] *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)").

[59] *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013). The DCCA has long held that general intent is the mental state applicable to unlawful entry's "entry" requirement. *Id*. at 305. But the DCCA has also held that "knew or should have known" applies to the element that entry be "against the will" of the lawful occupant. *Id*. "General intent" is not used in or defined in the statute for trespass, but the DCCA has said it is frequently defined as "the intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984)."

[60] *Id.*

[61] *Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993).

[62] The defense appears to require a "reasonable belief" that the circumstance of non-consent did not exist (or phrased in the positive, a "reasonable belief" that the defendant did have consent to enter) based on objective facts. *See Gaetano v. United States*, 406 A.2d 1291, 1294 (D.C. 1979) ("The clear rule of law gleaned from these cases, as well as others . . . is that a reasonable belief in an individual's right to remain on property not owned or possessed by that individual must be based in the pure indicia of innocence. There must be some evidence that, for example, the individual had no reason to know that he was trespassing on the rights of others. Perhaps the individual could reasonably believe that he had title or a possessory interest in the land, or that the land was publicly owned. Perhaps he could believe that he was invited onto the land.").

Consequently, by requiring knowledge as to subsection (a)(3), the revised statute not only elevates the culpable mental state requirement for that element, but changes the bona fide belief defense.[63]

Second, the revised trespass statute no longer punishes attempts to commit the offense the same as the completed offense. The text of the current unlawful entry statute states that it is an offense to "enter, or attempt to enter" a location whereas the revised trespass does not address attempts at all. There is no clear rationale for such a special attempt provision for trespass as compared to other offenses. Under the revised statute, the General Part's attempt provisions will establish liability for attempted trespass consistent with other offenses.

Third, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised trespass offense and other offenses in Chapters 26 and 27 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.[64] However, trespass is not among those offenses and, as described in the commentary to RCC § 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 trespass 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.

Fourth, under the revised trespass statute the general culpability principles for self-induced intoxication in RCC § 22A-209 allow the defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current statute is a general intent crime,[65] which would preclude the defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary intent for the crime.[66] At the same time, the DCCA has also interpreted the current statute to incorporate a negligence-like culpable mental state, which is not a form of culpability that is susceptible to being negated by self-induced intoxication.[67] As a result, a person charged under the current statute would have no basis for even raising—let alone presenting evidence in support of—a claim that he or she, due to his or her self-induced intoxicated state, lacked the necessary intent. By contrast, per the revised trespass offense, the defendant would both have a basis for, and be allowed to raise, a

[63] Under the revised statute, it continues to be true that the defendant's reasonable belief that he or she lacked the effective consent of the occupant (or owner) would exculpate the defendant. However, the bona fide belief defense gives way to a more expansive defense under the RCC. Per the revised offense the government must prove the defendant knew he or she lacked the effective consent of the occupant (or owner). Consequently, any mistake by the defendant about the fact that he or she had effective consent, whether the mistake is reasonable or not, would be an absent-element defense to the revised trespass statute.

[64] 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.").

[65] *See Ortberg*, 81 A.3d at 305.

[66] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^], then you must find him/her not guilty of the offense of [^]. On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^].")

[67] *See Ortberg*, 81 A.3d at 305.

claim of this nature since the revised trespass offense is subject to a more demanding culpable mental state of knowledge.[68] Likewise, where appropriate, under the revised trespass statute the defendant would be entitled to a jury instruction clarifying that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in trespass. This change improves the clarity, consistency, and proportionality of the offense.

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

First, the revised statute requires a culpable mental state of knowledge as to subsection (a)(1) ("enters or remains in"), and subsection (a)(2) (regarding the nature of the location). No mental state is provided in the current statute regarding these elements, and there is no case law on point.[69] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[70]

Second, while the current trespass statute refers to its evidentiary inference as providing "prima facie evidence" for the crime, the revised statute refers more simply to a permissive inference ("the jury may infer"). The phrase "prima facie" has no definition in the current statute, and there is no case law on point. However, similar language elsewhere in the D.C. Code has been interpreted in case law.[71] As the phrase may be unnecessarily confusing to lawyers and lay people alike, the revised offense uses more straightforward language to convey that the inference is optional. The revised statute's approach appears to be in line with current District practice.[72]

Third, the permissive inference in subsection (b) of the revised statute adds an explicit reasonableness requirement that may be a change in law. There is no reasonableness requirement specified in the statute and case law has not addressed the point.[73] The current trespass statute's evidentiary inference simply states that it applies when a property is: "vacant and boarded up"; "otherwise secured in a manner that conveys it is vacant and not to be entered"; or "displays a no trespassing sign". The revised permissive inference, by contrast, requires the

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[68] This result is a product of the logical relevance principle set forth in RCC § 22A-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22A-209(b).

[69] DCCA case law states that the offense is one of "general intent" and that "our cases make clear that the physical act of entry must be purposeful and voluntary – not accidental or mistaken." *Ortberg*, 81 A.3d at 307-08. Under the RCC all physical acts must be voluntary per RCC § 22A-203, but neither *Ortberg* nor any other DCCA cases specifically address the culpable mental state applicable to entry or remaining, or the circumstance of the premises' nature.

[70] *See Elonis*, 135 S. Ct. at 2009 ("[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)").

[71] The DCCA has not examined the language with respect to the current trespass offense in particular; however, the phrase "prima facie" in the context of the bail reform act (D.C. Code § 22-1327) has been construed as "a permissive inference, not a presumption." *Trice v. United States*, 525 A.2d 176, 182 (D.C. 1987); see also *Raymond v. United States*, 396 A.2d 975, 976-77 ("although the wording . . . may be read to imply that the inference of willfulness is mandatory . . . the trier of fact has merely been permitted and not required to infer willfulness. We conclude that this instruction, incorporating a permissive inference, properly construes the statute.").

[72] The Redbook Jury Instructions describe the *prima facie* provision by telling jurors "[y]ou may, but you are not required to, presume that [name of defendant] entered the property against the will" of the occupant if they find the relevant factors. D.C. Crim. Jur. Instr. § 5.401.

[73] The provision is relatively new, having been added only in 2007. The Omnibus Public Safety Amendment Act of 2006, D.C. Law No. 16-306.

manner in which the premises are secured to "reasonably convey" that it is not to be entered, or there be signage that is "reasonably visible" and "reasonably indicates" that a person shall not enter. The intent of such reasonableness requirements is to provide courts with a degree of flexibility in assessing whether the manner of securing or signage is sufficient to assume that the defendant was on notice.[74] The revised statute's reasonableness requirements are an objective matter,[75] to be determined from the perspective of an ordinary person entering or remaining in the location. Of course, even if the reasonableness requirements are not met, the government may prove the defendant's guilt without the benefit of the permissive inference.

Fourth, the revised trespass statute includes "watercraft" in the trespass definition. The current statute only specifically references locations that relate to real property: the defendant must enter a "dwelling, building, or other property, or part of such dwelling, building, or other property." While watercraft that functions as a "dwelling" would seem to be within the ambit of the current statute, it is unclear if non-dwelling watercraft would constitute "other property" under the current statute. There is no case law on point. Watercraft that are motorized are subject to the revised trespass of a motor vehicle offense, RCC § 22A-2602, but not non-motorized watercraft. Inclusion of "watercraft" in subsection (a)(2) clarifies the offense and potentially removes a gap in liability.

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

First, the revised trespass statute merges the nearly identical subsections (a)(1) and (b) in the current District statute[76] into one revised subsection (a) and adds subsection (e) to clarify when the defendant may request a jury trial for trespass.[77] This organizational change maintains the intent to provide greater public scrutiny where First Amendment concerns may be at issue, which is behind the current law's bifurcated form of trespass.[78]

Second, the revised offense replaces the reference to "other property" in the current unlawful entry statute with a specific list of locations where trespass may occur. The offense currently protects "any private dwelling, building, or other property," as well as, "any public building, or other property," and parts thereof. The DCCA has not provided clear guidance on

[74] Depending on the particular facts of the case, the reasonableness requirement may narrow the applicability of the permissive inference as compared to current law. *E.g.*, a single "No trespassing" sign that is obscured or at one entrance of a building with multiple entrances accessible to the public may not "reasonably" indicate that the building is not to be entered, but arguably may provide adequate notice under the current statute. On the other hand, the reasonableness requirement in the revised offense also may expand the applicability of the permissive inference, as compared to the current statute. E.g., Signs that say, "Employees Only," "Keep Out," or "Authorized Personnel Only" would all be included within the ambit of the RCC permissive inference, while they might not be included within the current statute.

[75] The question is not whether the defendant acted reasonably in the circumstances such as they were known to him or her.

[76] Compare D.C. Code § 22-3302(a)(1) with D.C. Code § 22-3302(b). Subsection (a)(1) of the current statute concerns trespasses to private dwellings, carries a 180 day maximum penalty, and is not jury-demandable, whereas subsection (b) concerns trespasses to public places, carries a six month maximum penalty, and is jury-demandable.

[77] D.C. Code § 16-705.

[78] Committee on the Judiciary, Report B18-151, 198, (June 26, 2009) (hereinafter, "Committee 2009 Report"), *available at* http://lims.dccouncil.us/Download/2056/B18-0151-COMMITTEEREPORT.pdf (last visited Oct. 30, 2015) (statement of Patricia A. Riley, Special Counsel to the United States Attorney for the District of Columbia: "[Trespass], like other six-month offenses, was apparently overlooked when one-year misdemeanors were reduced to 180 days in the Misdemeanor Streamlining Act of 1994. It is time to fix it. Concern has been expressed about eliminating a jury trial particularly in protester cases . . . Such cases would continue to be tried to a jury under the proposed amendment.").

how broadly "or other property" should be read.[79] Nevertheless, the fact that the issue has not been litigated at least suggests that the statute protects land, in conformity with the traditional purpose of trespass, which is to protect landowners' right to exclude others from the landowners' property.[80] Watercraft are included in the closely-related current burglary statute,[81] and, as noted above, may also constitute "other property" per the current unlawful entry statute.

Third, the revised statute uses the phrase "without the effective consent" instead of "against the will" in the current unlawful entry statute.[82] The phrase "against the will" is undefined in the current statute, and the DCCA has construed the phrase differently in private versus public or semi-public buildings.[83] However, the DCCA has been clear that there is no positive requirement of a warning in order to convict an alleged trespasser.[84] Perpetuating a private to semi-public distinction may give rise to litigation and the revised offense more directly addresses the underlying question of whether the defendant was aware that his or her entry (or remaining) was without consent by requiring the culpable mental state of knowledge (see above Commentary). The use of "without effective consent" appears to be consistent with existing case law.[85]

Fourth, the revised offense refers to "effective consent of the occupant or, if there is no occupant, the owner," replacing the current statute's reference to "lawful occupant or of the person lawfully in charge thereof."[86] This change in wording clarifies that when premises do not have an occupant (defined as a person holding a person holding a possessory interest in the property)[87] the effective consent of owner (defined as a person holding a person holding an

[79] In none of the DCCA's cases has the scope of "or other property" explicitly been considered, but cases that involve successful trespass convictions for intrusions into places other than buildings or dwellings include a Home Depot parking lot (*Gray v. United States*, 100 A.3d 129 (D.C. 2014)), the steps of the United States Capitol (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the area immediately surrounding the Farragut West Metro station (*United States v. Powell*, 536 A.2d 1086 (D.C. 1989)), and the White House grounds (*Leiss v. United States*, 364 A.2d 803 (D.C. 1976))

[80] *See* WAYNE R. LAFAVE, CRIMINAL LAW 1081 (5th ed. 2010).

[81] D.C. Code § 22-801.

[82] D.C. Code § 22-3302.

[83] *Compare Bowman v. United States*, 212 A.2d 610, 611 (D.C. 1965) ("the entry must be against the expressed will, that is, after a warning to keep off") *with McGloin v. United States*, 232 A.2d 90, 90 (D.C. 1967) ("Bowman must be read in the light of the facts of that case. It concerned an unlawful entry into a restricted area of the Union Station, a semi-public building. In such a building the public generally is permitted to enter and if there are portions which are not obviously private or restricted, it is only reasonable that warning of some kind be given the public to stay out. Even in a semi-public or public building there are portions obviously not open to the public; and surely no one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry.").

[84] In *Ortberg*, the defendant argued that his conviction should be overturned because the premises "[were] not clearly closed off to members of the public who might be in the lobby of the W Hotel." The DCCA took this to mean, however, that the defendant was arguing that "the government failed either to prove that he had the requisite mental state to commit unlawful entry or to disprove his bona fide belief in the lawfulness of his actions."

[85] The revised statute's explicit prohibition on consent obtained by coercion or deception (per the definition of "effective consent" in RCC § 22A-2001) seems to more precisely indicate what is meant by "against the will" in the current statute.

[86] D.C. Code § 22-3302.

[87] See RCC § 22A-2001. The DCCA has cited a nearly identical definition in discussing the civil tort of trespass. *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014) ("A 'possessory interest' is defined as '[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner.' Black's Law Dictionary 1203 (8th ed.2004); see also *Fortune v. United States*, 570 A.2d 809, 811 (D.C.1990).").

interest in the property)[88] controls. Moreover, by using the RCC definition of "occupant," the revised trespass statute resolves an outstanding issue of District law as to whether a lawful occupant or owner can commit trespass of premises actually possessed by another without right.[89] The revised trespass statute adopts a "legal occupancy" model of trespass, clarifying, for example, that a person under a relevant court order[90] is not an "occupant" for purposes of the trespass statute. Identical language is used in the revised burglary statute because, although the current burglary statute is silent as to whose consent is controlling, the DCCA has held that the focus of the common law crime is first on occupancy and use, not legal title.[91]

Fifth, the revised statute eliminates as superfluous the current statute's reference to the person "lawfully in charge of the premises"[92] and in the subsection for public property, entries against the will of "the person lawfully in charge thereof or his or her agent."[93] Through multiple cases the DCCA has held that trespass can be proved upon a showing that authorized employees or agents demanded the defendant leave.[94] In the revised trespass offense, the definition of "consent" includes consent given by an agent on behalf of the agent's principal,

[88] See RCC § 22A-2001.

[89] *Spriggs v. United States*, 52 A.3d 878 (D.C. 2012) (The defendant argued that because he in fact used and occupied an apartment, he was an occupant and not liable for aiding and abetting burglary of the apartment where he was staying. The government argued that the jury instruction was correct in stating that if the defendant did not have "a right to use or occupancy," the apartment would be a "dwelling of another" and he could commit burglary of the apartment. *Id.* at 882. The DCCA recognized the distinction between a "legal right to occupancy" model of burglary and a "factual occupancy" model, but declined to resolve the issue. *Id*. The DCCA specifically noted the complicated nature of determining when a person holds a lawful right of occupancy: "The law relating to occupancy and the procedures required to resolve disputes is complicated with respect to trespassers, guests, roomers, lodgers, licensees, and true tenants, including holdover tenants. As the police recognized, appellant's rights, or lack thereof, were not totally clear-cut, and Mr. Morgan's testimony itself lacked some clarity. For this reason, we have tended to focus on the issue of actual "'occupancy' and 'use' " as a test for burglary as in *Bodrick v. United States*, 892 A.2d 1116, 1120–21 (D.C.2006), a case relied on by appellant for his position." *Id.* at 886.

[90] *Bodrick v. United States*, 892 A.2d 1116, 1121 (D.C. 2006) ("Similarly, here, Mr. Bodrick was under a court order to "stay away" from Ms. Bodrick's home and place of employment and not to come within 100 feet of her. Thus, not only did Ms. Bodrick have occupancy and exclusive use of the apartment in the 600 block of 46th Street, S.E., but Mr. Bodrick's interest as leaseholder was subordinate to her occupancy and use."); see also D.C. Crim. Jur. Inst. § 5.101 ("[If you find that on [date of the offense], [name of defendant] was under a court order directing him/her to stay away from [name of complainant], then you may decide that the [house] [apartment] in which [name of complainant] resided was the dwelling of another.]").

