First Draft of Report #8
Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions

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. 8, *Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions*, 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. 8. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Subtitle III. Property Offenses.

Chapter 20. Property Offense Subtitle Provisions.

RCC § 22A-2001. Property Offense Definitions.

In this subtitle, the term:

(1) "Attorney General" means the Attorney General for the District of Columbia.

(2) "Building" means a structure affixed to land that is designed to contain one or more human beings.

(3) "Business yard" means securely fenced or walled land where goods are stored or merchandise is traded.

(4) "Check" means any written instrument for payment of money by a financial institution.

(5) "Coercion" means causing another person to fear that, unless that person engages in particular conduct, then another person will:
- (A) Inflict bodily injury on another person;
- (B) Damage or destroy the property of another person;
- (C) Kidnap another person;
- (D) Commit any other offense;
- (E) Accuse another person of a crime;
- (F) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule;
- (G) Notify a law enforcement official about a person's undocumented or illegal immigration status.
- (H) Inflict a wrongful economic injury on another person;
- (I) Take or withhold action as an official, or take action under color or pretense of right; or
- (J) Perform any other act that is calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships.

(6) "Consent" means words or actions that indicate an agreement to particular conduct. Consent includes words or actions that indicate indifference towards particular conduct. Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.

(7) "Court" means the Superior Court of the District of Columbia.

(8) "Deceive" and "deception" mean:
- (A) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions.
- (B) Preventing another person from acquiring material information;
- (C) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or
- (D) Failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record;
- (E) Provided that the term "deception" does not include puffing statements unlikely to deceive ordinary persons, and deception as to a person's intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.

(9) "Deprive" means:
- (A) To withhold property or cause it to be withheld from an owner permanently, or for so extended a period or under such circumstances that a substantial portion of its value or its benefit is lost to that person; or
- (B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

(10) "Dwelling" means a structure that is either designed for lodging or residing overnight, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each unit is an individual dwelling.

(11) "Effective consent" means consent obtained by means other than coercion or deception.

(12) "Elderly person" means a person who is 65 years of age or older.

(13) "Fair market value" means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied.

(14) "Financial injury" means all monetary costs, debts, or obligations incurred by a person as a result of another person's criminal act, including, but not limited to:
- (A) The costs of clearing the person's credit rating, credit history, criminal record, or any other official record;
- (B) The expenses related to any civil or administrative proceeding to satisfy or contest a debt, lien, judgment, or other obligation of the person,;
- (C) The costs of repairing or replacing damaged or stolen property;
- (D) Lost time or wages, or any similar monetary benefit forgone while the person is seeking redress for damages; and

(E) Legal fees.

(15) "Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, moped, truck, truck tractor, truck tractor with semitrailer or trailer, bus, or other vehicle propelled by an internal-combustion engine or electricity, including any non-operational vehicle that is being restored or repaired.

(16) "Occupant" means a person holding a possessory interest in property that the accused is not privileged to interfere with."

(17) "Owner" means a person holding an interest in property that the accused is not privileged to interfere with.

(18) "Payment card" means an instrument of any kind, including an instrument known as a credit card or debit card, issued for use of the cardholder for obtaining or paying for property, or the number inscribed on such a card. "Payment card" includes the number or description of the instrument.

(19) "Person" means an individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, or any other legal entity.

(20) "Property" means anything of value. The term "property" includes, but is not limited to:
(A) Real property, including things growing on, affixed to, or found on land;
(B) Tangible or intangible personal property;
(C) Services;
(D) Credit;
(E) Debt; and
(F) A government-issued license, permit, or benefit.

(21) "Property of another" means any property that a person has an interest in that the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property. The term "property of another" does not include any property in the possession of the accused that the other person has only a security interest in.

(22) "Services" includes, but is not limited to:
(A) Labor, whether professional or nonprofessional;
(B) The use of vehicles or equipment;
(C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;
(D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;
(E) Admission to public exhibitions or places of entertainment; and
(F) Educational and hospital services, accommodations, and other related services.

(23) "United States Attorney" means the United States Attorney for the District of Columbia.

(24) "Value" means:

(A) The fair market value of the property at the time and place of the offense; or

(B) If the fair market value cannot be ascertained:

(i) For property other than a written instrument, the cost of replacement of the property within a reasonable time after the offense;

(ii) For a written instrument constituting evidence of debt, such as a check, draft, or promissory note, the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied; and

(iii) For any other written instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument.

(C) Notwithstanding subsections (A) and (B) of this section, the value of a payment card is $[X] and the value of an unendorsed check is $[X].

(25) "Vulnerable adult" means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests.

(26) "Written instrument" includes, but is not limited to, any:

(A) Security, bill of lading, document of title, draft, check, certificate of deposit, and letter of credit, as defined in Title 28;

(B) A will, contract, deed, or any other document purporting to have legal or evidentiary significance;

(C) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity;

(D) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for or warrant or right to subscribe to or purchase any of the foregoing items;

(E) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or

(F) Other instrument commonly known as a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.

Commentary

This section establishes the definitions that are applicable to property offenses in Chapters 20-27 of the Revised Criminal Code (RCC).[1] Each definition is discussed separately, below.

(1) "Attorney General" means the Attorney General for the District of Columbia.

Explanatory Note. The definition of "Attorney General" provides a concise way to describe the District's Attorney General.

This term is statutorily defined for Chapter 9A of Title 22 of the D.C. Code, regarding criminal abuse and neglect of vulnerable adults.[2] The RCC definition is used in: financial exploitation of a vulnerable adult civil provisions,[3] criminal obstruction of a public road or walkway,[4] and unlawful demonstration.[5]

Relation to Current District Law. The RCC definition of "Attorney General" is identical to the statutory definition under current law.[6]

(2) "Building" means a structure affixed to land that is designed to contain one or more human beings.

Explanatory Note. The definition of "building" includes mainly enclosed spaces with walls and a roof, but also may extend to non-walled, elevated areas that restrict egress.

This term is not statutorily defined for property offenses in the D.C. Code. The RCC definition is used in: arson,[7] reckless burning,[8] trespass,[9] criminal obstruction of a public way,[10] and burglary.[11]

Relation to Current District Law. The RCC definition of "building" generally corresponds with existing District case law interpreting the term in the context of particular statutes. For example, certain Metro stations continue to be "buildings" under the RCC definition.[12]

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[1] The definitions of "appropriate" and "stolen property" currently applicable to Chapter 32 of Title 22 of the D.C. Code are deleted in the RCC because these terms are not used in the revised property offenses. See D.C. Code 22-3201(1) (""Appropriate" means to take or make use of without authority or right."); D.C. Code 22-3201(6) ("Stolen property" includes any property that has been obtained by conduct previously known as embezzlement.").

[2] D.C. Code § 22-932.

[3] RCC § 22A-2209.

[4] RCC § 22A-2603.

[5] RCC § 22A-2604.

[6] D.C. Code § 22-932(3).

[7] RCC § 22A-2501.

[8] RCC § 22A-2502.

[9] RCC § 22A-2601.

[10] RCC § 22A-2603.

[11] RCC § 22A-2701.

[12] *See, e.g., Swinson v. United States*, 483 A.2d 1160, 1163 ("The dictionary definition of the word "building" is "a thing built ... a constructed edifice designed to stand more or less permanently ... usually covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 292 (1969). Both the Rhode Island Avenue and Stadium Armory metro stations are "useful structures" that were "built"; each is "more or less completely enclosed by walls," covered by a roof, and intended for permanent use.").

Relation to National Legal Trends. The Model Penal Code (MPC) does not provide a definition for "building." However, it does provide a definition for "occupied structure" that is similar.[13]

(3) "Business yard" means securely fenced or walled land where goods are stored or merchandise is traded.

Explanatory Note. The definition of "business yard" includes mainly areas that are surrounded by some sort of barrier, such as a fence, where goods are kept for sale.

This term is not statutorily defined for property offenses in the D.C. Code. The RCC definition is used in: arson,[14] reckless burning,[15] criminal obstruction of a public way,[16] and burglary.[17]

Relation to Current District Law. The RCC definition of "business yard" generally corresponds with existing District case law interpreting the term in the context of particular statutes. For example, construction yards where goods are not stored would not constitute business yards under the RCC.[18]

Relation to National Legal Trends. The Model Penal Code (MPC) does not have a similar definition.

(4) "Check" means any written instrument for payment of money by a financial institution.

Explanatory Note. The definition of "check" includes any written instrument that authorizes payment by any financial institutions, including banks, credit unions, or savings and loan companies.

This term is not statutorily defined for property offenses in the D.C. Code. The RCC definition is used in: check fraud,[19] and the definition of value.[20]

Relation to Current District Law. The RCC definition of "check" generally corresponds with existing District law. However, the exact effect on current District law is unclear, as the current D.C. Code does not provide a statutory definition of "check," nor has the D.C. Court of Appeals defined the term.

Relation to National Legal Trends. The Model Penal Code (MPC) does not provide a definition for "check."

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[13] MPC § 221.0 ("'occupied structure' means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present."). The MPC does, however, employs the word "building" in the same offense definitions as "occupied structure," suggesting the two terms are intended to have different meanings.

[14] RCC § 22A-2501.

[15] RCC § 22A-2502.

[16] RCC § 22A-2603.

[17] RCC § 22A-2701.

[18] *Sydnor v. United States*, 129 A.3d 909, 913 (D.C. 2016) ("As the government failed to prove that the casings kept in the Nicholson construction site would later be sold, bartered, or exchanged, or that Nicholson kept the casings there for the purpose of a future commercial transaction rather than for the current needs of the construction project, the construction site cannot be considered a 'yard' under the burglary statute.").

[19] RCC § 22A-2203.

[20] RCC § 22A-2001(24).