[91] *Bodrick.*, 892 A.2d at 1120 ("[W]e hold that, despite Mr. Bodrick's status as "legal lessee," the government needed to establish only that Ms. Bodrick occupied and used the residential dwelling in the 600 block of 46th Street, S.E. This reading of the statute not only is consistent with Douglas and Cady, supra, but it is also in harmony with other jurisdictions' interpretation of their first-degree burglary statutes. The Supreme Court of North Carolina interpreted its burglary statute, as it related to "a dwelling house or sleeping apartment of another" to mean occupancy or possession, not ownership.").

[92] D.C. Code § 22-3302.

[93] D.C. Code § 22-3302(b).

[94] *Smith v. United States*, 445 A.2d 961, 964 (D.C. 1982) (a Secret Service officer can demand that protestors leave the grounds of the White House, even though the officer was not the highest ranking officer at the White House); see also *Whittlesey v. United States*, 221 A.2d 86 (D.C. 1966) (President need not personally order protestors to leave the White House grounds); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("The evidence in this case was sufficient to permit a finding that Joan Drummond was in charge of the office and that she exercised her authority through her agent, Carol Kiser."); *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963) (an embassy minister asked intruder to leave); and *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C. 1981) (a receptionist at an abortion clinic asked person to leave).

where the agent is authorized to give such consent.[95] This includes government agents and officers, and employees and agents of private persons.

Sixth, the revised statute replaces the phrase "refuses to quit" with the more modern "remains in." This not intended to be a substantive change, merely a stylistic one supported by modern usage.[96]

Seventh, the revised statute eliminates the lengthy provision in subsection (a)(2) of the current unlawful entry statute to a list of premises that are considered to constitute a "private dwelling."[97] The intent of the provision appears to be to ensure that private houses that are publicly owned or financed still count as "private dwellings" under the statute, subject to a bench trial only. Via subsection (e), the revised offense continues to provide a jury trial only for those cases where the complainant is the government, and it makes sure that public housing is protected as are private dwellings. Because the focus of revised trespass offense is first on occupancy, the fact that the government is the landlord and the occupant is a person receiving a government benefit is irrelevant to whether the defendant can demand a jury trial under subsection (e). Consequently, a special provision explicitly addressing the issue of public housing is unnecessary.

Eighth, while the revised statute does not specifically address partial entries of the body into a location, such conduct is intended to be included in "enters" and "remains in." Consistent with the unlawful entry of a motor vehicle offense, evidence of a partial entry of the body may satisfy subsection (a)(1).[98]

Last, it should be noted that the revised statute is not intended to change existing District case law regarding the requirement of an "additional, specific factor" establishing the lack of a legal right to engage in First Amendment activity when a trespass on public property is alleged.[99] The current District statute is silent as to any additional requirements for proving trespass on public property. However, based on the current statute's requirement that an unlawful entry be

[95] RCC § 22A-2001(6).

[96] The DCCA has referenced "remaining" in construing the elements of the offense. *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976) (the offense prohibits "the act of entering or *remaining* upon any property when such conduct is both without legal authority and against the expressed will of the person lawfully in charge of the premises.") (emphasis added).

[97] D.C. Code § 22-3302(a)(2) ("For the purposes of this subsection, the term "private dwelling" includes a privately owned house, apartment, condominium, or any building used as living quarters, or cooperative or public housing, as defined in section 3(1) of the United States Housing Act of 1937, approved August 22, 1974 (88 Stat. 654; 42 U.S.C. § 1437a(b)), the development or administration of which is assisted by the Department of Housing and Urban Development, or housing that is owned, operated, or financially assisted by the District of Columbia Housing Authority.").

[98] For example, reaching through a doorway or window may constitute a trespass.

[99] Accepted "additional specific factors" include: a published WMATA free speech regulation (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982)), the issuance of a Capitol police order (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the existence of a chain that separated a tourist line from the White House lawn (*Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980)), a "pair of gates which WMATA personnel closed every night at the conclusion of the day's business," (*United States v. Powell*, 563 A.2d 1086 (D.C. 1989)), and a regulation prohibiting sitting or lying down combined with a police officer's warning that the defendant was in violation of the regulation (*Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993)). However, additional specific factors that the DCCA has rejected includes: closing early the public buildings early in response to the defendant-protestors themselves (*Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988)), and an invalid arrest under a different statute (*Hasty v. United States*, 669 A.2d 127, 135 (D.C. 1995)).

"without lawful authority,"[100] the DCCA has long held that "individual citizens may not be ejected from public property on the order of the person lawfully in charge absent some additional, specific factor establishing their lack of a legal right to be there."[101] The breadth and specificity of circumstances the courts have accepted as proving the "additional, specific factor" make codification of the requirement inadvisable.[102] Consequently, the revised trespass is intended to preserve, but does not codify, the "additional, specific factor" requirement in current District case law. The government maintains its burden of showing the additional specific factor in appropriate cases.

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

First, nearly all of the twenty-nines states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions")[103] require that the defendant have at least knowledge of the owner's wishes;[104] only four states permit conviction based on recklessness.[105] And not a single reformed jurisdiction permits conviction based on the defendant's negligence or based on strict liability. One commentator flatly states that it is "exceedingly rare" for a state to adopt "an express utilization of either of the lesser mental states . . . ."[106] Both the Model Penal Code and the Brown Commission recommended a mental state of recklessness. Also, as one commentator has noted, not requiring a culpable mental state would make the crime of trespass equivalent to the tort of trespass.[107] This fact has significance because it is generally known that "as to civil trespass . . . the interest of the landowner is protected at the expense of those who would make mistakes," while "more is required in the criminal arena."[108]

Second, no reformed code jurisdiction treats attempted trespass and completed trespass the same.

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[100] D.C. Code § 22-3302; *see also Leiss*, 364 A.2d at 806 ("It is, by its terms, aimed at certain limited conduct which is constitutionally subject to restraint. It prohibits the act of entering or remaining upon any property when such conduct is both without legal authority and against the expressed will of the person lawfully in charge of the premises. Thus, to be subject to the statute's sanctions, one must be without legal right to trespass upon the property in question.").

[101] *Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980).

[102] Codifying the "additional specific factor" may either result in language too sweeping, giving rise to questions of unconstitutional vagueness, or too narrow. Alternatively, codifying a rule stating that trespass prosecutions must not be contrary to Constitutional rights of defendants merely restates an obvious principle of American law.

[103] 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.

[104] Ala. Code § 13A-7-2; Ark. Code Ann. § 5-39-203; Ariz. Rev. Stat. Ann. § 13-1504; Colo. Rev. Stat. Ann. § 18-4-502; Conn. Gen. Stat. Ann. § 53a-107; Del. Code Ann. tit. 11, § 823; Haw. Rev. Stat. § 708-813; 720 Ill. Comp. Stat. Ann. 5/21-3; Ind. Code Ann. § 35-43-2-2; Kan. Stat. Ann. § 21-5808; Ky. Rev. Stat. Ann. § 511.060; Me. Rev. Stat. tit. 17-A, § 402; Minn. Stat. Ann. § 609.605; Mo. Ann. Stat. § 569.140; Mont. Code Ann. § 45-6-203; N.H. Rev. Stat. Ann. § 635:2; N.J. Stat. Ann. § 2C:18-3; N.Y. Penal Law § 140.05; N.D. Cent. Code Ann. § 12.1-22-03; Ohio Rev. Code Ann. § 2911.21; Or. Rev. Stat. Ann. § 164.255; 18 Pa. Cons. Stat. Ann. § 3503; S.D. Codified Laws § 22-35-5; Utah Code Ann. § 76-6-206; Wash. Rev. Code Ann. § 9A.52.070.

[105] Alaska Stat. Ann. § 11.46.320; Tenn. Code Ann. § 39-14-405; Tex. Penal Code Ann. § 30.05; Wis. Stat. Ann. § 943.13.

[106] LAFAVE, CRIMINAL LAW 1087 (5th ed. 2010).

[107] *See* LAFAVE, CRIMINAL LAW 1081 (5th ed. 2010).

[108] *Id*.

Third, Third, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised trespass offense and other offenses in Chapters 26 and 27 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. However, the current unlawful entry 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 trespass 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.

Fourth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[109] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[110] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[111]

Fifth, nearly all reformed code jurisdictions use the phrase "enter or remains in."[112] "Enter or remain" is the language used by the Model Penal Code,[113] and was also the language

[109] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[110] LAFAVE, *supra* note__, AT 2 SUBST. CRIM. L. § 9.5.

[111] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[112] Ala. Code § 13A-7-2; Alaska Stat. Ann. § 11.46.320; Ariz. Rev. Stat. Ann. § 13-1504; Ark. Code Ann. § 5-39-203; Colo. Rev. Stat. Ann. § 18-4-502; Conn. Gen. Stat. Ann. § 53a-107; Del. Code Ann. tit. 11, § 823; Haw. Rev. Stat. Ann. § 708-813; 720 Ill. Comp. Stat. Ann. 5/21-3; Kan. Stat. Ann. § 21-5808; Ky. Rev. Stat. Ann. § 511.060; Me. Rev. Stat. tit. 17-A, § 402; Mo. Ann. Stat. § 569.140; Mont. Code Ann. § 45-6-203; N.H. Rev. Stat. Ann. § 635:2; N.J. Stat. Ann. § 2C:18-3; N.Y. Penal Law § 140.17; N.D. Cent. Code Ann. § 12.1-22-03; Ohio Rev. Code Ann. § 2911.21; Or. Rev. Stat. Ann. § 164.255; 18 Pa. Stat. and Cons. Stat. Ann. § 3503; Tenn. Code Ann. § 39-14-405; Tex. Penal Code Ann. § 30.05; S.D. Codified Laws § 22-35-5; Utah Code Ann. § 76-6-206; Wash. Rev. Code Ann. § 9A.52.070; Wis. Stat. Ann. § 943.14. One state uses only "enters." Minn. Stat. Ann. § 609.605.

[113] Model Penal Code § 221.2 ("A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof.").

recommended by the Brown Commission in its review of the federal criminal code.[114] Only Indiana varies, and its statute uses the phrase, "enters or refuses to leave," which is substantially similar to "enter or remains."[115]

Sixth, the revised trespass is largely in line with respect to the types of property that are protected, and the words used to describe them. Although there is no true uniformity in the reformed code jurisdictions, "real property" is used by a plurality of the states. This is roughly equivalent to "land." Five states use the term "real property" in their trespass statutes; none of these states provide a definition of the term in their definition sections.[116] The word "premises" is used by eight states;[117] however, six of these states simply define "premises" to include "real property," which brings the total of "real property" states to eleven.[118] Four states simply use the word "land,"[119] and four others use the very broad term, "any place."[120] "Dwelling" is often defined as "a building which is used or usually used by a person for lodging."[121] The word "lodging" is frequently used across all states, though some states also use a mixture of terms including "residence,"[122] and reference to "overnight accommodation."[123]

Seventh, the revised trespass offense uses the phrase "effective consent," which is not commonly found in other reformed code jurisdictions. "[W]ithout license or privilege to do so" is used by eight of the reformed code jurisdictions,[124] as well as the language used by the Model Penal Code.[125] Additionally, thirteen states use the phrase "unlawfully" in the criminal trespass statute itself, which is then separately defined as entering or remaining without "license[], invit[ation] or privilege[] to do so."[126] Thus, the total number of reformed jurisdictions using

[114] Proposed Federal Criminal Code § 1712 ("A person is guilty [of an offense] if, knowing that he is not licensed or privileged to do so, he (a) enters or remains in any building, occupied structure or storage structure, or separately secured or occupied portion thereof . . . .").

[115] Ind. Code Ann. § 35-43-2-2 (West).

[116] Ariz. Rev. Stat. Ann. § 13-1502; Del. Code Ann. tit. 11, § 821; Ind. Code Ann. § 35-43-2-2; Mo. Ann. Stat. § 569.140; N.Y. Penal Law § 140.10.

[117] Ala. Code § 13A-7-4; Ark. Code Ann. § 5-39-203; Colo. Rev. Stat. Ann. § 18-4-504; Conn. Gen. Stat. Ann. § 53a-109; Haw. Rev. Stat. § 708-815; Ky. Rev. Stat. Ann. § 511.080; Mont. Code Ann. § 45-6-203; Or. Rev. Stat. Ann. § 164.245.

[118] Ala. Code § 13A-7-1; Ark. Code Ann. § 5-39-101; Colo. Rev. Stat. Ann. § 18-4-504.5; Haw. Rev. Stat. § 708-800; Ky. Rev. Stat. Ann. § 511.010; Or. Rev. Stat. Ann. § 164.205.

[119] Alaska Stat. Ann. § 11.46.320; 720 Ill. Comp. Stat. Ann. 5/21-3; Ohio Rev. Code Ann. § 2911.21.

[120] Me. Rev. Stat. tit. 17-A, § 402; N.H. Rev. Stat. Ann. § 635:2; N.D. Cent. Code Ann. § 12.1-22-03; 18 Pa. Cons. Stat. Ann. § 3503.

[121] Haw. Rev. Stat. § 708-813; see also Ala. Code § 13A-7-1 ("Dwelling. A building which is used or normally used by a person for sleeping, living or lodging therein."); Del. Code Ann. tit. 11, § 829 (""Dwelling" means a building which is usually occupied by a person lodging therein at night."); Ky. Rev. Stat. Ann. § 511.010; N.Y. Penal Law § 140.00; N.D. Cent. Code Ann. § 12.1-05-12; Or. Rev. Stat. Ann. § 164.205; Utah Code Ann. § 76-6-201.

[122] Ariz. Rev. Stat. Ann. § 13-1501.

[123] Ark. Code Ann. § 5-39-101(4)(A); N.J. Stat. Ann. § 2C:18-1; 18 Pa. Cons. Stat. Ann. § 3501; Tenn. Code Ann. § 39-14-401; Tex. Penal Code Ann. § 30.01.

[124] Conn. Gen. Stat. Ann. § 53a-107; Kan. Stat. Ann. § 21-5808; Me. Rev. Stat. tit. 17-A, § 402; Mont. Code Ann. § 45-6-203 (another statute defines "entering or remaining unlawfully" as "not licensed, invited, or otherwise privileged to do so"); N.H. Rev. Stat. Ann. § 635:2; N.J. Stat. Ann. § 2C:18-3; N.D. Cent. Code Ann. § 12.1-22-03 ; 18 Pa. Stat. and Cons. Stat. Ann. § 3503.

[125] Model Penal Code § 221.2.

[126] Ala. Code § 13A-7-1. See also, Alaska Stat. Ann. § 11.46.350 ("enter or remain in or upon premises or in a propelled vehicle when the premises or propelled vehicle, at the time of the entry or remaining, is not open to the public and when the defendant is not otherwise privileged to do so"); Ariz. Rev. Stat. Ann. § 13-1501 ("an act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged"); Ark. Code Ann. § 5-39-101 ("enter or remain in or upon premises when not

some variant of "license or privilege" is twenty-four states.[127] However, four states do use the term "consent" or the phrase "effective consent."[128]

The precise meaning of "license" and "privilege" is not clear from other jurisdictions' statutory text. Some courts in states adopting the language have drawn a distinction between the two. For example, the Supreme Court of Vermont observed that "[w]hile the decisions are not entirely consistent, they generally support the interpretation that 'licensed' refers to a consensual

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licensed or privileged to enter or remain in or upon the premises"); Colo. Rev. Stat. Ann. § 18-4-201 ("A person 'enters unlawfully' or 'remains unlawfully' in or upon premises when the person is not licensed, invited, or otherwise privileged to do so."); Conn. Gen. Stat. Ann. § 53a-107 ("A person is guilty of criminal trespass in the first degree when: (1) Knowing that such person is not licensed or privileged to do so . . . ."); Del. Code Ann. tit. 11, § 829 ("A person 'enters or remains unlawfully' in or upon premises when the person is not licensed or privileged to do so."); Haw. Rev. Stat. Ann. § 708-800 ('Enter or remain unlawfully' means to enter or remain in or upon premises when the person is not licensed, invited, or otherwise privileged to do so."); Kan. Stat. Ann. § 21-5808 ("Criminal trespass is entering or remaining upon or in any . . .[l]and . . . by a person who knows such person is not authorized or privileged to do so,"); Ky. Rev. Stat. Ann. § 511.090 ("A person 'enters or remains unlawfully' in or upon premises when he is not privileged or licensed to do so."); Me. Rev. Stat. tit. 17-A, § 402 ("A person is guilty of criminal trespass if, knowing that that person is not licensed or privileged to do so, that person . . . enters any dwelling place."); Mo. Ann. Stat. § 569.010 ("a person 'enters unlawfully or remains unlawfully' in or upon premises when he is not licensed or privileged to do so."); Mont. Code Ann. § 45-6-201 ("A person enters or remains unlawfully in or upon any vehicle, occupied structure, or premises when the person is not licensed, invited, or otherwise privileged to do so."); N.Y. Penal Law § 140.00 ("A person 'enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so."); Or. Rev. Stat. Ann. § 164.205 ("'Enter or remain unlawfully' means: (a) To enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the entrant is not otherwise licensed or privileged to do so; (b) To fail to leave premises that are open to the public after being lawfully directed to do so by the person in charge; (c) To enter premises that are open to the public after being lawfully directed not to enter the premises; or (d) To enter or remain in a motor vehicle when the entrant is not authorized to do so."); Utah Code Ann. § 76-6-201 ("'Enter or remain unlawfully' means a person enters or remains in or on any premises when: (a) at the time of the entry or remaining, the premises or any portion of the premises are not open to the public; and (b) the actor is not otherwise licensed or privileged to enter or remain on the premises or any portion of the premises."); Wash. Rev. Code Ann. § 9A.52.010 ("A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."). One state uses "without lawful authority." 720 Ill. Comp. Stat. Ann. 5/21-3. Minnesota uses a variety of terms, including "without claim of right" and "without consent." Minn. Stat. Ann. § 609.605.