(5) "Coercion" means causing another person to fear that, unless that person engages in particular conduct, then another person will:

(A) Inflict bodily injury on another person;

(B) Damage or destroy the property of another person;

(C) Kidnap another person;

(D) Commit any other offense;

(E) Accuse another person of a crime;

(F) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule;

(G) Notify a law enforcement official about a person's undocumented or illegal immigration status.

(H) Inflict a wrongful economic injury on another person;

(I) Take or withhold action as an official, or take action under color or pretense of right; or

(J) Perform any other act that is calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships.

***Explanatory Note*.** The RCC definition of "coercion" lists forms of threatened conduct that constitute coercion for property offenses. "Coercion" involves pressuring a person to engage in some particular conduct by making the person fear that someone other than the person being coerced[21] will inflict a list of designated harms on some other person.[22] "Coercion" may come in the form of verbal or written communication, however intimidating conduct, such as making a threatening gesture, could also suffice.

The term "coercion" is not statutorily defined for property offenses in the D.C. Code,[23] however conduct specified in the District's current blackmail[24] and extortion[25] statutes is replaced by the revised definition of "coercion." The RCC definition is used in: extortion[26] and financial exploitation of an adult.[27] The term is also incorporated in the definition of "effective consent" (i.e. consent by means other than coercion or deception) in many RCC property offenses: unauthorized use of property,[28] unlawful creation or possession of a recording,[29]

[21] Often, the person coercing will threaten to personally carry out the coercive conduct himself or herself, but that need not be the case. For example, a mafia don may well make extortive threat to inflict bodily injury on a shopkeeper by threatening to send one of his enforcers to rough up the shopkeeper. Although the mafia don himself may not be the one who will personally assault the victim, the mafia don has still made a coercive threat for purposes of the RCC.

[22] Frequently, the person being coerced is the one who will be threatened with harm, but that need not be the case. For example, a family member or friend of the victim may be the person who will suffer the threatened harm.

[23] However, the phrase "undue influence" in the current Financial Exploitation of a Vulnerable Adult or Elderly Person uses the word "coercion." D.C. Code § 22-933.01(c). ("For the purposes of this section, the term "undue influence" means mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being."). Also, while not a property offense, the current human trafficking chapter includes a definition of "coercion." D.C. Code § 22-1831.

[24] D.C. Code § 22-3252.

[25] D.C. Code § 22-3251.

[26] RCC § 22A-2301.

[27] RCC § 22A-2208.

[28] RCC § 22A-2102.

[29] RCC § 22A-2105.

criminal damage to property,[30] criminal graffiti,[31] trespass,[32] trespass of a motor vehicle,[33] and burglary.[34]

Subsections (A)-(D) include forms of conduct that would be criminal if actually committed. Subsection (A) covers threats of assaults or homicide; subsection (B) covers threats to destroy or damage another's property; and subsection (C) covers threats to kidnap another person. Last, subsection (D) includes a threat to commit any other criminal offense.

Subsections (E)-(J) address other forms of coercive conduct that, standing alone, would not generally constitute a criminal offense.

Subsection (E) includes threats to accuse a person of a crime. The victim of this threat need not have actually committed the offense the defendant threatens to accuse the victim of. Similarly, the threat still constitutes coercion even if the victim did commit the offense.

Subsection (F) covers conduct that previously constituted a provision within blackmail. Threats to reveal information that would subject a person to intense public shame and ridicule constitute coercion.

Subsection (G) is similar to subsection (E) in that it covers threats to accuse a person of unlawful conduct. Rather than a threat to accuse the person of a criminal offense, however, subsection (G) covers threats to reveal a person's undocumented immigration status. Because of the unique consequences stemming from such an accusation, coercion includes these threats.

Subsection (H) covers threats to inflict wrongful economic injury on another person. It is intended to include not only causing wrongful financial losses but also situations such as threatening labor strikes or consumer boycotts. While labor activities are not inherently problematic, when threats of labor activity are issued in order to personally enrich a person, and not to benefit the workers as a whole, such threats may constitute a criminal offense.

Subsection (I) covers threats to take or withhold action as a government official. This provision covers threats such as citing someone for violation of a regulation, making an arrest, or denying the award of a contract or permit.

Subsection (J) is a residual provision that is intended to cover a broad array of conduct. Threats to materially harm a person's health, safety, business, career, reputation, or personal relationships are all included. Conduct such as threatening to lower a student's grade, or to demote a person at work, or to interfere with the receipt of medical care, or to ruin a person's marriage or partnership are all intended to fall within this provision. Because the harm must be material, threats of trivial or insubstantial harms would not be encompassed within the definition of coercion.

Relation to Current District Law. The revised "coercion" definition changes District law in three main ways to improve the clarity of District law and provide definitions for elements of criminal offenses.

Subsection (D) of the revised statute includes as a form of "coercion" a threat to commit any criminal offense. By contrast, the current extortion statute refers only to "wrongful use of actual or threatened force or violence or by wrongful threat of economic injury."[35] The DCCA has not interpreted any of these phrases, although the Judiciary Committee report to the act

[30] RCC § 22A-2503.
[31] RCC § 22A-2504.
[32] RCC § 22A-2601.
[33] RCC § 22A-2602.
[34] RCC § 22A-2701.
[35] D.C. Code § 22-3251.

codifying extortion explicitly states that the wrongful threat of force or violence prong "is intended to cover threats that anyone will cause physical injury to or kidnapping of any person . . . [and] a threat of property damage or destruction."[36] Subsections (A)-(C) codify the specific forms of criminal conduct referenced by the Council, however, subsection (D) clearly extends current law beyond crimes involving force, violence, or economic injury.[37] The additional criminal conduct recognized in the revised subsection (D) varies in seriousness, but is arguably as harmful as the minimal kind of economic injury that would otherwise constitute extortion under the current statute. Including threats to commit any criminal offense potentially fills gaps in the current statute and improves the proportionality of the offense.

Subsection (G) of the revised statute includes a threat to notify a law enforcement officer of another person's undocumented or illegal immigration status. Under the current blackmail statute, threats to "accuse any person of a crime" or "expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule" or "impair the reputation of any person" expose a person to liability.[38] There could be instances of notifying law enforcement as to a person's improper immigration status that do not constitute accusing a person of a crime,[39] or other conduct covered under the current blackmail statute. However, given the serious individual and familial consequences of civil fines or removal for an improper immigration status, including such conduct alongside the exposure of secrets that subject a person to major adverse consequences improves the proportionality of the revised definition of coercion. Including such conduct regarding a person's immigration status also aligns the definition of "coercion" in property offenses with the definition for "coercion" in the District's human trafficking statute.[40]

Subsection (J) of the revised statute is a residual provision that punishes any threat to commit an act that would cause material harm to a person's "health, safety, business, career, reputation, or personal relationships." The current blackmail offense includes threats to expose a secret that "would subject any person to hatred, contempt, or ridicule" or "to impair the reputation of any person, including a deceased person,"[41] but otherwise there is no comparable language to Subsection (J) in current law. Inclusion of such conduct recognizes the manifold ways in which a person may be placed in fear of loss and thereby compelled to accede to the demands of another. Inclusion of subsection (J) closes potential gaps in liability under the offense.

In addition, the revised definition of "coercion" may constitute a change in District law in one other respect.

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[36] Judiciary Committee Report at 69.

[37] For example, a threat to illegally block an entrance to a building (D.C. Code § 22–1307) or to violate a civil protection order (D.C. Code § 16-1005) would be possible predicates for liability under the revised extortion statute.

[38] D.C. Code § 22-3252.

[39] It is a federal crime to enter into the United States without proper approval of an immigration officer. 8 U.S.C. § 1325. However, this statute does not reach persons overstaying a visa.

[40] The definition of coercion in the current human trafficking chapter includes "the abuse or threatened abuse of law or legal process," which is then itself defined as "the use or threatened use of law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, to exert pressure on another person to cause that person to take some action or refrain from taking some action." D.C. Code § 22-1831. Although perhaps narrower, the basic gist of the human trafficking definition seems to cover conduct that is substantially similar to what the RCC includes in subsection (G). A threat to report someone's immigration status implicitly threatens to use the "legal process . . . to exert pressure on another person." *Id.*

[41] D.C. Code § 22-3252.

Subsection (I) of the revised statute provides liability for conduct to "[t]ake or withhold action as an official, or take action under color or pretense of right." By contrast, the third and final prong in the current extortion statute relates to property taken with consent obtained "under color of authority or right."[42] No DCCA case law has interpreted the phrase. However, the Judiciary Committee report from the adoption of this "under color or authority of right" language states that this prong "is established whenever . . . the wrongful taking by a public officer of money not due to him or his office, whether or not taking was accomplished by force, threats, or use of fear."[43] The report further states that "[i]t does not matter whether the public official induces payments to perform his duties or not to perform his duties, so long as motivation for payment focuses on the recipient's office."[44] It is difficult to discern what exactly the Council intended to cover under the current statute.[45] The "coercion" definition is arguably narrower than what the Council had intended when it defined the current extortion offense. Per the revised definition of coercion, the threat of taking action or failing to take action as an official must be present; this may narrow the scope of the comparable "color or pretense of official right" language in the current extortion statute. The revised definition clarifies the meaning of the criminalized conduct.

The remaining changes to the revised definition of "coercion" are clarificatory in nature and are not intended to substantively change District law.

The second extortion prong, "wrongful threat of economic injury," is codified nearly verbatim in subsection (4)(H). A minor textual tweak is that "wrongful" is now appended to "economic injury." Substantively, the current scope of "wrongful threat of economic injury" is also unclear; no DCCA case law has interpreted the phrase. However, the Judiciary Committee report states that the measure is "not intended to cover the threat of labor strikes or other labor activities," nor does it include "consumer boycotts."[46] Rather, the provision would cover "a leader of an organization [who] threatens to strike or boycott in order to extort anything of value for his personal benefit, unrelated to the interest of the group he represents."[47] The "coercion" definition does not intend to alter these policy goals, and the examples used in the *Explanatory Note* are taken from the Judiciary Committee report.