[127] Given its widespread use, this language was considered for the revised trespass offense, but ultimately rejected because it appeared to be practically identical to "consent," but unnecessarily legalistic. Compare LICENSE, Black's Law Dictionary (10th ed. 2014) ("A permission, usu. revocable, to commit some act that would otherwise be unlawful; esp., an agreement [not amounting to a lease or profit à prendre] that it is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal, such as hunting game."), with CONSENT, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, esp. given voluntarily by a competent person; legally effective assent. • Consent is an affirmative defense to assault, battery, and related torts, as well as such torts as defamation, invasion of privacy, conversion, and trespass. Consent may be a defense to a crime if the victim has the capacity to consent and if the consent negates an element of the crime or thwarts the harm that the law seeks to prevent.").

[128] Ind. Code Ann. § 35-43-2-2 (trespass occurs when a person "knowingly or intentionally interferes with the possession or use of the property of another person without the person's consent;"); Minn. Stat. Ann. § 609.605; Tenn. Code Ann. § 39-14-405 ("A person commits criminal trespass if the person enters or remains on property, or any portion of property, without the consent of the owner."); Tex. Penal Code Ann. § 30.05 ("A person commits an offense if the person enters or remains on or in property of another . . . without effective consent . . . ."); Wis. Stat. Ann. § 943.14 "Whoever intentionally enters or remains in the dwelling of another without the consent of some person lawfully upon the premises . . . .").

entry while 'privileged' refers to a nonconsensual entry."[129] It would seem that a person does not commit trespass when that person is invited into a friend's home because the person is "licensed" to enter. On the other hand, a police officer who searches a home pursuant to a warrant does not commit trespass because the officer is "privileged" to enter the home – the officer is in the home lawfully due to his or her status as a peace officer, but most likely does not have the consent of the home's owner.[130]

In other jurisdictions, trespass is commonly considered a lesser-included offense (LIO) of burglary; generally, a determination of the LIO relationship is matter of case law, and most states appear to determine the LIO relationship on the basis of examining statutory elements.[131] Although it appears to be more common than not that trespass is an LIO of burglary, some reformed code jurisdiction takes the opposite view.[132]

[129] *State v. Kreth*, 553 A.2d 554, 556 (Vt. 1988).

[130] *See* WAYNE R. LAFAVE, CRIMINAL LAW 1083-84 (5th ed. 2010).

[131] *E.g.*, *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985) ("Criminal trespass can be a lesser included offense of burglary of a building."); State v. Terry, 118 S.W.3d 355, 359 (Tenn. 2003) ("we conclude that aggravated criminal trespass is a lesser-included offense of aggravated burglary. Thus, we also conclude that attempted aggravated criminal trespass is a lesser-included offense of attempted aggravated burglary."); People v. Devonish, 843 N.E.2d 1120, 1120 (2005) ("It was error to refuse defendant's request that the jury be charged with the lesser included offense of criminal trespass in the second degree."); *State v. Singleton*, 675 A.2d 1143, 1146 (N.J. App. Div. 1996) (trespass is a lesser-included offense of burglary, and therefore, judge erred when failing to instruct jury on trespass in burglary case); *State v. Williams*, 708 P.2d 834, 835 (Haw. 1985) ("Criminal trespass in the first degree is a lesser included offense of burglary in the first degree."); *State v. Harvey*, 713 P.2d 517, 520 (Mont. 1986) ("A reading of the criminal trespass and burglary statutes clearly shows that criminal trespass is a lesser included offense of burglary."); *State v. Smith*, No. SC 95461, 2017 WL 2952325, at *3 (Mo. July 11, 2017).

[132] *E,g., Commonwealth v. Quintua*, 56 A.3d 399, 402 (Penn. Super. Ct. 2012) (trespass is not a lesser-included offense of burglary, because trespass requires proof the defendant knew he or she was not permitted to enter, while burglary does not). *People v. Satre*, 950 P.2d 667, 668 (Colo. App. 1997) ("we conclude that first degree criminal trespass is not a lesser included offense of first degree burglary."); *State v. Malloy*, 639 P.2d 315, 320–21 (Ariz. 1981) ("Since in [burglary] the phrase "entering or remaining unlawfully" is not modified by the term "knowingly", in order to convict a defendant of burglary in the third degree, the prosecution need not prove that the defendant was aware of the unlawfulness of his entry. There need only be shown that the entry was knowingly or voluntarily made. Criminal trespass is not necessarily a lesser included offense of burglary.").

RCC § 22A-2602. Trespass of a Motor Vehicle

(a) *Offense*. A person commits the offense of unlawful entry of a motor vehicle when that person:
  (1) Knowingly enters or remains in;
  (2) A motor vehicle, or part thereof;
  (3) Without the effective consent of the owner.

(b) *Definitions.* The term "knowingly" has the meaning specified in § 22A-206, and the terms "motor vehicle," "effective consent," and "owner" have the meanings specified in § 22A-2001.

(c) *Penalty.* Unlawful entry of a motor vehicle 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 trespass of a motor vehicle (TMV) offense and penalty for the Revised Criminal Code. The offense criminalizes knowingly entering or remaining in motor vehicles without effective consent of the owner. TMV is closely related to trespass, except that TMV protects only motor vehicles.*[133] *The revised TMV offense replaces the unlawful entry of a motor vehicle statute*[134] *in the current D.C. Code.*

Section (a)(1) specifies elements that a person must engage in—enter or remain in something. The statute does not require complete or full entry of the body, and evidence of partial entry of the body is sufficient proof for a completed trespass. The "remaining" element, in combination with subsection (a)(3) creates liability for a person who remains in the vehicle with knowledge that he or she lacks consent to be there. A person who has been asked to leave the vehicle must have a reasonable opportunity to do so before he or she can be found guilty of a remaining-type trespass. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be knowledge, a term defined at RCC § 22A-206 that here requires the defendant to be aware to a practical certainty or consciously desire that he or she "enters or remains in."

Subsection (a)(2) provides the element that the offense take place in motor vehicles. "Motor vehicle" is defined in RCC § 22A-2001(13) to include (inter alia) cars and buses, trucks, and any "other vehicle propelled by an internal combustion engine or electricity." Subsection (a)(2) refers to "or part thereof" to clarify that a person who enters part of the motor vehicle, such as the trunk or the engine compartment, has completed the offense. 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 defendant to be aware to a practical certainty or consciously desire that the location is a motor vehicle, or part thereof.

Subsection (a)(3) states the final element, that the entry or remaining be without the effective consent of the owner. RCC § 22A-2001 defines both "effective consent" and "owner." Consent may be revoked for a person already in a vehicle, in which case that person may be liable for remaining in the vehicle, per subsection (a)(1), if he or she does not exit when safe to do so. 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 defendant to be aware to a practical certainty or consciously desire that he or she lacks the effective consent of the owner.

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

[133] RCC § 22A-2601.
[134] D.C. Code § 22-1341.

Subsection (c) provides the penalty for the offense. There is only a single grade of the offense.

Relation to Current District Law. *The revised TMV statute changes existing District trespass law in one way that improves the proportionality of penalties.*

The provision in section RCC 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised trespass offense and other offenses in Chapters 26 and 27 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.[135] However, TMV is not among those offenses and, as described in the commentary to RCC § 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 TMV 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.

Four other aspects of the revised trespass motor vehicle (TMV) offense may constitute substantive changes of law.

First, the revised TMV offense requires a culpable mental state of knowledge for subsections (a)(1)-(a)(3). The current statute does not specify a culpable mental state, and no case law exists on point.[136] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[137] Requiring a knowing culpable mental state also makes the revised TMV offense consistent with the revised trespass statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[138]

Second, the revised TMV offense codifies the element "remains in." By contrast, the current offense uses the phrase "be inside of the motor vehicle,"[139] and this phrase has not been interpreted by the DCCA. Read in conjunction with the requirement that the person act without permission, the current offense may also prohibit the same conduct prohibited by the revised offense—remaining in the motor vehicle after one no longer has effective consent to do so. The revised TMV offense uses "remains in" to clarify the statute and to use consistent terminology between TMV and trespass, which makes use of the same element.

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[135] 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.").

[136] Motor vehicle trespass is a relatively new offense that became effective December 10, 2009. Omnibus Public Safety and Justice Amendment Act, D.C. Law 18-88 (2009). The DCCA has not published a criminal case interpreting the statute. As of June 2017, the one published, criminal decision Westlaw identifies as citing the statute does not address the elements of the offense. *In re S.W.*, 124 A.3d 89, 92 (D.C. 2015). The other two cases citing the statute are civil cases, and they similarly do not discuss or interpret the elements of the offense. *Fleet v. Fleet*, 137 A.3d 983, 992 (D.C. 2016); *Cousins v. Hathaway*, No. 12-CV-1058 (RLW), 2014 WL 4050170, at *2 (D.D.C. Aug. 15, 2014).

[137] *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)").

[138] *See, e.g.*, RCC § 22A-2501.

[139] D.C. Code § 22-1341.

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 defendant is not privileged to interfere with. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(3), here requiring the defendant to be aware to a practical certainty or consciously desire that he or she lacks effective consent of the owner. Fourth, the revised TMV offense defines "owner" to mean "a person holding an interest in property that the defendant is not privileged to interfere with."[140] The current statute refers instead to "owner or the person lawfully in charge of the motor vehicle,"[141] but does not define these terms. Given that the revised offense's definition of "consent" includes consent "given by one person on behalf of another person, if the person giving consent has been authorized by that person to do so,"[142] the revised offense is potentially broader than the current statute as to the scope of the person whose effective consent prevents liability. The revised offense is intended to cover situations ranging from borrowing a neighbor's vehicle with the neighbor's permission to a car dealership leasing a vehicle to an employer giving an employee a vehicle for work. This change clarifies the statute and may improve the proportionality of the offense.

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

First, the revised TMV strikes the definition of "enters" that is present in the current offense.[143] Partial entries of the body into motor vehicles are sufficient to complete the revised TMV offense,[144] and the revised statute specifically includes entry into a "part"[145] of a motor vehicle. Elimination of the current definition of "enters" is not intended to change existing law and is merely clarificatory.

Second, the Revised Criminal Code defines "motor vehicle" as any vehicle propelled by an internal-combustion engine or electricity.[146] No definition exists in the current offense, nor is there case law on point. The revised statute's use of a new definition of "motor vehicle" is intended to clarify the scope of the law.

Third, the revised TMV offense does not explicitly exclude any persons from liability for the offense. The current offense contains a subsection that excludes persons such as on-duty District police officers and an authorized tow crane operator from the scope of the offense.[147] While the current statute's exceptions are not itself problematic, the implication that those not

[140] RCC § 22A-2001.
[141] D.C. Code § 22-1341.
[142] RCC § 22A-2001.
[143] D.C. Code § 22-1341(c) ("For the purposes of this section, the term "enter the motor vehicle" means to insert any part of one's body into any part of the motor vehicle, including the passenger compartment, the trunk or cargo area, or the engine compartment.").
[144] E.g., reaching in through a motor vehicle window with an arm only.
[145] E.g., the trunk or engine compartments.
[146] RCC § 22A-2001.
[147] D.C. Code § 22-1341(b) ("Subsection (a) of this section shall not apply to: (1) An employee of the District government in connection with his or her official duties; (2) A tow crane operator who has valid authorization from the District government or from the property owner on whose property the motor vehicle is illegally parked; or (3) A person with a security interest in the motor vehicle who is legally authorized to seize the motor vehicle.").

listed as exempt are liable is problematic.[148] More generally, the exceptions listed in the current offense are not necessary. Lawful grants of authority to certain persons to seize or enter property contrary to the consent or will of the property owner override any plausible claim of criminal act. It would not be feasible to list every such possible grant of authority. Instead, general exceptions to the criminal law for such circumstances are sufficient for this offense as they are in other offenses.[149] The revised TMV offense is intended to exclude more persons from liability (i.e., those who have authority given outside the criminal code) than those explicitly listed in the current offense. This change clarifies the statute and may improve the proportionality of the offense.

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

Regarding the bar on multiple convictions for the revised TMV 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 TMV offense and other overlapping property offenses. For example, where the offense most like revised TMV 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[150] 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,[151] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[152]

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[148] *E.g.,* federal employees, including FBI agents and Capitol Police, acting in connection with their official duties are not excluded, nor does their authorization to tow crane operators exempt those operators.
[149] For example, there is no list of exceptions for trespass in current law. D.C. Code § 22-3302.
[150] D.C. Code § 22-3203.
[151] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[152] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

RCC § 22A-2603. Criminal Obstruction of a Public Way

(a) *Offense*. A person commits the offense of criminal obstruction of a public way when that person:
  (1) Knowingly obstructs;
  (2) A public street, public sidewalk, or other public way;
  (3) After receiving a law enforcement order to stop such obstruction.

(b) *Definitions.* The term "knowingly" has the meaning specified in § 22A-206. In this section, the term "obstruct" means to render impassable without unreasonable hazard to any person, the term "road" includes any road, alley, or highway, and the term "walkway" includes a sidewalk, trail, railway, bridge, passageway within a public building or public conveyance, or entrance of a public or private building or business yard.

(c) *Exclusion from Liability.* Nothing in this section prohibits conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq.

(d) *Penalty.* Criminal obstruction of a public way is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Prosecutorial Authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

Commentary

Explanatory Note. *This section establishes the criminal obstruction of a public way (COPW) offense and penalty for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in conduct that renders impassable, without unreasonable hazard, public thoroughfares and entries and exits from building after receiving a law enforcement order to stop such conduct. COPW is closely related to the unlawful demonstration statute,*[153] *except that COPW requires proof that the defendant was blocking a public way and unlawful demonstration requires proof the defendant was demonstrating in an area where demonstrations are not permitted. Additionally, COPW is closely related to the obstructing a bridge connecting Virginia to the District of Columbia.*[154] *These two statutes differ in the sorts of places that the defendant must block. The revised COPW offense, in combination with unlawful demonstration, RCC § 22A-2504, replaces the current District offense of crowding, obstructing, or incommoding*[155] *and similar conduct in several older District offenses that the RCC replaces.*[156]

Subsection (a)(1) provides the first element of the offense, "obstructs." The term "obstructs" is defined in subsection (b), such that subsection (a)(1) requires making a public street, public sidewalk or other public way impassable without unreasonable hazard.[157] Because

[153] RCC § 22A-2604.
[154] RCC § 22A-2605.
[155] D.C. Code § 22-1307.
[156] Specifically, D.C. Code § 22-3320 (Obstructing public road) is replaced by this revised statute and RCC § 22A-2403 (criminal damage to property); D.C. Code § 22-3321 (Obstructing public highway) is entirely replaced by this revised statute; and D.C. Code § 22-3319 (Placing obstructions on or displacement of railway tracks) is replaced by this revised statute, and RCC § 22A-2403 (criminal damage to property).
[157] The revised offense does not include minor incommoding that poses no risk to passers-by. For example, a person standing or sitting on part of a sidewalk that pedestrians have to step around likely is not committing an offense. However, blocking a sidewalk such that pedestrians have to walk around onto a busy street in order to pass likely is an offense.

the definition refers to "render impassable," no proof that a person actually attempted to make use of the road or walkway and was unable to do so is required.[158] Subsection (a)(1) also specifies the culpable mental state for subsection (a) to be knowledge, a term defined at RCC § 22A-206 and here requiring that the defendant must be aware to a practical certainty or consciously desire that his or her conduct "obstructs."

Subsection (a)(2) designates the areas subject to obstruction, which consists of public streets, public sidewalks, and other public ways. The last term, "other public ways," is intended to be broadly construed, generally encompassing the kinds of public spaces that humans may typically use to move from one point to another over land. The term public way is intended to include any alley, highway, trail, railway, bridge, passageway within a public building or public conveyance, or entrance to a public or private building. 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 defendant to be aware to a practical certainty or consciously desire that the location is a public street, public sidewalk, or other public way.

Subsection (a)(3) provides that the person must receive a law enforcement order to cease impeding the public road or walkway, and refuse to do so. This element allows a person to receive direct notice to cease obstructing before being subject to criminal penalties. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(3) also applies to subsection (a)(3), requiring the defendant to be aware to a practical certainty or consciously desire that he or she is refusing to obey a law enforcement order to stop such impeding.

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

Subsection (c) cross-references the District's First Amendment Assemblies Act, codified in Title 5 of the D.C. Code. This reference does not change or alter any person's rights or liabilities under the statute. Instead, it is merely intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Subsection (d) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (e) provides the penalty for the offense.

Relation to Current District Law. *The revised criminal obstruction of a public way statute changes existing District law in three main ways to specify the applicable culpable mental states and reduce unnecessary overlap between offenses.*

First, the revised statute clarifies that knowledge is the mental state that applies to the elements in subsections (a)(1)-(a)(3). No mental state is specified in the current statute with respect to any elements. Case law indicates some kind of intent is necessary, though the precise kind of intent is unclear.[159] In one case the DCCA has recognized that a reasonable mistake defense may apply to crowding, obstructing, or incommoding.[160] Applying a knowledge

[158] *E.g.*, if a group of persons blocked off a street that was not currently in use by cars or pedestrians, and refused to move after receiving a police order to do so, these persons would be guilty of completed COPW.

[159] The DCCA has stated that the offense is one of "general intent" which it noted is frequently defined to require "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984). Under the RCC all physical acts must be voluntary per RCC § 22A-203, but neither the *Morgan* court nor any other DCCA rulings specifically address in detail the culpable mental state required for particular elements in the current crowding, obstructing, or incommoding statute.

[160] *Morgan v. District of Columbia*, 476 A.2d 1128, 1133 (D.C. 1984).

culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[161] Given that the current and revised statutes require a warning from a law enforcement officer to the defendant, the defendant will typically have actual knowledge that he or she is obstructing a public way. Yet, by requiring knowledge, the revised statute would at least expand the available defenses from reasonable mistakes of fact to include unreasonable mistakes of fact.[162]

Second, the revised statute applies only to public locations per subsection (a)(2), narrowing the statute slightly as compared to current District law. The current crowding, obstructing, or incommoding statute is silent as to whether streets, sidewalks, etc.,[163] or entrances to buildings[164] covered by the statute may be on private land. However, while noting that it would be possible to construe the statute as covering only public locations where an unlawful entry charge could not be brought and recognizing the absence of any legislative history,[165] the DCCA nonetheless has upheld a conviction for blocking an area "inside a private inclosure on a private driveway leading to the door of a private building."[166] Because unwanted entries onto private property are already criminalized as trespass,[167] COPW is applicable only to public land to reduce unnecessary overlap. Apart from limiting the locations covered by the revised statute to public areas, changes to the list of specified locations in the revised offense is not intended to change the scope of the offense under current law.

Third, the provision in section RCC 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised COPW offense and other offenses in Chapters 26 and 27 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.[168] However, COPW is not among those offenses and, as described in the commentary to RCC § 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 COPW 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.

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

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[161] *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)").

[162] Under the revised statute, it continues to be true that the defendant's reasonable, but mistaken belief as to the elements of the offense would exculpate the defendant. However, per the revised offense the government must prove the defendant knew, for example, that he or she was obstructing a public street after a police order. Consequently, any mistake by the defendant about these facts, whether the mistake is reasonable or not, would be an absent-element defense to the revised statute.

[163] D.C. Code § 22-1307(a)(1)(A).

[164] D.C. Code § 22-1307(a)(1)(B).

[165] *Morgan v. District of Columbia*, 476 A.2d 1128, 1130 (D.C. 1984).

[166] *Id*.

[167] RCC § 22A-2501.

[168] 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.").

Through its use of the definition of "obstruct," the revised COPW offense clarifies that the standard for determining prohibited conduct is whether it makes the street, sidewalk, etc. "impassable without unreasonable hazard to any person." The current statute is silent as to the meaning of the verbs "crowd, obstruct, or incommode"[169] used to indicate the prohibited behavior. No case law has provided interpretive guidance on these words either, although the fact patterns in cases are generally consistent with the revised definition of "obstructs."[170] The RCC uses a consistent definition for "obstructs" that is consistent across multiple offenses in this chapter. [171]

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

First, the revised statute, in combination with unlawful demonstration, RCC § 22A-2504, divides up and replaces the current District offense of crowding, obstructing, or incommoding.[172] The split of the current District offense is organizational, with the revised criminal obstruction of a public way offense corresponding to current D.C. Code § 22-1307(a) and the revised unlawful demonstration offense corresponding to D.C. Code § 22-1307(b). The reorganization better reflects the different conduct in the two subsections of D.C. Code § 22-1307(a).

Second, the revised statute adds an explicit cross-reference in subsection (c) to the First Amendment Assemblies Act of 2004 (FAAA), a statutory regime codified in Title 5.[173] Part of the FAAA, D.C. Code § 5-331.05(d), describes situations where an assembly "does not constitute an offense." The reference to the FAAA gives clearer notice that the FAAA may narrow conduct otherwise covered by the revised COPW offense.

Third, subsection (d) of the revised offense makes explicit reference to the prosecutorial authority responsible for bringing cases. The Attorney General for the District of Columbia has responsibility for the current crowding, obstructing, or incommoding offense under current law,[174] although the current statute is silent on the matter. The revised offense continues the

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[169] D.C. Code § 22-1307.

[170] For example, in one case the DCCA described how protestors blocked the front of the Rayburn Building and, "the trial judge found that, 'while not 100 percent blocked, [the building entrance] was significantly impeded or incommoded' because 'people had to pick their way around individuals lying on the ground in sheets,' some 'less than two or three feet . . . from the entryway.'" *Tetaz v. District of Columbia*, 976 A.2d 907, 911 (D.C. 2009). Such facts would likely constitute impeding under revised statute because the entryway was rendered impassable without unreasonable hazard.

[171] RCC § 22A-2503; RCC § 22A-2504; RCC § 22A-2505.

[172] D.C. Code § 22-1307.

[173] D.C. Code § 5-331.01 *et seq.* D.C. Code § 5-331.05(a) states that "It shall not be an offense to assemble or parade on a District street, sidewalk, or other public way, or in a District park, without having provided notice or obtained an approved assembly plan." However, this broad exception is limited by D.C. Code § 5-331.05(a), which provides that a plan is required unless certain exceptions are made. D.C. Code § 5-331.05(d) provides the exceptions, which include situations where:

> "(1) The assembly will take place on public sidewalks and crosswalks and will not prevent other pedestrians from using the sidewalks and crosswalks;
>
> (2) The person or group reasonably anticipates that fewer than 50 persons will participate in the assembly, and the assembly will not occur on a District street; or
>
> (3) The assembly is for the purpose of an immediate and spontaneous expression of views in response to a public event."

[174] Judiciary Committee, Report on Bill 18-425, The Disorderly Conduct Amendment Act of 2010 at 9 ("The violations of [the crowding offense] will be prosecuted ordinarily by the D.C. Attorney General. The Committee understands this to be current practice.").

current allocation of prosecutorial authority to the Attorney General for the District of Columbia, and the reference in subsection (d) of the revised statute gives clearer notice of this fact.

National Legal Trends. *The above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[175] twenty-three have some type of obstruction of public ways statute.[176] Of these twenty-three jurisdictions, at least twenty-one appear to statutorily require some subjective awareness on the part of the defendant as to the results of his or her actions.[177] Fourteen reform jurisdictions statutorily require a mental state of recklessness.[178] The commonality of this culpable mental state may be due to the MPC's adoption of recklessness.[179] Three states statutorily require a mental state of "intentionally,"[180] and two states use knowledge.[181] Last, two jurisdictions' obstruction of public ways statutes require proof that the defendant "intend to" engage in some other disruptive conduct or created a risk of harm.[182]

Second, with respect to the places protected, states vary and often combine various terms in their obstruction statutes. Thirteen states include "highway" in their list of protected places.[183] The generic phrases "public passage," "public thoroughfare," or "public way" are used by fourteen states.[184] Only two states statutorily extend liability for obstruction to private property.[185]

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[175] *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.

[176] Alaska Stat. Ann. § 11.61.150; Ala. Code § 13A-11-7; Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Colo. Rev. Stat. Ann. § 18-9-107; Conn. Gen. Stat. Ann. § 53a-182; Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; 720 Ill. Comp. Stat. Ann. 5/47-5; Ind. Code Ann. § 35-44.1-2-13; Ky. Rev. Stat. Ann. § 525.140; Minn. Stat. Ann. § 609.74; Mont. Code Ann. § 45-8-101; N.J. Stat. Ann. § 2C:33-7; N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11; Or. Rev. Stat. Ann. § 166.025; N.Y. Penal Law § 240.20; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03; Utah Code Ann. § 76-9-102; Wash. Rev. Code Ann. § 9A.84.030.

[177] Two states do not apply a mental state at all in their obstruction statute, though default culpable mental states may apply. Ark. Code Ann. § 5-71-214; 720 Ill. Comp. Stat. Ann. 5/47-5.

[178] Ariz. Rev. Stat. Ann. § 13-2906; Colo. Rev. Stat. Ann. § 18-9-107; Conn. Gen. Stat. Ann. § 53a-182; Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; N.J. Stat. Ann. § 2C:33-7; N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11; Or. Rev. Stat. Ann. § 166.025; N.Y. Penal Law § 240.20; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03; Utah Code Ann. § 76-9-102.

[179] Model Penal Code § 250.7 ("A person, who, having no legal privilege to do so, purposely or recklessly obstructs any highway or other public passage, whether alone or with others, commits a violation, or, in case he persists after warning by a law officer, a petty misdemeanor.")

[180] Ky. Rev. Stat. Ann. § 525.140 ("intentionally or wantonly"); Minn. Stat. Ann. § 609.74; Wash. Rev. Code Ann. § 9A.84.030.

[181] Alaska Stat. Ann. § 11.61.150; Mont. Code Ann. § 45-8-101.

[182] Ala. Code § 13A-11-7; Ind. Code Ann. § 35-44.1-2-13.

[183] Alaska Stat. Ann. § 11.61.150; Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Colo. Rev. Stat. Ann. § 18-9-107; Haw. Rev. Stat. Ann. § 711-1105; 720 Ill. Comp. Stat. Ann. 5/47-5; Ky. Rev. Stat. Ann. § 525.140; Minn. Stat. Ann. § 609.74; N.J. Stat. Ann. § 2C:33-7; Ohio Rev. Code Ann. § 2917.11; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03.

[184] Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Colo. Rev. Stat. Ann. § 18-9-107 ("any other place used for the passage of persons, vehicles, or conveyances"); Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; Ky. Rev. Stat. Ann. § 525.140; Me. Rev. Stat. tit. 17-A, § 505; Minn. Stat. Ann. § 609.74 ("public right-

Third, regarding the bar on multiple convictions for the revised COPW 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 COPW offense and other overlapping property offenses. For example, where the offense most like revised COPW 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[186] 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,[187] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[188]

Last, it is notable that eleven states either define this element of their obstruction statute (often using the word "obstruct") to mean "render impassable without unreasonable inconvenience or hazard," or simply codify that phrase as the element itself.[189] This definition of "obstruct" was proposed by the Model Penal Code.[190]

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of-way"); N.J. Stat. Ann. § 2C:33-7; Ohio Rev. Code Ann. § 2917.11 ("right-of-way"); Or. Rev. Stat. Ann. § 166.025; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307 ("any other place used for the passage of persons, vehicles, or conveyances"); Tex. Penal Code Ann. § 42.03 ("any other place used for the passage of persons, vehicles, or conveyances"); Utah Code Ann. § 76-9-102 ("vehicular or pedestrian traffic in a public place").

[185] 720 Ill. Comp. Stat. Ann. 5/47-5; Ohio Rev. Code Ann. § 2917.11.

[186] D.C. Code § 22-3203.

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

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

[189] Ala. Code § 13A-11-7; Alaska Stat. Ann. § 11.61.150; Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; Ky. Rev. Stat. Ann. § 525.140; N.J. Stat. Ann. § 2C:33-7; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03.

[190] MPC § 250.7 (""Obstructs" means renders impassable without unreasonable inconvenience or hazard.").

RCC § 22A-2604. Unlawful Demonstration

(a) *Offense*. A person commits the offense of unlawful demonstration when that person:
  (1) Knowingly engages in a demonstration;
  (2) In a location where demonstration is otherwise unlawful;
  (3) After receiving a law enforcement order to stop such demonstration.

(b) *Definitions.* The term "knowingly" has the meaning specified in § 22A-206. In this section, the term "demonstration" includes any assembly, rally, parade, march, picket line, or other similar gathering by one or more persons conducted for the purpose of expressing a political, social, or religious view.

(c) *Exclusion from Liability.* Nothing in this section shall be construed to prohibit conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq.

(d) *Penalty.* Unlawful demonstration is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Prosecutorial Authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

(f) *Jury Trial*. A defendant charged with violating this offense may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

Commentary

Explanatory Note. *This section establishes the unlawful demonstration offense and penalty for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in conduct that constitutes a demonstration, in locations where demonstration is prohibited by law, after receiving a law enforcement order to stop such conduct. Unlawful demonstration is closely related to the offense of crowding a public way (COPW),*[191] *except that unlawful demonstration concerns different locales than COPW. The revised offense, in combination with criminal obstruction of a public way, RCC § 22A-2503, replaces the current District offense of crowding, obstructing, or incommoding.*[192]

Subsection (a)(1) provides the first element of the offense, "engages in a demonstration." The term "demonstration" is defined in subsection (b), such that subsection (a)(1) includes any assembly, rally, parade, march, picket line, or other similar gathering by one or more persons conducted for the purpose of expressing a political, social, or religious view.[193] Subsection (a)(1) also specifies the culpable mental state for subsection (a) to be knowledge, a term defined at RCC § 22A-206 and here requiring that the defendant must be aware to a practical certainty or consciously desire that his or her conduct "obstructs."

Subsection (a)(2) codifies the second element. Specifically, the defendant must engage in a demonstration in a place where demonstrating is otherwise unlawful. Thus, if a civil or criminal statute specifically prohibits demonstrating in the United States Capitol[194] or the Supreme Court,[195] a person could be guilty of the offense. But there must be some other law that prohibits demonstration in the location where the defendant is for liability to attach. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also

[191] RCC § 22A-2603.
[192] D.C. Code § 22-1307.
[193] A person need not be accompanied by other demonstrators in order to be held responsible under the offense.
[194] D.C. Code § 10-503.16.
[195] 40 U.S.C. § 6135.

applies to subsection (a)(2), here requiring the defendant to be aware to a practical certainty or consciously desire that he or she received a law enforcement order to stop such demonstration.