***Relation to National Legal Trends*.** The Model Penal Code (MPC) has no definition of "coercion." However, it has a similar list of threatening conduct in the definition of "theft by extortion."[48] Additionally, within the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part

[42] D.C. Code § 22-3251.
[43] Judiciary Committee, Report on Bill No. 4-193, the D.C. Theft and White Collar Crime Act of 1982, at 70 (hereinafter, "Judiciary Committee Report").
[44] *Id.*
[45] Taking money as an official and keeping it for oneself would constitute embezzlement (i.e., theft); all other instances of officials taking money for themselves would seemingly involve the taking or withholding of some official action besides receipt of the property itself.
[46] Judiciary Committee Report at 69.
[47] *Id.*
[48] The conduct the MPC includes is: "threatening to: (1) inflict bodily injury on anyone or commit any other criminal offense; or (2) accuse anyone of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action; or (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) inflict any other harm which would not benefit the actor." MPC § 223.4.

(hereafter "reformed code jurisdictions"),[49] the three additions to the list of prohibited threats in coercion (subsections (D), (G) and (J)) are used in other reformed code jurisdictions.[50]

(6) "Consent" means words or actions that indicate an agreement to particular conduct. Consent includes words or actions that indicate indifference towards particular conduct. Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.

***Explanatory Note*.** In the context of property offenses, the term "consent" simply means a person has expressed (by word or act) an agreement to some conduct. In other words, "consent" generally means to agree to some transaction or to choose some transaction.

This term is not statutorily defined for property offenses in the D.C. Code.[51] The RCC definition is used in the following RCC offenses: theft,[52] unauthorized use of a motor vehicle,[53] fraud,[54] payment card fraud,[55] identity theft,[56] financial exploitation of a vulnerable adult,[57] and extortion.[58]

There are five important aspects of "consent": first, it is an expression by word or act; second the agreement must be to some particular conduct; fourth, as a matter of policy and as applied to the property chapter in particular, consent exists where a person expresses indifference towards a transaction; and fifth, "consent" may be given by agents on behalf of principals.[59]

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[49] 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.

[50] Other state statutes that include threats to report a person's immigration status include: Cal. Penal Code § 519; Colo. Rev. Stat. Ann. § 18-3-207; Md. Code Ann., Crim. Law § 3-701; Or. Rev. Stat. Ann. § 164.075; Va. Code Ann. § 18.2-59. Some of these states also include threatened destruction of immigration documentation, such as green cards. Other states that include threats of to commit any crime include: Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.41.520; Ariz. Rev. Stat. Ann. § 13-1804; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Ky. Rev. Stat. Ann. § 514.080; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; Ohio Rev. Code Ann. § 2905.11 (threaten to commit any felony); 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; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406. And states that include a threat to materially harm a list of designated interests include: Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.41.520; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Utah Code Ann. § 76-6-406; Wash. Rev. Code Ann. § 9A.04.110.

[51] However, a definition is provided in the D.C. Code's sexual abuse chapter. D.C. Code § 22-3001(4). That definition is similar to the RCC definition: "'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent."

[52] RCC § 22A-2101.

[53] RCC § 22A-2103.

[54] RCC § 22A-2201.

[55] RCC § 22A-2202.

[56] RCC § 22A-2205.

[57] RCC § 22A-2208.

[58] RCC § 22A-2301.

[59] In large part, the conceptual structure involved in thinking through consent -- as well as the attendant pressures of coercion and deception -- is based on the deeply influential work of Peter Westen. *See* PETER WESTEN, THE LOGIC OF CONSENT (2004); Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 Ohio St. J. Crim. L. 333, 333 (2004). Westen's work in *The Logic of Consent* has been described as "magisterial" and "a tour de force."

First, "consent" is an expression or action that indicates agreement. Such expressions include words, such as saying, "Yes, I agree," or writing the same in an email. "Consent" also includes actions, such as nodding or gesturing positively. Actions that indicate preferences could also include well-recognized customs: handing a merchant currency or a method of payment is commonly understood to indicate that the person has agreed to the transaction. On the other hand, the utter absence of any communication would indicate that no consent was given.[60]

Second, the agreement must be to some particular conduct. Typically, the particular conduct is defined by the substantive use of consent within an offense definition.[61]

Third, "consent" also includes expressions of indifference. This is intended to cover situations wherein a person, does not agree to particular conduct, but signals their neutrality as to the conduct.[62]

Fourth, "consent" can be conditioned or unconditioned.[63] This means that "consent" can be the product of completely free decision making (unconditioned),[64] or it can be the product of decision making driven by external pressures placed on the person giving consent

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); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402 (2016); Heidi M. Hurd, *Was the Frog Prince Sexually Molested?: A Review of Peter Westen's the Logic of Consent*, 103 MICH. L. REV. 1329 (2005). Although Westen's work primarily focuses on the use of consent in the context of rape, his basic approach to understanding consent in criminal law has been adopted by other scholars in other areas of substantive criminal law. For the use of the Westen's theory of consent with respect to theft in particular, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE (2012).

[60] For example, imagine a typical case of theft. A person leaves his laptop out on a table at a café while he goes to use the restroom. A thief sees the person step away from the laptop, and promptly takes it. The taking would be completely without consent, because the owner gave no words or actions that indicated consent to the taking.

[61] E.g., if an offense says that a person must not take the property of another without consent, then the "particular conduct" consent targets is the taking of property. Thus, for example, a person who consents to a defendant's examination or consideration of property has not given consent to the particular conduct of taking the property.

[62] E.g., Person A asks Person B, "May I borrow your car on Saturday?" and Person B responds, "Whatever, I don't care either way." If Person A then takes the car on Saturday, Person A would not have committed the offense of unlawful use of a motor because Person B has given "consent" by manifesting indifference to Person A's use of the car.

[63] This characteristic of consent is important: often, the term "consent" used both casually and in the law can mean one of two things. It can mean "agreeing to something," and it can also mean, "agreeing to something with sufficient freedom and knowledge." Imagine, for example, a person who is tricked by a fraudster into giving over her life savings. It would be correct in one sense to say that she consented to giving the money, because she voluntarily handed over her fortune. On the other hand, it could also be correct to say that she did not consent to the transaction, because her consent was vitiated by the fraudster's deception.

Both descriptions are correct: if one takes "consent" to mean "agreement," then the victim has consented because she has agreed. But if one takes "consent" to mean "agreement given pursuant to certain normative conditions, such as having sufficient knowledge about the nature of the transaction," then the victim has not given consent, because she did not have sufficient knowledge about the actual nature of the transaction. She had no idea, after all, that her money was getting put in a fraudulent scheme. In sum, both descriptions of the hypothetical are equally valid depending on what the definition of "consent" one intends to use.

Unfortunately, having dual, competing, and equally valid meanings for a single term is a recipe for confusion. How can one know which sense of "consent" is being used at a given time? It is impossible to say. Therefore, rather than persist in confusing these two distinct but useful concepts by employing a single word to describe them, the Revised Criminal Code distinguishes them. "Consent" is employed to refer to mere agreement, while "effective consent" is employed to refer to consent given under sufficient conditions of knowledge and freedom (i.e., consent free from problematic coercion and deception).

[64] E.g., if a person went to a store and said, "I am going to buy the largest television in this store, no matter the cost!" This is an expression of an unconditional preference - the person has stated that he or she will purchase the property no matter what.

(conditioned).[65] Although it is not "freely given," conditioned "consent" is present even when there is an extreme or normatively disturbing condition inducing a person's agreement.[66] The degree to which "consent" may be subject to conditions is specified by the elements of particular offenses[67] or the use of the phrase "effective consent."[68]

Fifth and last, "consent" includes those instances where an agent gives "consent" on behalf of a principal. Thus, an employee may sell her employer's merchandise by giving "consent" on behalf of the employer to a transaction.

Relation to Current District Law. Current District law has not codified a definition of "consent" for property offenses, nor does case law use the term in property offenses. However, there are similar terms and phrases in current property statutes and case law. On a few occasions, the D.C. Court of Appeals (DCCA) has recognized the relevance of consent in proving many property offenses.[69] Consent is also an explicit element in the current extortion offense.[70] Further, the current definition of "appropriate" makes use of "without authority or right," which is roughly in line with the RCC's definition of consent.[71] Additionally, DCCA case law has acknowledged that an agent's consent is relevant to determining whether a defendant has been given consent by the actual owner of the property.[72] And some current offense definitions explicitly include agents.[73]

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[65] E.g., if a person went to a store and said, "I would like to buy the largest television in this store - but because the largest television is too expensive, I'll settle for this smaller one." The person here has an unconditional preference for the largest television, just as the person in the previous footnote does; but here, the person's budget is an external condition that has pressured the person to choose something other than his or her unconditional preference.

[66] E.g., a defendant walks into the victim's store and says, "You better pay me some protection money, or you might find you suffer an unfortunate accident!" The victim's preference in this situation may well be to pay the protection money, rather than risk being murdered or assaulted -- therefore, the victim hands the cash over to the extortionist. In this case, the victim has given consent to the transaction. Admittedly, the victim's unconditioned preference is likely that he have to provide the money at all. But faced with either giving the money or suffering a physical harm, the person may well consent to giving the money. This is not to say that the extortionist in this hypothetical will avoid liability, of course: under the Revised Criminal Code, the extortionist would have obtained the victim's consent by means of coercion.

[67] E.g., RCC §§ 22A-2201 (fraud), 2701 (extortion).

[68] E.g., RCC §§ 22A-2501 (trespass), 2601 (burglary).

[69] *See McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation."); *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("They had both obtained consent to their entry into the premises under the pretext that they were looking for another person who was expected to arrive shortly."). All of these cases distinguish "consent" from the conditions used to obtain consent ("ruse" in *McKinnon*, "trickery, fraud, or misrepresentation" in *Jeffcoat*, and "pretext" in *Kearney*). See also, *Fussell v. United States*, 505 A.2d 72, 73 (D.C. 1986).