Subsection (a)(3) provides that the person must receive a law enforcement order to cease engaging in a demonstration, and refuse to do so. This element allows a person to receive direct notice to cease the demonstration before being subject to criminal penalties. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(3), here requiring the defendant to be aware to a practical certainty or consciously desire that the location is one where demonstration is otherwise unlawful.

Subsection (b) cross-references applicable definitions located elsewhere in the RCC and defines a "demonstration." "Demonstration" covers a variety of conduct; the use of "includes" is intended to indicate that the list is non-exhaustive.

Subsection (c) cross-references the District's First Amendment Assemblies Act, codified in Title 5 of the D.C. Code. This reference does not change or alter any person's rights or liabilities under the statute. Instead, it is merely intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense. All conduct involved in the offense presumably will implicate First Amendment rights.

Subsection (d) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (e) provides the penalty for the offense.

Finally, subsection (f) provides a jury trial for defendants charged with unlawful demonstration. Inclusion of a jury trial right is intended to ensure that the First Amendment rights of demonstrators are given fair consideration by members of the public, regardless of the imprisonment penalty.

Relation to Current District Law. *The revised unlawful demonstration statute changes existing District law in two main ways.*

First, through subsection (f), the revised offense specifically provides a right for the defendant to demand a jury trial, regardless of the imprisonment penalty. Currently, the offense has no specific provision providing for a jury trial, so as an offense punishable by a maximum of 90 days imprisonment is not a jury demandable offense under the D.C. Code.[196] However, given the First Amendment implications of prosecutions under this offense, a right to a jury trial is recommended.[197]

Second, the provision in section RCC 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised unlawful demonstration offense and other offenses in Chapters 26 and 27 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.[198] However, unlawful demonstration is not among those offenses and, as described in the commentary to RCC § 22A-2003, even if the sentences run

[196] D.C. Code § 16-705.

[197] *E.g.*, Judiciary Committee, Report on Bill 16-247, the Omnibus Public Safety Act of 2006 at 11 (amending unlawful entry, D.C. Code § 22-3302). When considering whether to offer a jury trial for unlawful entry, the Judiciary Committee recently reasoned that "because unlawful entry is frequently charged against civil demonstrators, the Committee rejected the provision in bill [sic] making this a nonjury demandable crime (180 days rather than six months)."

[198] 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.").

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 unlawful demonstration 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.

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

First, the revised statute clarifies that knowledge is the mental state that applies to the elements in subsections (a)(1)-(a)(3). No mental state is specified in the current statute with respect to any elements. There is no case law on the unlawful demonstration portion of the crowding, obstructing, or incommoding offense.[199] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[200] Given that the current and revised statute require a warning from a law enforcement officer to the defendant, a defendant will typically have actual knowledge that he or she is demonstrating in an area where demonstration is not permitted.

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

First, the revised statute, in combination with criminal obstruction of a public way, RCC § 22A-2503, divides up and replaces the current District offense of crowding, obstructing, or incommoding.[201] The split of the current District offense is organizational, with the revised criminal obstruction of a public way offense corresponding to current D.C. Code § 22-1307(a) and the revised unlawful demonstration offense corresponding to D.C. Code § 22-1307(b). The reorganization better reflects the different conduct in the two subsections of D.C. Code § 22-1307(a).

Second, the statute codifies a slightly different definition of "demonstration" than is present in the current statute.[202] The language in the revised unlawful demonstrations offense is follows the FAAA definition of a "First Amendment assembly."[203] This is intended to create textual consistency between that statutory regime and the Revised Criminal Code. However, the

[199] D.C. Code § 22-1307(b). Note that this portion of the statute is new, having been introduced as legislation in as part of the Omnibus Criminal Code Amendments Act of 2012 at the suggestion of the United States Attorney. Committee on the Judiciary, Report on Bill 19-645.

[200] *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)").

[201] D.C. Code § 22-1307.

[202] D.C. Code § 22-1307(b)(2) ("For purposes of this subsection, the term "demonstration" means marching, congregating, standing, sitting, lying down, parading, demonstrating, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief.").

[203] D.C. Code § 5-331.02(1) ("'First Amendment assembly' means a demonstration, rally, parade, march, picket line, or other similar gathering conducted for the purpose of persons expressing their political, social, or religious views."). Because the revised statute uses the term "demonstration" in the statute and the FAAA defines "assembly," the term "assembly" was added to the revised offense definition of "demonstration." Otherwise, the revised offense exactly follows the FAAA language. D.C. Code Ann. § 5-331.02.

conduct covered should not change; the use of the verb "includes" is intended to signify that the list is non-exhaustive.[204]

Third, the revised statute adds an explicit cross-reference in subsection (c) to the First Amendment Assemblies Act of 2004 (FAAA), a statutory regime codified in Title 5.[205] Part of the FAAA, D.C. Code § 5-331.05(d), describes situations where an assembly "does not constitute an offense." The reference to the FAAA gives clearer notice that the FAAA may narrow conduct otherwise covered by the revised unlawful demonstration offense.

Fourth, subsection (d) of the revised offense makes explicit reference to the prosecutorial authority responsible for bringing cases. The Attorney General for the District of Columbia has responsibility for the current crowding, obstructing, or incommoding offense under current law,[206] although the current statute is silent on the matter. The revised offense continues the current allocation of prosecutorial authority to the Attorney General for the District of Columbia, and the reference in subsection (d) of the revised statute gives clearer notice of this fact.

***Relation to National Legal Trends*.**

The current unlawful demonstration offense has no equivalent in other jurisdictions, and no other jurisdiction divides prosecutorial authority in the way it is divided in the District. Therefore, no comparable statutes exist from which one can draw meaningful comparisons for the change in law proposed.

[204] Conduct absent from the revised criminal demonstration offense includes congregating, sitting, standing, lying down, or patrolling.

[205] D.C. Code § 5-331.01 *et seq*. D.C. Code § 5-331.05(a) states that "It shall not be an offense to assemble or parade on a District street, sidewalk, or other public way, or in a District park, without having provided notice or obtained an approved assembly plan." However, this broad exception is limited by D.C. Code § 5-331.05(a), which provides that a plan is required unless certain exceptions are made. D.C. Code § 5-331.05(d) provides the exceptions, which include situations where:

"(1) The assembly will take place on public sidewalks and crosswalks and will not prevent other pedestrians from using the sidewalks and crosswalks;

(2) The person or group reasonably anticipates that fewer than 50 persons will participate in the assembly, and the assembly will not occur on a District street; or

(3) The assembly is for the purpose of an immediate and spontaneous expression of views in response to a public event."

[206] Judiciary Committee, Report on Bill 19-645, Omnibus Criminal Code Amendments Act of 2012 at 6.

RCC § 22A-2605. Unlawful Obstruction of a Bridge to the Commonwealth of Virginia

(a) *Offense*. A person commits the offense of unlawful obstruction of a bridge to the Commonwealth of Virginia when that person:
  (1) Purposely obstructs;
  (2) A bridge that connects the District of Columbia to the Commonwealth of Virginia.

(b) *Definitions.* The term "purposely" has the meaning specified in section § 22A-XXX. In this section, the term "obstruct" means to render impassable without unreasonable hazard to any person.

(c) *Exclusion from Liability.* Nothing in this section shall be construed to prohibit conduct permitted by the First Amendment Assemblies Act of 2004 codified at 5-331.01 et seq..

(d) *Penalty.* Unlawful obstruction of a bridge to the Commonwealth of Virginia 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 unlawful obstruction of a bridge to Virginia offense (UOBV) for the Revised Criminal Code. The offense punishes those who purposely obstruct the use of a bridge that connects the District of Columbia to Virginia.*[207] *UOBV is closely related to the offense of criminally obstructing a public way (COPW),*[208] *except that UOBV specifically addresses bridges, and does not require an order from a police officer to cease blocking the bridge. The revised offense replaces the current District offense of Obstructing bridges connecting D.C. and Virginia.*[209]

Subsection (a)(1) codifies , "obstructs," which is defined in subsection (b) to mean "renders impassable without unreasonable hazard." Subsection (a)(1) also specifies the culpable mental state for subsection (a) to be purpose, a term defined at RCC § 22A-206 and here requiring that the defendant must consciously desire that his or her conduct "obstructs." A person must desire to obstruct the bridge in order to be convicted of the offense. Subsection (a)(2) provides that the place that the defendant obstructs be a bridge that connects the District of Columbia to Virginia.

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

Subsection (c) cross-references the District's First Amendment Assemblies Act, codified in Title 5 of the D.C. Code. This reference does not change or alter any person's rights or liabilities under the statute. Instead, it is merely intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense. Some conduct involved in the offense presumably may implicate First Amendment rights.

Subsection (d) states that the offense penalty.

Relation to Current District Law. *The revised UOBV statute changes existing District law in one way.*

[207] Unlike RCC § 22A-2503 (criminal obstruction of a public way) RCC § 22A-2504 (unlawful demonstration), no warning by a law enforcement officer is required before incurring liability.
[208] RCC § 22A-2603.
[209] D.C. Code § 22-1323.

The provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised XXX offense and other offenses in Chapters 26 and 27 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. [210] However, YYY is not among those offenses and, as described in the commentary to RCC § 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 XXX 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.

Two aspects of the revised criminal obstruction of a bridge to the Commonwealth of Virginia statute may constitute substantive changes of law.

First, the revised statute clarifies that a culpable mental state of purposely, as defined in RCC § 22A-206 applies to the elements in subsections (a)(1)-(a)(2). The current statute specifies the person must act "knowingly and willfully,"[211] however the terms are not defined and there is no case law on the offense. It is unclear whether this culpable mental state applies to both subsections (a)(1)-(a)(2) or just the obstruction result in subsection (a)(1). "Purposely" is the most demanding culpable mental state in the Revised Criminal Code that most closely seems to approximate "knowingly and willfully."[212]

Second, the revised obstructing bridges offense uses the term "obstructs," which is then defined as "renders impassable without unreasonable hazard." The current offense uses the verb "obstructs," but does not define it. The use and definition of "obstructs" in the revised statute clarifies that the offense is focused on unreasonable risk creation.[213]

Relation to National Legal Trends. There are no comparable statutes in other jurisdictions. Some states that have obstructing bridges within their more general "obstructing highways" offenses, similar to the District's criminal obstruction of a public way offense, RCC § 22A-2603.

[210] 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.").

[211] D.C. Code § 22-1323 ("[W]hoever in the District of Columbia knowingly and willfully obstructs any bridge connecting the District of Columbia and the Commonwealth of Virginia…").

[212] The practical effect is to ensure that, for example, a person who stops their car on a bridge connecting DC and the Commonwealth of Virginia to take a photo would be clearly excluded from liability. Even though the person is practically certain that their conduct will obstruct traffic to some degree, the person's conscious object is not to obstruct traffic.

[213] For example, conduct that forces cars to change lanes in traffic or requires a person to step dangerously close to bridge traffic to avoid the obstruction may constitute a sufficient hazard.

Chapter 27. Burglary Offenses

Section 2701. Burglary.
Section 2702. Possession of Burglary and Theft Tools.

RCC § 22A-2701. Burglary

(a) *Offense*. A person commits the offense of burglary when that person:
  (1) Knowingly enters or surreptitiously remains in;
  (2) A dwelling, building, watercraft, or business yard, or part thereof;
  (3) Without the effective consent of the occupant or, if there is no occupant, the owner; and
  (4) With intent to commit a crime therein.

(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," "coercion," "deprive," and "value" have the meanings specified in § 22A-2001.

(c) *Gradations and Penalties.*
  (1) *First Degree Burglary.* A person is guilty of first degree burglary if that person commits burglary, knowing the location is a dwelling and, in fact, a person who is not a participant in the crime is present in the dwelling. First degree burglary is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Burglary.* A person is guilty of first degree burglary if that person commits burglary, either: knowing the location is a dwelling; or knowing the location is a building and, in fact, a person who is not a participant in the crime is present in the building. Second degree burglary is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Third Degree Burglary.* A person is guilty of third degree burglary if the person commits burglary. Third degree burglary 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 burglary offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes a person entering or surreptitiously remaining in a dwelling, building, watercraft, or business yard—conduct separately criminalized as trespass per RCC § 22A-2501—without effective consent of the occupant*[214] *(or owner, if there is no occupant), and with intent to commit a crime therein. The penalty gradations are based on the type of structure involved, and whether or not it is actually occupied at the time by a person who is not a participant in the crime. Burglary is closely related to trespass,*[215] *except that burglary requires proof of an intent to commit an offense*

[214] "Occupant" is a defined term in RCC § 22A-2001 that refers to a person holding a possessory interest in property. The term does not refer to any person physically present at the location. Physical presence at the location is irrelevant to whether a location has an occupant as defined.
[215] RCC § 22A-2601.

within the premises, and trespass does not. The revised burglary offense replaces the burglary statute[216] *in the current D.C. Code.*

Subsection (a)(1) describes the key element of the offense—a person must engage in conduct that results in entering or surreptitiously remaining in a location. The term "enters" is intended to include instances when the defendant enters with his or her entire body, as well as those instances where the defendant enters with only part of his or her body.[217] Subsection (a)(1) also specifies the culpable mental state for subsection (a) to be knowledge, a term defined at RCC § 22A-206 and here requiring that the defendant must be aware to a practical certainty or consciously desire that his or her conduct "enters or surreptitiously remains in."

Subsection (a)(2) codifies the first element of the offense, requiring the location to be a "dwelling," "building," or "business yard" are terms defined in RCC § 22A-2001. As a knowing mental state applies to subsection (a)(2), the defendant must be practically certain or desire that he or she is entering a dwelling, building, or business yard.

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 defendant is not privileged to interfere with. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(3), here requiring the defendant to be aware to a practical certainty or consciously desire that he or she lacks effective consent of the owner.

Subsection (a)(4) requires the defendant to intend to commit a crime once inside, but need not actually commit the crime for burglary liability. The only limitation on the intended crime is that the underlying trespass may not itself be the basis for a burglary conviction.[218] The defendant must have the intent to commit the crime at the time of entry, or at the time the person begins to hide in the case of surreptitious remaining.

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

Subsection (c) grades burglary by the type of location entered or surreptitiously remained in, providing more serious penalties where a person is present or more likely to be present. Each grade requires proof of elements in the base offense. In addition, first-degree burglary (subsection (c)(1)) requires proof that place at issue was a dwelling, and that another person was present when the defendant entered. The person must be someone other than another participant in the offense. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the presence of the other person. The defendant is strictly liable as to the presence of the other person. However, a knowing mental state applies to dwelling; therefore the defendant must be practically certain or desire that he or she is entering a dwelling.

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[216] D.C. Code 22-801.

[217] Thus, a defendant who reaches in through a window to steal something from inside a home has "entered" the building for purposes of burglary (*see* RCC § 22A-2601, Trespass, Explanatory Note).

[218] *See United States v. Melton*, 491 F.2d 45, 47 (D.C. Cir. 1973) ("The element that distinguishes burglary from unlawful entry is the intent to commit a crime once unlawful entry has been accomplished. To allow proof of unlawful entry, ipso facto, to support a burglary charge is, in effect, to increase sixty-fold the statutory penalty for unlawful entry."); *Lee v. United States*, 37 App. D.C. 442, 445 (D.C. Cir. 1911) ("To constitute the crime of housebreaking, it is necessary to show an unlawful entry, with the intent to commit *some other* offense") (emphasis added).

Second-degree burglary (subsection (c)(2)) includes all dwellings (occupied or not), and buildings where another person is present.[219] The person must be someone other than another participant in the offense. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the presence of the other person. The defendant is strictly liable as to the presence of the other person in the building. However, a knowing mental state applies to both building and dwelling; therefore the defendant must be practically certain or desire that he or she is entering a building or dwelling.

Third-degree burglary (subsection (c)(3)) is the lowest grade. It includes all dwellings (occupied or not) and buildings (occupied or not), as well as business yards and watercraft. A knowing mental state applies to the listed places; therefore the defendant must be practically certain or desire that he or she is entering a dwelling, building, business yard, or watercraft.

Relation to Current District Law. *The revised burglary statute changes existing District theft law in five main ways that clarify and improve the proportionality of the offense.*

First, the revised burglary offense requires proof that the defendant's presence in the location is "without effective consent" —i.e., trespassory. The current burglary statute does not require that entry be against the will of the occupant or owner, without consent, or otherwise unlawful.[220] As written, the current burglary statute is a kind of location aggravator, applicable to any crime committed in any building or watercraft. Even with the additional requirement under District case law that the location involved in the burglary be property "of another" requirement (see Commentary on the phrase "of the occupant," below), the lack of a trespassory element in burglary leads to some counterintuitive outcomes. For example, a witness who enters a courthouse intending to commit perjury, a government official who enters her office intending to accept a bribe, a drug user who enters his friend's home to use drugs with his companion, and a shoplifter who enters a store intending to steal a candy bar would all be guilty of burglary under current District law even though their presence in the specified location was invited. To improve the proportionality of the offense, the revised burglary statute requires that the defendant's entry into the location be without the effective consent of the occupant (or, if there is no occupant, the owner), as in trespass.

The inclusion of a trespassory requirement is consistent with, and clarifies, most District case law. For example, the "effective consent" definition would more clearly articulate the circumstances described in *Edelen v. United States*[221] where the defendant put a gun to the victim's head and told her to open the door to her apartment where he then raped her.[222] Under the "without effective consent" definition, the defendant in *Edelen* would have obtained the victim's consent by coercion. Similarly, in *McKinnon v. United States*[223] the defendant tricked his ex-girlfriend into admitting him into her apartment and upon entry, began to stab the victim.[224] Under the "effective consent" definition, the defendant here would be said to have

[219] Like first-degree burglary, second-degree burglary applies strict liability with respect to the presence of the other person, but the defendant must know that the location is a building.

[220] *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("It is thus apparent that since the District of Columbia first degree burglary statute makes it an offense to enter an occupied dwelling with intent to commit a crime therein and that such offense can be committed without a violation of the unlawful entry statute, the entry need not necessarily be against the will of the occupants.").

[221] 560 A.2d 527, 528 (D.C. 1989).

[222] *Id*.

[223] 644 A.2d 438, 440 (D.C. 1994).

[224] *McKinnon*, 644 A.2d at 440.

obtained the consent of his victim by deception.[225] Most basically, however, the typical case of a burglary involving a stealthy break-in will not be affected by this change in the revised statute since effective consent by its terms requires consent.

A second change to District law under the revised burglary statute is the inclusion of "surreptitiously remaining" in subsection (a)(1) as an alternative element to the more common "enters" element. Surreptitious remaining is not present in the current District burglary offense or case law, which only punishes entries. The inclusion of this alternative element in the revised statute provides liability in instances where a person enters a location with the effective consent of the occupant (or, if there is no occupant, the owner), but then hides themselves in order to commit a crime at a later time.[226] Allowing for this alternative avoids potential arguments over whether such surreptitious remaining constitutes entry without effective consent.[227] Moreover, the "surreptitiously" aspect of the circumstance avoids the overbreadth that may occur if the statute merely required that a person remain without effective consent.[228]

Third, the revised burglary offense eliminates liability for entry into a railroad car if it is not being used as a dwelling. The current second degree burglary statute includes not only dwellings, buildings, watercraft, and business yards, but "any railroad car."[229] The revised burglary statute would only provide liability for a railroad car used as a "dwelling" per RCC § 22A-2001.[230] Railroad cars otherwise are not provided special provision in the burglary statute as opposed to other public conveyances and means of transporting freight.

The fourth significant change to District law is the grading of the offense. The revised burglary statute creates an additional, intermediate grade of burglary that falls between the current first-degree and second-degree burglary subsections. The current burglary statute contains two gradations: first-degree burglary, which punishes those who burgle a dwelling where another person is present;[231] and second-degree burglary which punishes other invasions such as dwellings where no one is present, all other buildings, and the miscellaneous watercraft and railroad cars mentioned above.[232] Apart from the abovementioned requirement that the presence of the defendant in the location lack effective consent, the revised first-degree burglary is similar to the current offense. However, the revised second-degree burglary applies in two circumstances: when the defendant burgles a dwelling (regardless of whether it is occupied or not), and when the defendant burgles a building that is occupied by another person. The addition of this intermediate grade is intended to improve the proportionality of the statute to reflect the relative seriousness of entry into occupied where the risk of a violent encounter is heightened and unoccupied buildings. The revised third-degree burglary statute provides liability for non-dwelling, unoccupied buildings and business yards and watercraft.

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[225] *Id. See also Kearney*, 498 F.2d at 66 ("[E]ven if an entry against the will of the occupants was required, the consent that was given to the entry of appellant would be vitiated by the misrepresentation which he indulged in to obtain that consent.").

[226] *E.g.*, a person enters a store during business hours and hides away, intending to steal from the store once it is closed.

[227] *See* Model Penal Code § 221.1, Comment at 70 (1969).

[228] *E.g.*, a person who enters a store open to the public, makes a scene and is asked to leave by a manager, and who thereafter refuses and makes a threat against the manager, would be guilty of burglary whereas it has been a longstanding requirement for burglary that the intent to commit an offense be contemporaneous with the entry. *See also* Brown Commission Working Papers 2 at 895.

[229] D.C. Code § 22-801(b).

[230] E.g., a berth in an Amtrak sleeping car.

[231] D.C. Code § 22-801(a).

[232] D.C. Code § 22-801(b).

Fifth, the provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised burglary offense and other offenses in Chapters 26 and 27 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.[233] However, burglary is not among those offenses and, as described in the commentary to RCC § 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 burglary 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.

Beyond these four substantive changes to current District law, two other aspects of the revised theft statute may be viewed as substantive changes of law.

First, the revised burglary statute clarifies that effective consent of the occupant (or, if there is no occupant, the owner), is required to avoid burglary liability. "Occupant" is a defined term referring to a person holding a person holding a possessory interest in the property,[234] and "owner" is a defined term referring to a person holding a person holding an interest in the property[235] is controlling. The current burglary statute does not address whose consent is controlling or whether a person can commit burglary of property to which he has a legal claim of some sort. However, the DCCA has held that the focus of the burglary statute is on protecting occupancy and use of dwellings, rejecting a defendant's claim that the property must merely be "of another."[236] The DCCA specifically noted that other states had similarly found that burglary protected occupancy or possession, not just legal ownership.[237] Consequently, the revised statute clarifies that the occupant, as defined, is the person whose effective consent is normally required. Only if a location has no occupant does the owner's effective consent negate burglary liability. By using the RCC definition of "occupant," the revised burglary statute resolves an outstanding issue of District law as to whether a lawful occupant or owner can commit burglary of premises actually possessed by another without right.[238] The revised burglary statute adopts a "legal

[233] 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.").

[234] *See* RCC § 22A-2001. The DCCA has cited a nearly identical definition in discussing the civil tort of trespass. *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014) ("A 'possessory interest' is defined as '[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner.' Black's Law Dictionary 1203 (8th ed.2004); see also *Fortune v. United States*, 570 A.2d 809, 811 (D.C.1990)."). Insofar as the RCC definition of "occupant" requires a legal right to possession, this would mean a person (e.g., a trespasser) with actual control of premises but who lacks a legal right to possession is not an occupant for purposes of burglary.

[235] *See* RCC § 22A-2001.

[236] *Bodrick v. United States*, 892 A.2d 1116, 1120 (D.C. 2006) (The defendant argued that his first-degree burglary charge must be overturned due to the fact that he leased the house he allegedly broke into, even though he and his wife, who occupied the home, were separated. The DCCA disagreed that holding a civil right to occupy the property was sufficient, stating: "As to the first element of the first-degree burglary statute, we hold that, despite Mr. Bodrick's status as 'legal lessee,' the government needed to establish only that Ms. Bodrick occupied and used the residential dwelling . . . .")

[237] *Id.* at 1120-21.

[238] *Spriggs v. United States*, 52 A.3d 878 (D.C. 2012) (The defendant argued that because he in fact used and occupied an apartment, he was an occupant and not liable for aiding and abetting burglary of the apartment where he was staying. The government argued that the jury instruction was correct in stating that if the defendant did not

occupancy" model of burglary, clarifying, for example, that a trespasser or person under a relevant court order[239] is not an "occupant" for purposes of the burglary statute. Identical language is used in the revised trespass statute and the current unlawful entry statute clearly refers to conduct "against the will of the *lawful* occupant." [240]

Second, the revised burglary statute adds a culpable mental state applicable to the elements that the defendant "enters" or "surreptitiously remains in" the location per subsection (a)(1), the element that the location is a "dwelling, building, watercraft, or business yard" per subsection (a)(2), and the element that the defendant lacks effective consent of the occupant per subsection (a)(3). The current burglary statute is silent as to the culpable mental states required beyond an intent to commit another offense as codified in subsection (a)(4).[241] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[242]

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

First, the revised burglary statute clarifies that trespass is a lesser included offense of burglary. This is consistent with case law on the relationship between the two offenses,[243] and resolves a tension with the DCCA's holding that lesser included offenses must pass an "elements test." [244] The current trespass offense would not be a lesser included offense of the current

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have "a right to use or occupancy," the apartment would be a "dwelling of another" and he could commit burglary of the apartment. *Id.* at 882. The DCCA recognized the distinction between a "legal right to occupancy" model of burglary and a "factual occupancy" model, but declined to resolve the issue. *Id.* The DCCA specifically noted the complicated nature of determining when a person holds a lawful right of occupancy: "The law relating to occupancy and the procedures required to resolve disputes is complicated with respect to trespassers, guests, roomers, lodgers, licensees, and true tenants, including holdover tenants. As the police recognized, appellant's rights, or lack thereof, were not totally clear-cut, and Mr. Morgan's testimony itself lacked some clarity. For this reason, we have tended to focus on the issue of actual " 'occupancy' and 'use' " as a test for burglary as in *Bodrick v. United States*, 892 A.2d 1116, 1120–21 (D.C.2006), a case relied on by appellant for his position." *Id.* at 886.

[239] *Bodrick v. United States*, 892 A.2d 1116, 1121 (D.C. 2006) ("Similarly, here, Mr. Bodrick was under a court order to "stay away" from Ms. Bodrick's home and place of employment and not to come within 100 feet of her. Thus, not only did Ms. Bodrick have occupancy and exclusive use of the apartment in the 600 block of 46th Street, S.E., but Mr. Bodrick's interest as leaseholder was subordinate to her occupancy and use."); see also D.C. Crim. Jur. Instr.§ 5.101 ("[If you find that on [date of the offense], [name of defendant] was under a court order directing him/her to stay away from [name of complainant], then you may decide that the [house] [apartment] in which [name of complainant] resided was the dwelling of another.]").

[240] D.C. Code § 22-3302(a) (emphasis added).

[241] *Massey v. United States*, 320 A.2d 296, 299 (D.C. 1974) ("A requisite element of proof in a prosecution under our burglary statute . . . and those of most jurisdictions, is that the defendant have an intent to steal or commit a crime at the time of entry."). The intent to commit an offense has been described as "specific intent." *Douglas v. United States*, 570 A.2d 772,776 (D.C. 1990). *See also* D.C. Crim. Jur. Instr. § 5.101.

[242] *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)").

[243] *United States v. Whitaker*, 447 F.2d 314, 320 (D.C. Cir. 1971). The DCCA in *Whitaker* noted that it was only in "rare" circumstances that a burglary can be committed where the entry is lawful. *Id* at 349.

[244] *Byrd v. United States*, 598 A.2d 386, 390 (D.C. 1991) (In *Byrd* the DCCA opted to use the Supreme Court's *Blockburger* test for deciding whether one offense is a lesser-included offense (LIO) of another, rejecting the fact-based approach previously used. See *Whitaker*, 447 F.2d at 319. The elements test asks whether all the elements of one offense are contained within another. If so, then a defendant may not be punished for committing both offenses in one instance.

burglary offense under an elements test;[245] however, the DCCA appears to still consider its prior case law declaring trespass to be an LIO of burglary as binding.[246] The DCCA has repeatedly declined to clarify this tension.[247] By their elements, the revised trespass offense is an LIO of the revised burglary offense, thereby clarifying the current ambiguity. This clarification would also appear to be in line with District practice, as well.[248]

Second, by use of the word "therein," the revised burglary statute clarifies that the defendant must intend to commit the offense within the place trespassed upon. Although this requirement does not appear in the statutory text, the DCCA has included this requirement in some of its recitations of burglary's elements.[249] The purpose is to exclude from liability instances where a person passes through one property *en route* to the property where he or she intends to commit the crime.[250]

Third, the revised burglary statute clarifies that participants in the crime cannot be the "other person" required in first-degree and second-degree burglary. The current statute is silent on this matter. The basis for treating burglaries of occupied places more seriously is the added danger and terror those occupants may experience. Such danger and terror is far less likely to occur if the other person present during the crime is an accomplice, co-conspirator, or aider and abettor. "Participant" is intended to be construed broadly.

Finally, the revised burglary statute updates and modernizes the language of the offense in various other ways that do not change the scope of the offense. For instance, the revised offense simply eliminates a number of contradictory and redundant phrases.[251] Existing District

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[245] Currently, burglary does not require proof that the entry be without consent or against the will of the occupant, and trespass does not require proof of intent to commit a crime. *See Sydnor v. United States*, 129 A.3d 909, 913 (D.C. 2016).

[246] *Id*.

[247] *Id*.

[248] The Redbook includes trespass as a lesser included offense, though notes it is "not a lesser included when defendant entered the property with permission," citing *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974). Such circumstances being "rare," s*ee Whitaker*, 447 F.2d at 349, from a practical standpoint it seems that trespass is treated as an LIO in most cases.

[249] *Shelton v. United States*, 505 A.2d 767, 769 (D.C. 1986) ("A conviction for burglary requires a finding that the defendant entered the premises having already formed the intent to commit a criminal offense inside."); *Marshall v. United States*, 623 A.2d 551, 557 (D.C. 1992) ("In order to prove armed first degree burglary, the government must establish beyond a reasonable doubt, an armed entry (by appellant or by a principal aided and abetted by appellant) into an occupied dwelling with the intent to commit a crime therein. The intent to commit the crime inside the premises must have been formed by the time of the entry.") (internal citations omitted); *Lee v. United States*, 699 A.2d 373, 383 (D.C. 1997) ("To prove burglary, the government must establish that the defendant entered the premises having already formed an intent to commit a crime therein.") (internal quotations and citations omitted).

[250] For example, imagine adjacent houses A and B. A burglar plans to enter House B to steal property; but to do so, she knows she must cross over the backyard of House A to get to House B. She does so. Absent the requirement that the burglar must intend to commit an offense "therein," it appears that the burglar has actually committed burglary twice, once as to House A and once as to House B. Although counterintuitive, the burglar did trespass with intent to commit an offense when she entered the backyard of House A. Under the revised statute, the burglar would only be guilty of a trespass as to House A, and a burglary as to House B.

[251] The phrases are, "in the nighttime or in the daytime," which is pure surplusage; "break and enter, or enter without breaking," which is also surplusage; "room used as a sleeping apartment in any building," which is covered by the Revised Criminal Code's definition of dwelling; and "with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto," which is surplusage to the phrase "with intent to commit any criminal offense therein." D.C. Code § 22-801. In the case of second-degree burglary, "bank, store, warehouse, shop, stable," are redundant because each is covered by the broader term "building."

case law is retained as to the meaning of "enters,"[252] whether a location is "occupied by a person,"[253] the requirement that the intent to commit the target offense must be held at the moment of entry or start of surreptitious remaining,[254] the effect of a defendant intending to commit multiple crimes upon entry,[255] and the necessity of proving a culpable mental state as part of the defendant's intent to commit a crime.[256]

Relation to National Legal Trends. *The above-mentioned substantive changes to current District burglary law are broadly supported by national legal trends.*

First, regarding the revised burglary offense's requirement that the defendant's presence in the location is "without effective consent" or trespassory, nearly all jurisdictions require some kind of trespass or otherwise limit the sort of entry to one that is unlawful or somehow illicit by statute. Within the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[257] the most common means of imposing this requirement is through the use of the word "unlawfully."[258] Some states' statutes say that the entry must be "without authority,"[259]

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[252] The DCCA has clarified that entry does not require complete or full entry of the body. For instance, reaching a hand in through a door is sufficient. *Davis v. United States*, 712 A.2d 482, 485-86 (D.C. 1998). See also *Roane v. United States*, 432 A.2d 1218, 1220 (D.C. 1981); *United States v. Thomas*, 444 F.2d 919, 927 (D.C. Cir. 1971). Both *Roane* and *Thomas* ultimately reversed the burglary convictions on other grounds, but both cases accepted that proof of partial entry was sufficient to meet the definition of "entry." See also, *Hagood v. United States*, 93 A.3d 210, 228 (D.C. 2014) (defendants partially entered a home and were properly convicted of burglary).