[70] D.C. Code § 22-3251.

[71] D.C. Code § 22-3201. *See* D.C. Crim. Jur. Instr. § 5.300. According to the Redbook, theft requires proof of "taking . . . property against the will or interest of" the owner. The Redbook Committee "included 'against the will'" because "the [Judiciary] Committee report making clear that the concept of 'taking control' was supposed to cover common law larceny, which only could be committed by taking property against the will of the complainant." *Id.* Indeed, the Judiciary Committee report states that "the term 'wrongfully' [in theft] is used to indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property." Committee on the Judiciary, Extend Comments on Bill 4-133, the D.C. Theft and White Collar Crime Act of 1982, at 16-17.

[72] *Russell v. United States*, 65 A.3d 1172, 1174 (D.C. 2013).

[73] E.g., D.C. Code § 22-3302. Trespass requires that entry into land be "against the will of the lawful occupant or of the person lawfully in charge thereof." *Id.*

Relation to National Legal Trends. The Model Penal Code (MPC) has no equivalent definition, although it does use the term "consent" in some provisions.[74] Other states and commentators have definitions that are very similar to the RCC definition.[75] The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and has provided a definition of "consent" that is similar to the RCC's.[76]

(7) "Court" means the Superior Court of the District of Columbia.

Explanatory Note. The definition of "court" provides a concise way to describe the Superior Court of the District of Columbia.

This term is statutorily defined for Chapter 9A of Title 22 of the D.C. Code, regarding criminal abuse and neglect of vulnerable adults.[77] The RCC definition is used in: unlawful creation or possession of a recording,[78] criminal graffiti,[79] identity theft civil provisions,[80] unlawful labeling of a recording,[81] financial exploitation of a vulnerable adult or elderly person civil provisions,[82] trespass,[83] and unlawful demonstration.[84]

Relation to Current District Law. The RCC definition of "court" is identical to the statutory definition under current law.[85]

(8) "Deceive" and "deception" mean:

(A) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions.

(B) Preventing another person from acquiring material information;

(C) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or

[74] The clearest example is in the MPC's affirmative consent defense. Model Penal Code § 2.11.

[75] Wash. Rev. Code Ann. § 9A.44.010(7) ("Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."). *See also* Stephen J. Schulhofer, *Consent: What it Means and Why It's Time To Require It*, 47 U. PAC. L. REV. 665, 669 (2016). Schulhofer offers a tripartite definition of consent specific to sexual assault. The first part of the definition contains similar language to the RCC definition of consent: "'Consent' means a person's behavior, including words and conduct -- both action and inaction -- that communicates the person's willingness to engage in a specific act of sexual penetration or sexual conduct."

[76] Model Penal Code: Sexual Assault and Related Offenses § 213.0(3) (Tentative Draft No. 3, April 6, 2017) ("'Consent' . . . means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact. Consent may be express or it may be inferred from behavior -- both action and inaction -- in the context of all the circumstances.").

[77] D.C. Code § 22-932.

[78] RCC § 22A-2105.

[79] RCC § 22A-2504.

[80] RCC § 22A-2206.

[81] RCC § 22A-2207.

[82] RCC § 22A-2209.

[83] RCC § 22A-2601.

[84] RCC § 22A-2604.

[85] D.C. Code § 22-932(3).

(D) Failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record;

(E) Provided that the term "deception" does not include puffing statements unlikely to deceive ordinary persons, and deception as to a person's intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.

Explanatory Note. This definition enumerates means by which a person can deceive another. Although other conduct may be deemed deceptive in the ordinary use of the word, for purposes of the RCC, "deceive" and "deception" only include the means listed in this definition.

This term is not statutorily defined for property offenses in the D.C. Code. The RCC definition is used in: fraud,[86] forgery,[87] and identity theft.[88]

Subsection (A) defines "deception" to include creating or reinforcing a false impression. It is not necessary that the defendant create the false impression. Even if another person has a pre-conceived false impression, a person can deceive by merely reinforcing that false impression. "Deception" requires a false impression, but not necessarily false statements. A person can "deceive" by making statements that are factually true to create or reinforce a false impression. Creating or reinforcing a false impression does not require any oral or written communications. Acts and gestures that create or reinforce false impressions can also constitute deception under this definition.

Subsection (A) also requires that the creation or reinforcement of a false impression be about a material fact, a fact that a reasonable person would deem relevant under the circumstances. A material fact can include a false impression as to law[89] or the value of the property.

Subsection (A) also defines "deception" to include creating or reinforcing false impressions as to an intention to perform future actions. However, mere failure to perform the promised future action does not constitute deception. The defendant must have had the requisite mental state as to whether he would not perform at the time he made the promise.[90]

Subsection (B) defines "deception" to include preventing a person from acquiring material information.[91]

Subsection (C) includes two exceptions to the general rule that there is no duty to correct a false impression. Ordinarily, a person has no duty to correct another's pre-existing false impression, and is free to take advantage of that false impression.[92] However, if a person had previously created or reinforced a false impression, even if innocently, that person can "deceive"

[86] RCC § 22A-2201.
[87] RCC § 22A-2204.
[88] RCC § 22A-2205.
[89] For example, a person can deceive another by creating a false impression that a car for sale is street-legal, when in fact it is not.
[90] *See Warner v. United States*, 124 A.3d 79 (D.C. 2015) (the trial judge noted that whether a promise is fraudulent or not depended on "whether or not at the time the defendant made the promise, he knew he was going to [fail to perform the promise.]").
[91] For example, if a person selling a car that had been seriously damaged in an accident hides or destroys records of the accident to prevent a buyer from learning that information, he may have deceived the other person, even if he did not actually create or reinforce the false impression that the car had never been in an accident.
[92] For example, if a person is selling a ring that he believes is made of fool's gold, but a buyer realizes that the ring is made of real gold, the buyer has no obligation to correct the seller's false impression.

by later failing to correct that false impression. Subsection (C) also states that a person can "deceive" if he or she has a fiduciary or other confidential relationship with another person, and fails to correct a false impression held by that person.

Subsection (D) defines "deception" to include failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not the impediment is a matter of official record. This is a specialized form of deception that only arises in the context of real estate transactions.

Subsection (E) provides one limitation to the definition of "deception," and an evidentiary rule regarding false intentions to perform a future act. First, "deception" excludes puffery that is unlikely to deceive ordinary persons. Such statements that exaggerate or heighten the attractiveness of a product or service do not go so far as to constitute deception. When representations go beyond mere exaggeration to actually create or reinforce an explicit false impression, however, then the defendant may cross the line into criminal deception. In many cases, this exception is unnecessary as puffery ordinarily does not, and is not intended to, actually create or reinforce a false impression. However, advertising may include puffing statements that will create a false impression in at least some listeners. In this context, there is no "deception" if the puffery is unlikely to deceive ordinary persons. With non-puffing statements however, there is no requirement that the deception be likely to fool an ordinary person.

Notably, the "deception" definition does not itself require any culpable mental state. If a person creates a false impression, it is not required that he knew that the impression was false. However, specific statutes in the RCC that use the "deception" definition may specify a mental state for that particular offense. For example, if an offense requires a culpable mental state of "knowingly", and the deception is premised on creating or reinforcing a false impression, then the defendant must have been practically certain that the impression was actually false. If another offense requires a culpable mental state of "recklessly," and the deception is premised on creating or reinforcing a false impression, then the defendant must only have been consciously aware of a substantial and unjustifiable risk that the impression was actually false.

Relation to Current District Law. The RCC "deception" definition does not itself change current District law, but may result in changes of law as applied to particular offenses.

The RCC definition of "deception" may have an effect on current law with respect to those offenses which include such conduct as an element. Most notably, the current fraud and theft offenses criminalize taking property of another by means of creating a false impression.[93]

However, there is no known case law that would be negated by use of the RCC definition of deception. The D.C. Court of Appeals (DCCA) has not explicitly held whether fraud or theft include obtaining property by reinforcing a false impression, preventing another from obtaining information, failing to correct a false impression that the defendant first created or when a person has a fiduciary or confidential relationship with another[94], or failing to disclose a lien or other adverse claim to property. However, the "deception" definition appears consistent with current

[93] The current theft statute states that the offense "includes conduct previously known as . . . larceny by trick, larceny by trust . . . and false pretenses." D.C. Code § 22-3211. The current fraud statute criminalizes "engag[ing] in a scheme ort systematic course of conduct with intent to defraud or to obtain property of another by means of false or fraudulent pretense, representation, or promise[.]" D.C. Code 22-3221.

[94] Some federal courts however, have held that "[mail fraud statutes] are violated by affirmative misrepresentations or by omissions of material information that the defendant has a duty to disclose." *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000).

theft and fraud law in several respects. First, the DCCA has held that both fraud and theft criminalize taking property of another by means of "false representation."[95] Second, the current fraud statute explicitly includes using a false promise to obtain property of another.[96] Third, the U.S. Supreme Court has held that the federal mail fraud statute, which served as a model for the District's current fraud statute,[97] "require[es] a misrepresentation or concealment of *material* fact."[98] Although the DCCA has never squarely held that fraud or theft requires a false impression as to a material fact, the Redbook Jury Instructions for fraud state that a "false representation or promise is any statement that concerns a material or important fact or a material or important aspect of the matter in question."[99].

Relation to National Legal Trends. The "deception" definition is not broadly supported by law in a majority of jurisdictions, but is largely consistent with law in a significant minority of jurisdictions with reformed criminal codes. 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"),[100] nearly half,[101] as well as the Model Penal Code[102] (MPC), have statutory definitions of "deception," either in standalone form, or incorporated into a specific offense.[103] The "deception" definition is broadly consistent with the definitions in the MPC and other jurisdictions, with a few exceptions.

First, only a minority of the reformed code jurisdictions define "deception" to require materiality.[104] However, the MPC[105] and six states require that the false impression must be of "pecuniary significance."[106]

Second, although the revised "deception" definition is consistent with the MPC[107] in including a failure to correct a false impression when the defendant has a fiduciary duty or is in

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[95] *United States v. Blackledge*, 447 A.2d 46 (D.C. 1982) ("To convict a defendant for the crime of false pretenses, the government must prove that the defendant made a false representation"); *see also Youssef v. United States*, 27 A.3d 1202, 1207-08 (D.C. 2011) ("To convict for fraud, the jury had to conclude that the appellant engaged in 'a scheme or systematic course of conduct' composed of at least two acts calculated to deceive, cheat, or falsely obtain property."); *See also* D.C. Crim. Jur. Instr. § 5-300 (stating that "deception" is any act or communication made by [the defendant] she s/he knows to be false[.]").

[96] D.C. Code § 22-3221.

[97] Commentary to the District of Columbia Theft and White Collar Crime Act of 1982 at 40 ("The language 'obtain property of another by means of false or fraudulent pretense, representation, or promise' is basically derived from the federal mail fraud statute.").

[98] *Neder v. United States*, 527 U.S. 1, 22 (1999) (emphasis original). See also, Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1 (1998); LAFAVE, WAYNE. 3 SUBST. CRIM. L. § 19.7.

[99] D.C. Crim. Jur. Instr. § 5-200.

[100] 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.

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

[102] MPC § 223.3.

[103] For example, the MPC does include a general deception definition, but instead defines the types of deceptions that would constitute theft by deception. MPC § 223.3.

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

[105] MPC § 223.3.

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

any other confidential relationship, most reformed code jurisdictions with statutory "deception" definitions have not followed this approach. Only three reformed code jurisdictions[108] with statutory "deception" definitions criminalize failure to correct a false impression when the actor has a legal duty to do so.

Third, the MPC[109] and a majority of reformed code jurisdictions with statutory "deception" definitions also include false impressions as to a person's state of mind.[110] The definition includes false impressions as to state of mind insofar as the state of mind relates to false intentions to perform acts in the future. However, false impressions as to states of mind more generally are not included in the definition.

(9) "Deprive" means:

(a) To withhold property or cause it to be withheld from an owner permanently, or for so extended a period or under such circumstances that a substantial portion of its value or its benefit is lost to that person; or

(b) To dispose of the property, or use or deal with the property so as to make it unlikely that an owner will recover it.

***Explanatory Note*.** In the RCC, the revised definition of "deprive" applies to all property offenses that require an intent to "deprive" as an element.

This definition of "deprive" replaces the current definition in Chapter 32 of Title 22 of the D.C. Code.[111] The RCC definition is used in: theft,[112] fraud,[113] financial exploitation of a vulnerable adult,[114] possession of stolen property,[115] and extortion.[116]

Subsection (a) states the first of the two alternative requirements for "deprive." The accused withholds property or causes it to be withheld from an owner permanently or the accused withholds property or causes it to be withheld for so extended a period or under such circumstances that a substantial portion of its value or its benefit is lost to that person. "Owner" is a defined term in RCC § 22A-2001 to mean a person holding an interest in property that the accused is not privileged to interfere with.

Subsection (b) states the second of the two alternative requirements for "deprive." The accused disposes of the property, or uses or deals with the property so as to make it unlikely that an owner will recover it. The subsection is unchanged from the current definition.[117]

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[107] MPC § 223.3.

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

[109] MPC § 223.3.

[110] Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-36-101; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922.

[111] D.C. Code 22-3201(2) ("'Deprive' means: (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or (B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.").

[112] RCC § 22A-2101.

[113] RCC § 22A-2201.

[114] RCC § 22A-2208.

[115] RCC § 22A-2401.

[116] RCC § 22A-2503.

[117] D.C. Code 22-3201(2) ("'Deprive' means: (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value;

Relation to Current District Law. Subsection (a) of the revised definition of "deprive" replaces "as to acquire a substantial portion of its value" in the current definition[118] with "that a substantial portion of its value or its benefit is lost to that person." The revised definition makes clear that deprive includes situations where the accused does not actually gain any value or benefit, but causes an owner to lose it. In the rare situation where an accused gains a substantial portion of the value or benefit of the property without causing an owner to lose it a substantial portion of its value or benefit,[119] the revised definition of "deprive" is not satisfied and the conduct would be covered by unauthorized use of property in RCC § 22A-2102.

The remaining changes to the revised definition of "deprive" are clarificatory and not intended to change District law. The revised definition of "deprive" replaces two references to "a person" with "an owner," a defined term in 22A-2001 meaning a person holding an interest in property that the accused is not privileged to interfere with. Subsection (b) of the current definition of "deprive" uses the term "owner,"[120] but it is not a statutorily defined term in the current D.C. Code. Replacing the two references to "a person" with "an owner" clarifies the revised definition.

***Relation to National Legal Trends*.** The Model Penal Code (MPC) has a definition of "deprive" that is substantively similar to the revised definition, although the MPC does not include language that explicitly includes causing another person to lose a substantial portion of the value or benefit of the property.[121] The MPC's approach has been adopted by a majority of the 29 states[122] that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[123] (hereafter "reformed code jurisdictions"). Most of these reformed code jurisdictions explicitly include in their definitions of "deprive" causing the other person to lose a significant portion of the value or benefit of the property.[124]

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or (B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.").

[118] *Id*.

[119] For example, in theft of intellectual property there may be situations that do not result in a substantial loss to the owner. Such unlawful uses of another's property would remain criminalized under unauthorized use of property in 22A-2102.

[120] D.C. Code 22-3201(2).

[121] MPC § 223.0(1) ("'deprive' means: (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it."

[122] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code § 5-36-101; Conn. Gen. Stat. Ann. § 53a-118; Del. Code Ann. tit. 11, § 857; Haw. Rev. Stat. Ann. § 708-800; 720 Ill. Comp. Stat. Ann. 5/15-3; Ky. Rev. Stat. Ann. § 514.010; Me. Rev. Stat. tit. 17-A, § 352; Mo. Ann. Stat. § 570.010; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1; N.Y. Penal Law § 155.00; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.005; 18 Pa. Stat. Ann. § 3901; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[123] 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.

[124] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code § 5-36-101; Conn. Gen. Stat. Ann. § 53a-118; Del. Code Ann. tit. 11, § 857; Haw. Rev. Stat. Ann. § 708-800; Me. Rev. Stat. tit. 17-A, § 352; N.H. Rev. Stat. Ann. § 637:2; N.Y. Penal Law § 155.00; Or. Rev. Stat. Ann. § 164.005; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

(10) "Dwelling" means a structure, or part of a structure, that is either designed for lodging or residing overnight, or that is used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each unit is an individual dwelling.

Explanatory Note. This subsection provides the definition for a "dwelling" in the property subtitle of the RCC. Whether a structure constitutes a "dwelling" depends on its design or, alternatively, its use.

This term is not statutorily defined for property offenses in the D.C. Code. The RCC definition is used in: arson,[125] reckless burning,[126] trespass,[127] and burglary.[128]

The revised definition of "dwelling" includes two sets of places. The first set of places includes locations that are designed for lodging, such as houses, apartments, and hotel rooms. It would also include rooms, such as a room in a hospital where surgeons or resident doctors might sleep between lengthy shifts. The definition also includes locations that are not necessarily designed for lodging, but that are used for lodging or residing overnight. This would include, for example, a car if a person were using the car as the person's primary residence. A person need not be physically present in a structure at the time in order for it to be "used" for purposes of the statute. Determination of what constitutes sufficient "use" to qualify as a "dwelling" will depend on the facts of the case, and may involve consideration of the frequency of a person's lodging in the location, the victim's relationship to the location, whether the victim's property is stored in the location, and other relevant evidence.

Relation to Current District Law. The RCC definition of "dwelling" generally corresponds with existing District case law interpreting the term in the context of particular statutes. For example, the District of Columbia Court of Appeals (DCCA) has looked to the actual use of the place to determine whether the premises constitutes a "dwelling."[129] Thus, rooms used solely for prostitution could not be "dwellings" for purposes of burglary.[130]

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "dwelling."[131] 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"),[132] six use substantially similar definitions of "dwelling."[133]

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[125] RCC § 22A-2501.
[126] RCC § 22A-2502.
[127] RCC § 22A-2601.
[128] RCC § 22A-2701.
[129] *Jennings v. United States*, 431 A.2d 552, 555 (D.C. 1981) (bedrooms used solely for prostitution did not constitute dwelling); *Newman v. United States*, 705 A.2d 246, 264 (D.C. 1997) (bedroom used both for prostitution and as a place to sleep constituted dwelling).
[130] *Id*.
[131] The MPC does provide a definition for "occupied structure," which states that the term "means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." MPC § 211.0. However, the MPC also uses the term "dwelling," which suggests that "occupied structure" and "dwelling" are intended to have different meanings.
[132] 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.
[133] Ala. Code § 13A-7-1; Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-39-101; Haw. Rev. Stat. Ann. § 708-800; Kan. Stat. Ann. § 21-5111; Tenn. Code Ann. § 39-14-401. Seven other states only refer to a place that is "usually used," seemingly not including places that are "designed for" or "adapted for use" as a place of lodging.

(11) "Effective consent" means consent obtained by means other than coercion or deception.

Explanatory Note. This subsection provides the definition for "effective consent" in the property subtitle of the RCC. First, in order to for "effective consent" to exist, there must be consent. Second, "effective consent" does not exist if it is obtained by coercion or by deception.