[253] The current first-degree burglary offense requires proof that "any person is any part of [a] dwelling or sleeping apartment at the time" of the entry, and the revised statute is intended to preserve case law requiring the other to be in the location at the moment of the defendant's entry in *Edelen v. United States*, 560 A.2d 527, 529 (D.C. 1989) (per curiam) (upholding burglary conviction where defendant forced victim to open the door to her apartment, forced her inside, and then immediately entered thereafter). See also *Watson v. United States*, 524 A.2d 736, 737-38 (D.C. 1987).

[254] *Hawthorne v. United States*, 476 A.2d 164, 168 (D.C. 1984) ("The crime of burglary requires an entry, with or without a breaking, and a contemporaneous intent to commit a criminal offense."); United States v. Fox, 433 F.2d 1235, 1236-37 (D.C. Cir. 1970) ("The intended theft need not have been consummated; what is crucial is whether the act of entering coincided, in point of time, with an intent, in the statutory language, 'to commit any criminal offense.").

[255] *See Bailey v. United States*, 831 A.2d 973, 987 (D.C. 2003); *Bowman v. United States*, 652 A.2d 64, 70 (D.C. 1994) ("That is why appellant was charged with only one count of burglary with intent to commit an assault. A burglary with intent to commit two assaults [assuming that appellant had such an intent] is still a single, unitary burglary."); *Lee v. United States*, 699 A.2d 373, 383 (D.C. 1997) ("Each appellant's two burglary convictions merge."); *Hanna v. United States*, 666 A.2d 845, 858 (D.C. 1995) ("The two first degree burglary while armed charges . . . merge because they are both based on appellants' entry into apartment 302."); *Thorne v. United States*, 471 A.2d 247, 248 n.1 (D.C. 1983) (citing *Whalen v. United States*, 379 A.2d 1152, 1157 (D.C. 1977), *rev'd on other grounds by* 445 U.S. 684 (1980)).

[256] As in an attempt, there must be proof that a defendant intended not only to complete the actus reus of the target offense, but also, that he or she possessed the requisite mental state of the target offense. *Mills v. United States*, 228 F.2d 645 (D.C. Cir. 1955). E.g., a defendant who breaks into his neighbor's home to retrieve what the defendant believes are his own tools would not be guilty of a burglary. This is the case even if the defendant accidentally takes tools that in fact belong to his neighbor. Because theft demands that the defendant be practically certain that the property taken be of another, the defendant cannot be said to intend to complete the offense of theft.

[257] 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.

[258] Ala. Code § 13A-7-5; Alaska Stat. Ann. § 11.46.300; Ariz. Rev. Stat. Ann. § 13-1508; Ark. Code Ann. § 5-39-201; Colo. Rev. Stat. Ann. § 18-4-202; Conn. Gen. Stat. Ann. § 53a-101; Del. Code Ann. tit. 11, § 826; Haw. Rev.

"unauthorized,"[260] or (following the MPC[261]) that the defendant is not "licensed or privileged" to enter.[262] The remaining approaches vary. One state codifies a requirement that the place burgled be "of another,"[263] and another requires that the defendant "break" into the building.[264] Only one reformed jurisdiction seems to omit a trespassory element from the statutory offense definition entirely.[265] That state, however, also codifies a defense that applies when the defendant is "licensed or privileged to enter."[266] Finally, two states use the phrase "without effective consent" as proposed in the revised burglary offenses for the RCC, and two other states use the phrase "without consent.[267] Tennessee and Texas both use this phrase in their burglary offenses.[268] Finally, one state codifies this element by stating that "[n]o person, by force, stealth, or deception, shall . . . trespass in an occupied structure[.]"[269]

Among jurisdictions that have not undergone comprehensive reform of their codes based on the MPC, five states' statutes require no proof of that the entry was trespassory.[270] It may be that, like the District, courts of these five states require proof that the building be "of another" or otherwise that the entry be something similar to a trespass; nothing, however, is required by the statutory language in these jurisdictions. Five other states retain the use of the common law requirement, "breaks."[271] Additionally, twelve unreformed jurisdictions use some trespass-like

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Stat. Ann. § 708-810; Ky. Rev. Stat. Ann. § 511.020; Mo. Ann. Stat. § 569.160; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.Y. Penal Law § 140.30; Or. Rev. Stat. Ann. § 164.225; Utah Code Ann. § 76-6-203; Wash. Rev. Code Ann. § 9A.52.020.

[259] Kan. Stat. Ann. § 21-5807; 720 Ill. Comp. Stat. Ann. 5/19-1; Wyo. Stat. Ann. § 6-3-301.

[260] N.M. Stat. Ann. § 30-16-4.

[261] Model Penal Code § 221.1.

[262] Me. Rev. Stat. tit. 17-A, § 401; N.J. Stat. Ann. § 2C:18-2; N.D. Cent. Code Ann. § 12.1-22-02; S.D. Codified Laws § 22-32-1.

[263] Ind. Code Ann. § 35-43-2-1.

[264] Neb. Rev. Stat. Ann. § 28-507.

[265] 18 Pa. Stat. and Cons. Stat. Ann. § 3502.

[266] *Id*.

[267] Two states use effective consent. Tenn. Code Ann. § 39-14-402; Tex. Penal Code Ann. § 30.02. Two states use consent. Minn. Stat. Ann. § 609.582; Wis. Stat. Ann. § 943.10.

[268] *Id*.

[269] Ohio Rev. Code Ann. § 2911.12.

[270] Cal. Penal Code § 459 ("Every person who enters any house . . .with intent to commit grand or petit larceny or any felony is guilty of burglary."); Idaho Code Ann. § 18-1401 ("Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, trailer, airplane or railroad car, with intent to commit any theft or any felony, is guilty of burglary."); Nev. Rev. Stat. Ann. § 205.060 ("Except as otherwise provided in subsection 5, a person who, by day or night, enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane, glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary."); W. Va. Code Ann. § 61-3-11 ("If any person shall, in the daytime, enter without breaking a dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a crime therein, he shall be deemed guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than ten years.").

[271] Md. Code Ann., Crim. Law § 6-202 ("A person may not break and enter the dwelling of another with the intent to commit theft."); Mich. Comp. Laws Ann. § 750.110 ("A person who breaks and enters, with intent to commit a felony or a larceny therein, a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, shipping container, or railroad car is guilty of a felony punishable by imprisonment for not more than 10 years."); Neb. Rev. Stat. Ann. § 28-507 ("A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value."); Okla. Stat. Ann. tit. 21, § 1431 ("Every person

element in their burglary statutes. Four states use the phrase, "without authority,"[272] four use the phrase, "without consent,"[273] and four follow the MPC and use the phrase, "without license or privilege."[274] Although these terms all lack the precision of the Revised Criminal Code's "effective consent," one scholar has concluded that in those jurisdictions that use the term "breaks," most of these jurisdictions "permit 'constructive breaking,' meaning entry gained by artifice, trick, fraud or threat."[275] In some instances, state case law has highlighted the absurdities that can happen without requiring burglary to be trespassory.[276]

Second, the inclusion of an alternative element of "remaining" is also present among other nearly all the reform jurisdictions.[277] However, these states generally codify "remaining"

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who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either . . . ."); Va. Code Ann. § 18.2-90 ("If any person in the nighttime enters without breaking or in the daytime breaks and enters or enters and conceals himself in a dwelling house or an adjoining, occupied outhouse or in the nighttime enters without breaking or at any time breaks and enters or enters and conceals himself in any building permanently affixed to realty, or any ship, vessel or river craft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation, with intent to commit murder, rape, robbery or arson in violation of §§ 18.2-77, 18.2-79 or § 18.2-80, he shall be deemed guilty of statutory burglary, which offense shall be a Class 3 felony.").

[272] Ga. Code Ann. § 16-7-1 ("A person commits the offense of burglary in the first degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied, unoccupied, or vacant dwelling house of another or any building, vehicle, railroad car, watercraft, aircraft, or other such structure designed for use as the dwelling of another."); La. Stat. Ann. § 14:62 ("Simple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60."); Wyo. Stat. Ann. § 6-3-301 ("A person is guilty of burglary if, without authority, he enters or remains in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with intent to commit theft or a felony therein.").

[273] S.C. Code Ann. § 16-11-311 ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either . . . .")

[274] Fla. Stat. Ann. § 810.02 (burglary is "[e]ntering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter . . . ."); Iowa Code Ann. § 713.1 ("Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary."); Vt. Stat. Ann. tit. 13, § 1201 ("A person is guilty of burglary if he or she enters any building or structure knowing that he or she is not licensed or privileged to do so, with the intent to commit a felony, petit larceny, simple assault, or unlawful mischief.").

[275] Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 IND. L. REV. 629, 644 (2012).

[276] *See, e.g., In re T.J.E.*, 426 N.W.2d 23, 25 (S.D. 1988). The South Dakota Supreme Court reversed a conviction where an eleven-year-old girl was charged with burglary after she entered a store with her aunt, took a piece of Easter candy off the shelf, and ate it without paying for it. *Id*. at 23. The court read in a requirement that there be an "unlawful remaining," largely on the basis of avoiding a perceived "absurdity." *Id.* One concurring justice described the result as "a type of horror/nonsensical situation" that arises from not requiring the remaining be somehow trespassory. *Id*. at 26. Subsequent to the case, South Dakota amended its statute to say directly that a person is not guilty of burglary if the person is licensed or privileged to remain. *See State v. Miranda*, 776 N.W.2d 77, 82 (S.D. 2009).

[277] Ala. Code § 13A-7-5; Alaska Stat. Ann. § 11.46.300; Ariz. Rev. Stat. Ann. § 13-1508; Ark. Code Ann. § 5-39-201; Colo. Rev. Stat. Ann. § 18-4-202; Conn. Gen. Stat. Ann. § 53a-101; Del. Code Ann. tit. 11, § 826; Haw. Rev. Stat. Ann. § 708-810; 720 Ill. Comp. Stat. Ann. 5/19-1; Kan. Stat. Ann. § 21-5807; Ky. Rev. Stat. Ann. § 511.020; Mo. Ann. Stat. § 569.160; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.Y. Penal Law § 140.30; Ohio Rev. Code Ann. § 2911.12 (Ohio uses the element "trespasses," which includes entry and remaining); Or. Rev. Stat. Ann. § 164.225; S.D. Codified Laws § 22-32-1; Utah Code Ann. § 76-6-203; Wash. Rev. Code Ann. § 9A.52.020.

alone, without that the requirement that the remaining be surreptitious. Five states do codify "surreptitious remaining" or similar language.[278] And finally, four states only use "enters" and do not permit convictions based on remaining at all.[279]

Third, jurisdictions vary in the types of places that are protected by burglary. Burglary historically protected dwellings,[280] and that history has carried forward: nearly all reformed jurisdictions make use of dwelling (or its functional equivalent) in their definitions of burglary.[281] Protecting "buildings" or some functional equivalent (e.g., "structure" or "non-residential structure") is also nearly universal.[282] Less common is something akin to the Revised Criminal Code's "business yard."[283] However, two jurisdictions incorporate places like business yards in their definitions of "building."[284] Although some jurisdictions include "watercraft" in their definition of "building," they generally do so only if the "vehicle, aircraft, or watercraft [is] used for the lodging of persons or carrying on business therein."[285] Eleven states include railcars by statute, which the revised burglary omits.[286] Of course, such places, if they are used for lodging, would be covered under the Revised Criminal Code's definition of dwelling.

Fourth, the factors used to grade burglary vary widely across reform jurisdictions, but generally these states tend to penalize the invasion of a dwelling more severely than invasion of a non-dwelling. The use of the presence of another person is also a grading distinction adopted in six other reformed jurisdictions.[287] Eleven jurisdictions have two grades of burglary, while fifteen have three or more grades of burglary.[288]

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[278] Me. Rev. Stat. tit. 17-A, § 401; N.J. Stat. Ann. § 2C:18-2; N.D. Cent. Code Ann. § 12.1-22-02; Tenn. Code Ann. § 39-14-404; Tex. Penal Code Ann. § 30.02.

[279] Ind. Code Ann. § 35-43-2-1; Minn. Stat. Ann. § 609.582; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Wis. Stat. Ann. § 943.10.

[280] Sir Edward Coke, The Third Part of the Institutes of the Laws of England 63 (London, W. Clarke & Sons 1809) (1644).

[281] Ala. Code § 13A-7-5; Alaska Stat. Ann. § 11.46.300; Ariz. Rev. Stat. Ann. § 13-1508; Colo. Rev. Stat. Ann. § 18-4-203; Conn. Gen. Stat. Ann. § 53a-102; Del. Code Ann. tit. 11, § 825; 720 Ill. Comp. Stat. Ann. 5/19-3; Ind. Code Ann. § 35-43-2-1.5; Ky. Rev. Stat. Ann. § 511.030; Mo. Ann. Stat. § 569.170; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.M. Stat. Ann. § 30-16-3; N.Y. Penal Law § 140.30; N.D. Cent. Code Ann. § 12.1-22-02; Ohio Rev. Code Ann. § 2911.12; Or. Rev. Stat. Ann. § 164.225; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Tenn. Code Ann. § 39-14-403; Tex. Penal Code Ann. § 30.02; Utah Code Ann. § 76-6-202; Wash. Rev. Code Ann. § 9A.52.025.

[282] Ala. Code § 13A-7-7; Alaska Stat. Ann. § 11.46.310; Ariz. Rev. Stat. Ann. § 13-1506; Colo. Rev. Stat. Ann. § 18-4-203; Conn. Gen. Stat. Ann. § 53a-103; Del. Code Ann. tit. 11, § 824; Haw. Rev. Stat. Ann. § 708-811; 720 Ill. Comp. Stat. Ann. 5/19-1; Ind. Code Ann. § 35-43-2-1; Ky. Rev. Stat. Ann. § 511.040; Me. Rev. Stat. tit. 17-A, § 401; Mo. Ann. Stat. § 569.170; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.J. Stat. Ann. § 2C:18-2; N.M. Stat. Ann. § 30-16-3; N.Y. Penal Law § 140.20; N.D. Cent. Code Ann. § 12.1-22-02; Ohio Rev. Code Ann. § 2911.12; Or. Rev. Stat. Ann. § 164.215; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Tenn. Code Ann. § 39-14-402; Utah Code Ann. § 76-6-202; Wash. Rev. Code Ann. § 9A.52.030; Wyo. Stat. Ann. § 6-3-301.

[283] Ariz. Rev. Stat. Ann. § 13-1506.

[284] Ala. Code § 13A-7-1; Wash. Rev. Code Ann. § 9A.04.110.

[285] Ala. Code § 13A-7-1; Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-39-101; Haw. Rev. Stat. Ann. § 708-800; Ky. Rev. Stat. Ann. § 511.010; Minn. Stat. Ann. § 609.556.

[286] Ala. Code § 13A-7-1; Ariz. Rev. Stat. Ann. § 13-1501; Conn. Gen. Stat. Ann. § 53a-100; Haw. Rev. Stat. Ann. § 708-800; 720 Ill. Comp. Stat. Ann. 5/19-1; Kan. Stat. Ann. § 21-5807 (West 2017; Miss. Code. Ann. § 97-17-33; S.D. Codified Laws § 22-1-2; Tenn. Code Ann. § 39-14-402; Wash. Rev. Code Ann. § 9A.04.110; Wis. Stat. Ann. § 943.10.

[287] Colo. Rev. Stat. Ann. § 18-4-203; Conn. Gen. Stat. Ann. § 53a-102; Mo. Ann. Stat. § 569.160; N.H. Rev. Stat. Ann. § 635:1; Ohio Rev. Code Ann. § 2911.11; 18 Pa. Stat. and Cons. Stat. Ann. § 3502.