This term is not statutorily defined for property offenses in the D.C. Code. The RCC definition is used in: unauthorized use of property,[134] unauthorized use of a motor vehicle,[135] unlawful creation or possession of a recording,[136] payment card fraud,[137] identity theft,[138] criminal damage to property,[139] criminal graffiti,[140] trespass,[141] trespass of a motor vehicle,[142] burglary.[143]

Relation to Current District law. The RCC definition of "effective consent" is a new provision that has no clear equivalent in current law. Although current District property offenses do not use a unified definition equivalent to "effective consent," the component concepts of consent, coercion, and deception are used in the statutes and case law for many current property offenses.[144] In general, to the extent that lack of consent is relevant to proving current District property offenses, consent obtained by coercion or deception has not been recognized as true consent—consistent with the revised definition of effective consent.[145]

The clearest example is the District's current extortion statute, which renders consent gained by coercion insufficient to absolve the defendant of liability. Extortion consists of the threatened use of force or violence, and using such threats to obtain consent to a property transfer is the basis for extortion.[146] Consequently, it is clear that certain kinds of threats used to pressure a person to consent can, if consent is obtained, render that consent ineffective.[147]

Conn. Gen. Stat. Ann. § 53a-100; Del. Code Ann. tit. 11, § 829; Ky. Rev. Stat. Ann. § 511.010; N.Y. Penal Law § 140.00; Or. Rev. Stat. Ann. § 164.205; Tex. Penal Code Ann. § 30.01; Utah Code Ann. § 76-6-201. The remaining states either provide no definition or use the MPC's "occupied structure" definition or something similar.

[134] RCC § 22A-2102.

[135] RCC § 22A-2103.

[136] RCC § 22A-2105.

[137] RCC § 22A-2202.

[138] RCC § 22A-2205.

[139] RCC § 22A-2503.

[140] RCC § 22A-2504.

[141] RCC § 22A-2601.

[142] RCC § 22A-2602.

[143] RCC § 22A-2701.

[144] E.g., D.C. Code §§ 22-3251 (extortion), 3252 (blackmail), 3221 (fraud).

[145] *Johnson v. United States*, 426 F.2d 651, 653 (D.C. Cir. 1970) ("acquiescence may be deemed nonconsensual in the absence of force if the victim is put in genuine apprehension of death or bodily harm."); *Williams v. United States*, 113 A.3d 554, 564 (D.C. 2015) ("Here, viewed in the light most favorable to the government and within the 'beyond a reasonable doubt' standard, the government's evidence establishes that three young people walked by Mr. Chau, turned around and walked back to him. Two of the young people said, 'what, what, what,' while the third was quiet or 'observing the scenery' or 'looking around.' Mr. Chau handed his wallet to one of the young people. This evidence did not prove menacing conduct that would engender fear, or some threatening act that would lead a reasonable person to believe he was in imminent danger of bodily harm.") (internal citations and quotations omitted).

[146] D.C. Code § 22-3251.

[147] In addition to the types of threats identified in extortion, the Revised Criminal Code also includes conduct that constitutes a threat and types of conduct that are elements of blackmail. D.C. Code § 22-3252. Imagine a defendant

Also, as evident in the District's current theft by deception[148] and fraud[149] statutes, consent cannot be effective when it is the product of deception. Although the basic concept of "deception" is not currently tied by statute to the concept of "consent," as the RCC does, the DCCA has recognized through case law that voluntary, consensual transactions induced by deception are sufficient bases for theft convictions.[150] Thus, deception can render what otherwise appears to be a consensual property transfer ineffective and criminal.

In sum, consent, coercion, and deception as defined by the RCC are not new concepts for District offenses. However, the Revised Criminal Code does add something new to current law in the implementation of these concepts. For the first time in District law, the RCC unifies these concepts to provide a clear definition of when consent is not effective.

Relation to National Legal Trends. Although courts have long struggled with related issues,[151] distinguishing offenses using the same principles of consent and "effective consent" is rare in other jurisdictions' statutes.

Two states, Texas and Tennessee, codify a definition of "effective consent" for use in property offenses,[152] and case law in one state has used the distinction in the context of

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who threatens to release embarrassing photographs of the victim unless the victim permits the defendant to enter the victim's dwelling. If the victim complies, the defendant will not have obtained effective consent, because the victim's consent was obtained by the defendant's threat.

[148] D.C. Code § 22-3211 ("The term 'wrongfully obtains or uses' includes conduct previously known as larceny, larceny by trick, larceny by trust, embezzlement, and false pretenses.").

[149] D.C. Code § 22-3221.

[150] *Cash v. United States*, 700 A.2d 1208, 1211 (D.C. 1997) ("Viewed in the light most favorable to the government, the evidence showed that he obtained Ms. King's money by deception, and therefore 'wrongfully,' by entering into a contract and accepting payment for home improvements which he did not intend to complete. Ms. King relied on this deception when she gave appellant her money. She believed that he was a licensed contractor [because he told her he was] and that he would complete the home improvements described in the contract. A reasonable trier of fact could find, from all the evidence, that Ms. King would not have given more than $5,000 to appellant had it not been for his deception."); *McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation."); *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("They had both obtained consent to their entry into the premises under the pretext that they were looking for another person who was expected to arrive shortly.").

[151] For example, the line between "mere puffery" and outright deception sufficient to create criminal liability is frequently litigated. *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180 (2d Cir. 1970) (holding that "claims or statements in advertising may go beyond mere puffing and enter the realm of fraud where the product must inherently fail to do what is claimed for it.").

[152] Texas defines "effective consent" as: "consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." Tex. Penal Code Ann. § 31.01(3). This definition of "effective consent" is specific to the property offenses; Texas also has a general "effective consent" definition that applies broadly to the entire penal code. Tex. Penal Code Ann. § 1.07(19). The only difference between the two definitions is that the property-specific definition does not include "force" subsection (3)(A), and subsection (3)(E) in the property-specific section above is not included in the general definition. Tennessee defines effective consent as "assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when: (A) Induced by deception or coercion; (B) Given by a person the defendant knows is not authorized to act as an agent; (C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or (D) Given solely to detect the commission of an offense." Tenn. Code

burglary.[153] The Texas and Tennessee statutes first identify "consent" as a basic foundation for finding effective consent (or in the case of Tennessee, "assent" and then "consent") then the statutes provide a list of circumstances that render consent ineffective. In addition, Texas and Tennessee both state that consent given by certain people (generally, people with disabilities or children) is ineffective.[154] Also, both Texas and Tennessee address the issue of consent given to detect the commission of an offense.[155] The RCC does not address the issue of incompetence or consent given to detect the commission of an offense, but otherwise closely resembles these jurisdictions' statutes.

The Model Penal Code (MPC) contains a definition of "ineffective consent" in its General Part, in its description of the affirmative consent defense.[156] But that definition of ineffective consent does not appear to be applicable anywhere else in the MPC.

Ann. § 39-11-106(9). And Missouri also has a definition. Mo. Ann. Stat. § 556.061 ("consent or lack of consent may be expressed or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of youth, mental disease or defect, intoxication, a drug-induced state, or any other reason is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) It is induced by force, duress or deception"). Unlike Tennessee and Texas, however, Missouri does not define force, duress, or deception. This gives very little guidance when attempting to ascertain what kinds of pressures may vitiate "consent" in Missouri. For example, will "assent" induced by any deception fail to constitute assent? Will the smallest amount of duress do the same? If not, then what degree of duress or deception is sufficient to meet the law's demand? Ultimately, while Missouri's definition of "consent" is useful, it is also inadequate. The Revised Criminal Code differs from Missouri in that it sets out not only the kinds of pressures render consent ineffective, but also the degree of pressure that must be brought to bear against the victim. The kinds of pressures are identified other in the offense definitions (e.g., deception in fraud, RCC § 22A-2201), or by the definition of effective consent. The degree of pressure is identified in the definitions of force, coercion, and deception themselves.

[153] Minnesota's burglary offense distinguishes between entries *without consent* and entries made "by using artifice, trick, or misrepresentation to obtain consent to enter." See *State v. Zenanko*, 552 N.W.2d 541, 542 (Minn. 1996) (affirming conviction of defendant who "misrepresented his purpose for being [in the dwelling] and gained entry by ruse") (internal quotations omitted), citing *State v. Van Meveren*, 290 N.W.2d 631, 632 (Minn. 1980) (affirming conviction of defendant who gained entrance to a dwelling by telling the occupant he needed to use the occupant's bathroom, and after entering, immediately began to sexually assault the occupant). *See* Minn. Stat. Ann. § 609.581. By comparison, the RCC says that burglary can be committed without consent and with consent obtained by deception. The RCC also covers burglaries committed with consent obtained by coercion.

[154] Tex. Penal Code Ann. § 31.01(3)(C) and (3)(E); Tenn. Code Ann. § 39-11-106(9)(C).

[155] Tex. Penal Code Ann. § 31.01(3)(D); Tenn. Code Ann. § 39-11-106(9)(D). The effect of this provision, it would seem, is to provide complete liability for an offense when a police officer makes a transaction with a criminal in an undercover operation. For example, when attempting to catch a defendant engaged in fraud, a police officer might pose as an innocent and unsuspecting victim. When the defendant tries to deceive the officer into giving money, the officer would clearly be aware of the defendant's deception. If thereafter convicted, the defendant might argue that the officer's consent to the transaction was not "obtained by deception," and therefore, that the defendant is not guilty of fraud. Rather, the defendant would seemingly be at most guilty of attempted theft, because the defendant mistakenly believed the consent *was* induced by the defendant's deception. The definition of effective consent operating in Texas and Tennessee obviate this defense. *See Smith v. States*, 766 S.W.2d 544 (Tex. App. 1989). Similar facts are at work in *Fussell v. United States*, 505 A.2d 72 (D.C. 1986), and the DCCA reversed the defendant's conviction entirely. *Id.* at 73.

[156] Model Penal Code § 2.11(3) ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) it is given by a person whose

The relative lack statutory or case law use of the conceptual distinction between consent and "effective consent" may be due to the relatively recent origin of scholarly work on the topic.[157] However, in recent years, use of the conceptual distinction between "effective consent" and simple consent has become widespread among new proposals for substantive criminal law.[158]

(12) "Elderly person" means a person who is 65 years of age or older.

Explanatory Note. This term designates a minimum age for persons to qualify as an "elderly person."

This term is statutorily defined for Chapter 9A of Title 22 of the D.C. Code, regarding criminal abuse and neglect of vulnerable adults.[159] The definition is used in: financial exploitation of vulnerable adult or elderly person,[160] and financial exploitation of a vulnerable adult or elderly person civil provisions.[161]

Relation to Current District Law. The RCC definition of "elderly person" is identical to the statutory definition under current law.[162]

Relation to National Legal Trends. The MPC does not define "elderly person."

(13) "Fair market value" means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied.

Explanatory Note. In the RCC, "fair market value" is defined as the price "which a purchaser who is willing, but not obligated to buy, would pay an owner who is willing, but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied."

This term is not statutorily defined for property offenses in the current D.C. Code. The RCC definition is used in the definition of "value."[163]

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improvident consent is sought to be prevented by the law defining the offense; or (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.").

[157] In large part, the conceptual structure involved in thinking through consent and effective consent—as well as the attendant pressures of force, coercion, and deception—is based on the influential work of Peter Westen. *See* PETER WESTEN, THE LOGIC OF CONSENT (2004); Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 Ohio St. J. Crim. L. 333, 333 (2004). Although Westen's work primarily focuses on the use of consent in the context of rape, his basic approach to understanding consent in criminal law has been adopted by other scholars in other areas of substantive criminal law. For the use of the Westen's theory of consent with respect to theft in particular, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE (2012).

[158] James Grimmelmann, *Consenting to Computer Use*, 84 GEO. WASH. L. REV. 1500, 1517 (2016) (applying conceptual distinctions in consent to offenses involving computers); Stuart P. Green, *Introduction: Symposium on Thirteen Ways to Steal A Bicycle*, 47 NEW ENG. L. REV. 795 (2013) (discussing the use of differences of consent within the context of property offenses); Michelle Madden Dempsey, *How to Argue About Prostitution*, 6 CRIM. L. & PHIL. 65, 70 (2012) (using Westen's consent framework to discuss the ethics of prostitution); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402 (2016).

[159] D.C. Code § 22-932.

[160] RCC § 22A-2208.

[161] RCC § 22A-2209.

[162] D.C. Code § 22-932 (3).

Relation to Current District Law. The definition of "fair market value" clarifies long-standing D.C. Court of Appeals (DCCA) case law. The RCC definition of "fair market value" is taken from *Nichols v. United States*,[164] a malicious destruction of property case. It is also the definition that the jury instructions use for "value."[165] The DCCA has recognized at least two other definitions of fair market value in the context of other property offenses.[166] These definitions of "fair market value" differ from the *Nichols* definition by not specifically requiring that the buyer and seller be willing, but not obligated, or that all reasonable uses of the property be considered. There is no DCCA case law that discusses whether the variations between the definitions of fair market value are substantive. Given the ambiguity of the case law, adopting the more expansive *Nichols* definition of "fair market value" could be viewed as a substantive change in law.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define "fair market value," but also does not codify fair market value as a method for determining "value."[167] At least two of the 29 states[168] that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[169] (hereafter "reformed code jurisdictions") statutorily define "fair market value" for their theft offenses.[170]

> **(14) "Financial injury" means all monetary costs, debts, or obligations incurred by a person as a result of another person's criminal act, including, but not limited to:**
>
> **(F) The costs of clearing the person's credit rating, credit history, criminal record, or any other official record;**
>
> **(G) The expenses related to any civil or administrative proceeding to satisfy or contest a debt, lien, judgment, or other obligation of the person,;**

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[163] RCC § 22A-2001.

[164] 343 A.2d 336, 341 (D.C. 1975) (stating that the "normal definition" of "fair market value" is the price which a purchaser who is willing but not obliged to buy would pay an owner who is willing but not obliged to sell, considering all the uses to which the property is adapted and might reasonably be applied.").

[165] D.C. Crim. Jur. Instr. § 3.105 & cmt. at 3-12.

[166] In the context of receiving stolen property, the DCCA has stated that "property value is its market value at the time and place stolen, if there is a market for it. *Long v. United States*, 156 A.3d 698, 714 (D.C. 2017) (quoting *Hebron v. United States*, 837 A.2d 910, 913 n.3 (quoting Lafave, Criminal Law, § 8.4(b) (3d ed. 2000)), and has also applied the definition typically used in theft cases, *Curtis v. United States*, 611 A.2d 51, 52 and n.1. (D.C. 1992) (discussing the "fair market value" and citing to a theft case, *Williams v. United States*, 376 A.2d 442 (D.C. 1977)). The definition typically used in theft cases is the "price at which a willing seller and a willing buyer will trade." *Williams v. United States*, 376 A.2d 442, 444 (D.C. 1977); *see also Foreman v. United States*, 988 A.2d 505, 507 (D.C. 2010).

[167] MPC § 223.1(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal.").

[168] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code § 5-36-101; Conn. Gen. Stat. Ann. § 53a-118; Del. Code Ann. tit. 11, § 857; Haw. Rev. Stat. Ann. § 708-800; 720 Ill. Comp. Stat. Ann. 5/15-3; Ky. Rev. Stat. Ann. § 514.010; Me. Rev. Stat. tit. 17-A, § 352; Mo. Ann. Stat. § 570.010; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1; N.Y. Penal Law § 155.00; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.005; 18 Pa. Stat. Ann. § 3901; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

169 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.

[170] Ariz. Rev. Stat. Ann. § 13-1804; Ohio Rev. Code Ann. § 2913.61.

(H) The costs of repairing or replacing damaged or stolen property;

(I) Lost time or wages, or any similar monetary benefit forgone while the person is seeking redress for damages; and

(J) Legal fees.

Explanatory Note. The definition of "financial injury" provides a non-exhaustive list of costs, expenses, and lost time, wages, or benefits that may be considered when determining the extent of "financial injury" caused by a criminal act.

The RCC definition of "financial injury" replaces the current definition in the D.C. Code for identity theft.[171] The RCC definition is used in: identity theft[172] and financial exploitation of a vulnerable adult or elderly person.[173]

Relation to Current District Law. The RCC definition of "financial injury" generally corresponds with definition used in the current D.C. Code.[174] One slight distinction is defining financial injury to include legal fees. The current definition does not separately include "legal fees," but instead includes "attorney fees" as part of the cost of clearing a person's credit rating, credit history, criminal record, or any other criminal record, or as part of expenses related to any civil or administrative proceeding to satisfy or contest a debt, lien, judgment, or other obligation.[175] Separately including "legal fees" as part of the revised definition of "financial injury" is clarificatory, and is not intended to substantively change current District law.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "financial injury."

(15) "Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, moped, truck, truck tractor, truck tractor with semitrailer or trailer, bus, or other vehicle propelled by an internal-combustion engine or electricity, including any non-operational vehicle that is being restored or repaired.

Explanatory Note. In the RCC, the revised definition of "motor vehicle" applies to all property offenses that require "motor vehicle" as an element.

This definition of "motor vehicle" replaces two statutory definitions of motor vehicle in Chapter 32 of the current D.C. Code.[176] The RCC definition is used in: theft,[177] unauthorized use of a motor vehicle,[178] arson,[179] reckless burning,[180] alteration of a motor vehicle identification number,[181] and trespass of a motor vehicle.[182]

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[171] D.C. Code 22-3227.01.
[172] RCC § 22A-2206.
[173] RCC § 22A-2208.
[174] D.C. Code § 22-3227.01.
[175] D.C. Code § 22-3227.01.
[176] D.C. Code § 22-3215(a) (for the offense of unauthorized use of a motor vehicle, defining "motor vehicle" as "For the purposes of this section, the term "motor vehicle" means any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."); D.C. Code § 22-3233(c)(2) (for the offense of altering or removing vehicle identification numbers, defining "motor vehicle" as "'Motor vehicle" means any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semi trailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.'").
[177] RCC § 22A-2101.
[178] RCC § 22A-2103.

The definition includes "automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, moped, truck, truck tractor, truck tractor with semitrailer or trailer, bus," as well as any "other vehicle propelled by an internal-combustion engine or electricity." "Other vehicle propelled by an internal-combustion engine or electricity" is intended to include motorized boats and aircraft. In addition, the definition includes any vehicle that is currently non-operational if that vehicle is being repaired or restored. The revised definition is intended to encompass both statutory definitions of "motor vehicle" in Chapter 32 of the current D.C. Code.[183]

Relation to Current District Law. The revised definition of "motor vehicle" now includes any motorized watercraft, aircraft, or land vehicles. The change eliminates possible gaps in District law in offenses that pertain to motor vehicles, such as unauthorized use of a motor vehicle (UUV),[184] or alteration of a motor vehicle identification number.[185]

The revised definition adds all-terrain vehicles and mopeds to the list of specific vehicles. The D.C. Court of Appeals (DCCA) case law has held explicitly held that all-terrain vehicles[186] and mopeds[187] fall within the current definition of "motor vehicle." Adding all-terrain vehicles and mopeds will not change District law.