[288] One jurisdiction has one grade of burglary. Neb. Rev. Stat. Ann. § 28-507. Eleven jurisdictions have two grades of burglary. Alaska Stat. Ann. § 11.46.300-10; 720 Ill. Comp. Stat. Ann. 5/19-3; Mo. Ann. Stat. § 569.160-70;

Fifth, regarding the bar on multiple convictions for the revised burglary offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. However it does appear to be the case that, in other jurisdictions, trespass is commonly considered a lesser-included offense (LIO) of burglary. Generally, a determination of the LIO relationship is matter of case law, and most states appear to determine the LIO relationship on the basis of examining statutory elements.[289] Although it appears to be more common than not that trespass is an LIO of burglary, some reformed code jurisdiction takes the opposite view.[290] Aside from these cases, research has not identified any equivalent statutory provision to either the current Consecutive sentences[291] 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,[292] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[293]

Sixth, reform jurisdictions vary in the required semi-inchoate intent that distinguishes burglary from trespass. At common law, intent to commit a felony was required, but that standard has loosened. Seventeen states have at least one grade of burglary that requires proof the defendant intended to commit any offense (felony or misdemeanor).[294] Thirteen states do

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Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.J. Stat. Ann. § 2C:18-2; N.D. Cent. Code Ann. § 12.1-22-02; Or. Rev. Stat. Ann. § 164.215-25; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Wash. Rev. Code Ann. § 9A.52.020-30; Wyo. Stat. Ann. § 6-3-301. Seven jurisdictions have three grades of burglary. Ala. Code § 13A-7-5-7; Ariz. Rev. Stat. Ann. § 13-1506-08; Conn. Gen. Stat. Ann. § 53a-101-03; Ky. Rev. Stat. Ann. § 511.020-030; Haw. Rev. Stat. Ann. § 708-810-11; N.M. Stat. Ann. § 30-16-3-4; N.Y. Penal Law § 140.20-30. Six jurisdictions have four grades of burglary. Colo. Rev. Stat. Ann. § 18-4-202-04; Del. Code Ann. tit. 11, § 824-26; Me. Rev. Stat. tit. 17-A, § 401; Tenn. Code Ann. § 39-14-402-04; Tex. Penal Code Ann. § 30.02; Utah Code Ann. § 76-6-202-03. Two jurisdictions have five grades of burglary. Ind. Code Ann. § 35-43-2-1; Ohio Rev. Code Ann. § 2911.11-13.

[289] *E.g., Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985) ("Criminal trespass can be a lesser included offense of burglary of a building."); State v. Terry, 118 S.W.3d 355, 359 (Tenn. 2003) ("we conclude that aggravated criminal trespass is a lesser-included offense of aggravated burglary. Thus, we also conclude that attempted aggravated criminal trespass is a lesser-included offense of attempted aggravated burglary."); People v. Devonish, 843 N.E.2d 1120, 1120 (2005) ("It was error to refuse defendant's request that the jury be charged with the lesser included offense of criminal trespass in the second degree."); *State v. Singleton*, 675 A.2d 1143, 1146 (N.J. App. Div. 1996) (trespass is a lesser-included offense of burglary, and therefore, judge erred when failing to instruct jury on trespass in burglary case); *State v. Williams*, 708 P.2d 834, 835 (Haw. 1985) ("Criminal trespass in the first degree is a lesser included offense of burglary in the first degree."); *State v. Harvey*, 713 P.2d 517, 520 (Mont. 1986) ("A reading of the criminal trespass and burglary statutes clearly shows that criminal trespass is a lesser included offense of burglary."); *State v. Smith*, No. SC 95461, 2017 WL 2952325, at *3 (Mo. July 11, 2017).

[290] E,g., *Commonwealth v. Quintua*, 56 A.3d 399, 402 (Penn. Super. Ct. 2012) (trespass is not a lesser-included offense of burglary, because trespass requires proof the defendant knew he or she was not permitted to enter, while burglary does not). *People v. Satre*, 950 P.2d 667, 668 (Colo. App. 1997) ("we conclude that first degree criminal trespass is not a lesser included offense of first degree burglary."); *State v. Malloy*, 639 P.2d 315, 320–21 (Ariz. 1981) ("Since in [burglary] the phrase "entering or remaining unlawfully" is not modified by the term "knowingly", in order to convict a defendant of burglary in the third degree, the prosecution need not prove that the defendant was aware of the unlawfulness of his entry. There need only be shown that the entry was knowingly or voluntarily made. Criminal trespass is not necessarily a lesser included offense of burglary.").

[291] D.C. Code § 22-3203.

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

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

[294] Ala. Code § 13A-7-7; Alaska Stat. Ann. § 11.46.300; Colo. Rev. Stat. Ann. § 18-4-204; Conn. Gen. Stat. Ann. § 53a-103; Del. Code Ann. tit. 11, § 824; Ky. Rev. Stat. Ann. § 511.040; Me. Rev. Stat. tit. 17-A, § 401; Mo. Ann. Stat. § 569.160; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.J. Stat. Ann. § 2C:18-2; N.Y. Penal

require that the defendant intend to commit a felony, but they almost always permit proof of intent to commit theft (felony or misdemeanor) and sometimes an assault (felony or misdemeanor).[295] But since it appears most burglaries are based on the defendant's intent to steal, the inclusion of an intent to commit any theft would seemingly broaden the scope of burglary in these jurisdictions to substantially match the others.[296]

Lastly, it is notable that a recent study funded by the Department of Justice also provides a sensible basis for the RCC's grading scheme.[297] This study suggest two important empirical facts: first, burglaries as a whole are typically not violent: only 2.7% of burglaries involved actual physical injury, only 2.4% involved a defendant who was armed with a weapon, and only 4.9% involved a defendant who threatened violence or placed victims in fear.[298] When burglaries were of a dwelling, the authors state that a person other than the defendant was present 26% of the time.[299] Additionally, of the burglaries that are violent, 91% occur within a dwelling.[300] However, violent burglaries are still rare: only a small fraction of dwelling burglaries involve violence.[301] Nevertheless, distinguishing between occupied dwellings and other buildings sensibly reflects the greater risk of harm in burglaries of dwellings.

Law § 140.30 (McKinney); N.D. Cent. Code Ann. § 12.1-22-02; Ohio Rev. Code Ann. § 2911.11; Or. Rev. Stat. Ann. § 164.225; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Wash. Rev. Code Ann. § 9A.52.030.

[295] Ala. Code § 13A-7-6; Ariz. Rev. Stat. Ann. § 13-1508; Colo. Rev. Stat. Ann. § 18-4-202; Haw. Rev. Stat. Ann. § 708-810; 720 Ill. Comp. Stat. Ann. 5/19-1; Ind. Code Ann. § 35-43-2-1; Neb. Rev. Stat. Ann. § 28-507; N.M. Stat. Ann. § 30-16-4; Ohio Rev. Code Ann. § 2911.13; Tenn. Code Ann. § 39-14-404; Tex. Penal Code Ann. § 30.02; Utah Code Ann. § 76-6-203; Wyo. Stat. Ann. § 6-3-301.

[296] Additionally, a few states mix both sorts of intents, and use the intended offense as a basis for grading the offense. *E.g.*, compare Ala. Code § 13A-7-7 (second-degree burglary requiring proof of intent to commit a theft or felony) with Ala. Code § 13A-7-6 (third-degree burglary requiring proof of intent to commit any crime).

[297] RICHARD F. CULP ET AL., IS BURGLARY A CRIME OF VIOLENCE? AN ANALYSIS OF NATIONAL DATA 1998-2007 ii (2015), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf (last visited Aug. 4, 2017).

[298] *Id*. at 29-30. The report's authors also noted that the incidence of violence differed based on the database used. However, the authors stated that, "Expressed as a range, an average of between .9% and 7.6% of burglaries between 1998 and 2007 resulted in actual physical violence, or threats of violence." *Id*. at 34.

[299] *Id*. at 38.

[300] *Id*. at 40.

[301] *Id*. at 39. The authors state that 30,133 burglaries over the relevant time period (1998 -2007) involved violence. Of these, 27,293 were residential burglaries. However, 3,401,559 burglaries were non-violent. Of these non-violent burglaries, 2,277,069 were residential burglaries.

RCC § 22A-2702. Possession of Burglary and Theft Tools.

(a) *Offense.* A person commits the offense of possession of burglary and theft tools if that person:
  (1) Knowingly possesses;
  (2) A tool, or tools, created or specifically adapted for picking locks, cutting chains, bypassing an electronic security system, or bypassing a locked door;
  (3) With intent to use the tool or tools to commit a crime.

(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206.

(c) *Penalty*. Possession of burglary and theft tools is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *No Attempt Possession of Burglary and Theft Tools Offense*. It is not an offense to attempt to commit the offense described in this section.

Commentary

Explanatory Note. *This section establishes the possession of burglary and theft tools offense and penalty for the Revised Criminal Code (RCC). The offense criminalizes possession of tools created or specifically adapted for picking locks, cutting chains, or bypassing electronic security systems with intent to use the tool or tools to commit a crime. The revised possession of burglary and theft tools statute replaces the possession of implements of crime[302] statute in the current D.C. Code.*

Subsection (a)(1) specifies that the defendant must "possess," 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 defendant must be aware to a practical certainty or consciously desire the circumstance in subsection (a)(1) or the circumstance in subsection (a)(2). Subsection (a)(2) specifies that the types of tools that are covered by the offense are limited to tools for picking locks, cutting chains, or bypassing an electronic security system.[303] The tools must be created or specifically adapted for such use, and do not include unmodified, common, general use objects.[304] Subsection (a)(3) clarifies that the defendant must have intent to use the tool to commit a crime, where "intent" is a term defined at RCC § 22A-206 to mean the defendant consciously desired, or was practically certain, that he or she would use the tool to commit a crime. It is not necessary to prove that the defendant actually used the tool to commit a crime, only that the defendant consciously desired, or believed to a practical certainty that he or she would use it to commit a crime.

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

Subsection (c) establishes the penalty for this offense. There is only one grade of possession of burglary and theft tools.

[302] D.C. Code § 22-2501.

[303] *E.g.*, lock picks, lock shims, boltcutters, computer software to deactivate security systems, and specialty tools to slide under locked doors to open them from the inside.

[304] *E.g.*, an unmodified small (jeweler's) screwdriver would not be created or specifically adapted for picking locks, nor would an unmodified prybar be created or specifically adapted for bypassing an electronic security system.

Subsection (d) specifies that attempted possession of burglary and theft tools is not an offense.

Relation to Current District Law. *The revised possession of burglary and theft tools statute changes District law in five main ways to reduce unnecessary overlap and gaps in offenses, to clarify, and to improve the proportionality of statutes*

First, the revised statute changes the range of tools subject to the offense by including tools for purposes of "cutting chains, bypassing an electronic security system, or bypassing a locked door" and eliminating tools for picking pockets. The current statute only covers tools "for picking locks or pockets."[305] District case law has explicitly held that bolt-cutters, an item clearly within the ambit of the revised statute, are not tools covered by the current statute.[306] The revised statute would nullify District case law regarding bolt cutters,[307] however, the revised statute is intended to uphold case law defining tools for picking locks as tools that allow the "opening of the lock without the use of the original or duplicate keys and without damage to the lock."[308] The revised statute modernizes and reduces unnecessary gaps in the existing offense by expanding the offense to specified tools that may commonly be used in theft and burglary.

Second, the revised offense limits the offense to tools "created or specifically adapted for" the specified purposes. The current statute is silent as to whether the tool must be fashioned in a manner suited for the specified purposes of picking locks, etc. However, DCCA case law suggests that any object that could in any way facilitate picking pockets constitutes a tool for picking pockets.[309] The current broad scope of construing what constitutes a tool would potentially implicate many common items carried by ordinary citizens,[310] making proof of the offense turn solely on criminal intent of any sort. To clarify the scope of the offense and to help ensure proportionate penalties, the revised statute no longer covers objects that are not created or specifically adapted for one of the stated purposes.

Third, the revised statute eliminates the repeat offender provision in the current statute. In current law, the offense ordinarily is punishable by a maximum 180 day sentence, or a $1,000 fine, or both.[311] However, if the defendant has ever been previously convicted of this offense, or of any felony, the offense is punishable by a maximum of five years, with a one year minimum, or a fine of $12,500 or both.[312] Under the revised statute, the general repeat offender provision under RCC § 22A-806 would still apply to a defendant with two or more prior convictions for possession of burglary and theft tools[313] and, in cases in which the government can prove intent to use the tool to commit a crime, there may also be sufficient evidence to prove an attempt to

[305] D.C. Code § 22-2501.
[306] *Cf. In re J.W.*, 100 A.3d 1091, 1092-93 (D.C. 2014) (holding that bolt cutters do not constitute tools for picking pockets).
[307] *Id*.
[308] *Id*. at 1092-93.
[309] *See Lampkins v. United States*, 401 A.2d 966, 969 (D.C. 1979). In *Lampkins*, a defendant dropped coins on the floor next to a victim to distract him, while a co-defendant picked his pocket. The defendant was convicted of, *inter alia*, possession of implements of a crime. The convictions were reversed on unrelated grounds, and the court never directly addressed the issue of whether coins can constitute implements of crime, but the case suggests that almost any object can constitute a tool for picking pockets.
[310] *E.g.*, nail files, nail clippers, or pocket knives.
[311] D.C. Code § 22-2501.
[312] D.C. Code § 22-2501.
[313] RCC § 22A-806.

commit that crime.[314] Elimination of the repeat offender provision improves the proportionality of the revised statute and is consistent with other criminal offenses.

Fourth, the revised offense bars any attempt liability. Under current law, possession of implements of crime is subject to the general attempt statute.[315] Under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22A-301 as to possession of burglary and theft tools, that person has committed no offense under the revised statute. Completed possession of burglary and theft tools is already similar to an attempted form of theft or burglary, for which the RCC provides liability. Elimination of attempt liability improves the proportionality of the revised statute.

Fifth, the provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised possession of burglary and theft tools offense and other offenses in Chapters 26 and 27 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.[316] However, possession of burglary and theft tools is not among those offenses and, as described in the commentary to RCC § 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 possession of burglary and theft tools 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.

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

First, the revised extortion 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 defendant have an intent to commit a crime with the tool,[317] a knowing culpable mental state as to the facts that the defendant possessed a relevant kind of tool appears appropriate. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[318] Requiring a knowing culpable mental state also makes the revised possession of burglary and theft tools offense consistent with the revised burglary statute and other property

[314] *E.g.*, *In re J.W.*, 100 A.3d at 1091 (police found respondent wearing a ski mask during the summer time, examining in close proximity a locked scooter, while holding bolt cutters. On these facts in the RCC, the government might plausibly be able to convict a defendant for both possession of burglary and theft tools and attempted theft.).

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

[316] 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.").

[317] D.C. Code § 22-2501 ("No person shall have in his or her possession [an implement of crime] with the intent to use [the implement] to commit a crime.").

[318] *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)").

offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[319]

The remaining 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 revised possession of burglary and theft tools offense's above-mentioned substantive changes to current District law are not well supported by national legal trends because the District is an outlier in criminalizing possession of implements of crime.*

Most jurisdictions do not have analogous statutes, though some states have similar statutes that are limited to possession of burglary tools.[320] However, some states have broader statutes that criminalize possession of any tool with intent to use it criminally[321], or any tool that is specifically adapted for criminal use.[322]

Regarding the bar on multiple convictions for the revised possession of burglary and theft tools 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 possession of burglary and theft tools offense and other overlapping property offenses. For example, where the offense most like the revised possession of burglary and theft tools 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[323] 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,[324] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[325]

[319] *See, e.g.*, RCC § 22A-2201.
[320] Cal. Penal Code § 466; Idaho Code Ann. § 18-1406; N.M. Stat. Ann. § 30-16-5; Wis. Stat. Ann. § 943.12.
[321] Ohio Rev. Code Ann. § 2923.24.
[322] 18 Pa. Stat. Ann. § 907.
[323] D.C. Code § 22-3203.
[324] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[325] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.