Relation to National Legal Trends. The revised definition of "motor vehicle" is substantively similar to the definitions of "motor vehicle" and "vehicle" in the states with UUV statutes that define these terms.[188] In addition, a majority of states include aircraft and watercraft

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[179] RCC § 22A-2501.
[180] RCC § 22A-2502.
[181] RCC § 22A-2403.
[182] RCC § 22A-2602.
[183] D.C. Code § 22-3215(a) (for the offense of unauthorized use of a motor vehicle, defining "motor vehicle" as "For the purposes of this section, the term "motor vehicle" means any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."); D.C. Code § 22-3233(c)(2) (for the offense of altering or removing vehicle identification numbers, defining "motor vehicle" as "'Motor vehicle" means any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semi trailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.'").
[184] The current unlawful entry of a motor vehicle offense (D.C. Code § 22-1341) also uses the phrase "motor vehicle;" however, that phrase is not defined for purposes of the offense nor has the DCCA interpreted the phrase for that offense.
[185] RCC § 22A-2403. The current alteration of a motor vehicle identification number also defines "motor vehicle" to include a "vehicle propelled by an internal-combustion engine, electricity, or steam[.]" D.C. Code § 22-3233. There is no D.C. Court of Appeals case law determining whether this definition would include motorized watercraft or aircraft. Although the RCC's definition is nearly identical to the definition under current D.C. Code § 22-3233, interpreting the revised definition to include motorized watercraft and aircraft is a possible change in current law, as it is unclear whether the current alteration of motor vehicle identification numbers offense would cover altering an identification number on watercraft or aircraft.
[186] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.
[187] In *Gordon v. United States*, the DCCA stated that the "trial judge concluded correctly, as a matter of statutory interpretation, that an ATV—a vehicle propelled by a motor—is a motor vehicle under [the UUV statute]." *Gordon v. United States*, 906 A.2d 862, 885 (D.C. 2006) The jury instruction for UUV adopts the holding in *Gordon* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.
[188] Ala. Code §§ 13A-8-11 and 13A-8-1; Ariz. Rev. Stat. Ann. §§ 13-1803, 13-1803, and 13-105; Ark. Code Ann. §§ 5-36-108 and 5-36-101; Alaska Stat. Ann. § 11.46.360(a)(1); Colo. Rev. Stat. Ann. § 18-4-409; Del. Code Ann.

in their UUV statutes. By expanding the scope of the definition of "motor vehicle," and, in turn, the scope of the revised UUV offense, the revised definition reflects the national trends for the scope of UUV. The Model Penal Code (MPC) does not use the term motor vehicle for its UUV statute, but codifies as elements of the offense "automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle."[189]

(16) "Occupant" means a person holding a possessory interest in property that the accused is not privileged to interfere with."

Explanatory Note. In the RCC, the term "occupant" is used to refer to a person who has a general possessory interest in a particular place or thing. That possessory interest must be one that the accused is not privileged to interfere with.[190]

This term is not statutorily defined for property offenses in the D.C. Code. The RCC definition is used in: trespass[191] and burglary.[192]

Relation to Current District Law. The RCC definition of "occupant" clarifies but makes no substantive change to current District law. The definition is employed largely to conform the specific offenses of burglary and trespass to current District case law.[193] A "possessory interest" has been recognized in District civil law as "[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner."[194]

Relation to National Legal Trends. The Model Penal Code (MPC) has no equivalent definition. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part,[195] two have definitions that resemble the RCC's definition of "occupant."[196]

(17) "Owner" means a person holding an interest in property that the accused is not privileged to interfere with.

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tit. 11, § 853; Haw. Rev. Stat. Ann. § 708-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. §§ 514.100 and 514.010; Me. Rev. Stat. tit. 17-A, §360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03(A); Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-406; Tex. Penal Code Ann. §31.07; Minn. Stat Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; N.C. Gen. Stat. Ann. § 14-72.2; Iowa Code Ann. § 714.7; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. §§ 943.23 and 939.22.

[189] MPC § 223.9.

[190] E.g., a landowner may have certain rights to his or her tenant's property in fee. However, the tenant would be the "occupant," because the tenant is the one who is entitled to possession, either by dint of lawful occupation or by other legal right.

[191] RCC § 22A-2601.

[192] RCC § 22A-2701.

[193] *See Bodrick v. United States*, 892 A.2d 1116, 1120 (D.C. 2006).

[194] *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014) (citing Black's Law Dictionary 1203 (8th ed.2004)).

[195] 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.

[196] Tenn. Code Ann. § 39-14-401 ("Occupied" means the condition of or other building"); Utah Code Ann. § 76-6-409.3 ("'Tenant or occupant' includes any person, including the owner, who occupies the whole or part of any building, whether alone or with others.").

Explanatory Note. In the RCC, the revised definition of "owner" applies to all property offenses that require "owner" as an element.

The term is not statutorily defined for property offenses in the current D.C. Code. The RCC definition is used in: property offense definitions,[197] theft,[198] unauthorized use of property,[199] unauthorized use of a motor vehicle,[200] unlawful creation or possession of a recording,[201] criminal damage to property,[202] criminal damage to graffiti,[203] fraud,[204] financial exploitation of a vulnerable adult,[205] possession of stolen property,[206] extortion,[207] trespass,[208] trespass of a motor vehicle,[209] and burglary.[210]

The definition of "owner" provides a concise way to refer to an individual's rights in property. A person is an "owner" if that person holds "an interest in property that the accused is not privileged to interfere with." There can be more than one "owner" for a given piece of property. The definition also includes a person whose interest in property is possessory but otherwise unlawful. For example, it is possible for a third party to steal from a thief. The thief has an unlawful, but superior, possessory interest in the third party as to the third party.

Relation to Current District Law. There is no D.C. Court of Appeals (DCCA) case law discussing "owner" or a similar term, nor is it statutorily defined. Codifying a definition of "owner" improves the consistency of the property offense definitions because it provides a

Relation to National Legal Trends. The Model Penal Code (MPC) does not codify a definition of "owner," although it uses the term in at least one of its property offenses.[211]

Several of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[212] have a definition of "owner" that is similar to the definition in the RCC, but the precise language varies.[213]

(18) "Payment card" means an instrument of any kind, including an instrument known as a credit card or debit card, issued for use of the cardholder for obtaining or paying for property, or the number inscribed on such a card. "Payment card" includes the number or description of the instrument.

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[197] RCC § 22A- 2001.
[198] RCC § 22A-2101.
[199] RCC § 22A-2102.
[200] RCC § 22A-2103.
[201] RCC § 22A-2105.
[202] RCC § 22A-2503.
[203] RCC § 22A-2504.
[204] RCC § 22A-2201.
[205] RCC § 22A-2208.
[206] RCC § 22A-2401.
[207] RCC § 22A-2301.
[208] RCC § 22A-2601.
[209] RCC § 22A-2602.
[210] RCC § 22A-2701.
[211] MPC § 223.9 (unauthorized use of a vehicle).
[212] 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.
[213] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/15-2; Conn. Gen. Stat. Ann. § 53a-118; Tenn. Code Ann. § 39-11-106; Haw. Rev. Stat. Ann. § 708-800.

Explanatory Note. The definition of "payment card" includes any instrument issued for use by the cardholder to pay for or obtain property. The definition includes credit cards and debit cards. The definition includes the physical cards themselves, and the number or description of the cards.

The definition replaces the definition of "credit card" for the Credit card fraud offense in the current D.C. Code.[214] The RCC definition is used in: payment card fraud,[215] and the definition of "value."[216]

Relation to Current District Law. The RCC definition of "payment card" clarifies, but makes no substantive change, to current District law.

Relation to National Legal Trends. The Model Penal Code (MPC) defines "credit card" as "a writing or other evidence of an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer."[217] It is unclear if the MPC definition includes not only actual cards, but also the numbers or descriptions of those cards.[218]

(19) "Person" means an individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, or any other legal entity.

Explanatory Note. In the RCC, the revised definition of "person" applies to all property offenses that require "person" as an element. The revised definition of "person" codifies a close-ended list of individuals and entities.

This definition of "person" replaces the current definition in Chapter 32 of Title 22 of the D.C. Code.[219] The RCC definition is used in: property offense definitions,[220] limitation on conviction for multiple related property offenses,[221] and each statute in Chapters 21, 22, 24, 25, 26, and 27 of the RCC.

Relation to Current District Law. The revised definition of "person" is unchanged from the current definition,[222] with the exception that it replaces "government department, agency, or instrumentality" in the current definition with "government," and "government instrumentality." The revision clarifies that "person" includes "government" and any "governmental instrumentality," whereas the current definition appears limited to specific units within government. The revised language will not change District law.

Relation to National Legal Trends. The Model Penal Code (MPC) defines "person" for its entire code as "include[s] any natural person and, where relevant, a corporation or an

[214] D.C. Code § 22-3223 ("(a) For the purposes of this section, the term "credit card" means an instrument or device, whether known as a credit card, debit card, or by any other name, issued for use of the cardholder in obtaining or paying for property or services.").
[215] RCC § 22A-2202.
[216] RCC § 22A-2001 (24).
[217] MPC § 224.6.
[218] See Commentary to MPC § 224.6.
[219] D.C. Code 22-3201(2A) ("'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.").
[220] RCC § 22A-2001.
[221] RCC § 22A-2003.
[222] D.C. Code 22-3201(2A).

unincorporated association."[223] The Proposed Federal Criminal Code has a similar definition for its entire code.[224]

Many of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[225] (hereafter "reformed code jurisdictions") have a definition of "person," but the precise language varies.

(20) "Property" means anything of value. The term "property" includes, but is not limited to:
(A) Real property, including things growing on, affixed to, or found on land;
(B) Tangible or intangible personal property;
(C) Services;
(D) Credit;
(E) Debt; and
(F) A government-issued license, permit, or benefit.

Explanatory Note. In the RCC, the revised definition of "property" codifies that "property" is "anything of value." It establishes an open-ended list of items that are of value, such as services and credit. "Property" also includes a share in property, e.g., a possessory right.

This definition of "property" replaces the current definition in Chapter 32 of Title 22 of the D.C. Code.[226] The RCC definition is used in: property offense definitions,[227] aggregation to determine property offense grades,[228] theft,[229] unauthorized use of property,[230] shoplifting,[231] criminal damage to property,[232] criminal graffiti,[233] fraud,[234] payment card fraud,[235] check fraud,[236] forgery,[237] identity theft,[238] financial exploitation of a vulnerable adult,[239] possession of stolen property,[240] trafficking of stolen property,[241] and extortion.[242]

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[223] MPC § 1.13.
[224] Proposed Federal Criminal Code § 109(ae) ("'Person' means a human being and a corporation or organization as defined in section 409.").
[225] *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.
[226] D.C. Code 22-3201(2A) ("'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.").
[227] RCC § 22A-2001.
[228] RCC § 22A-2002.
[229] RCC § 22A-2101.
[230] RCC § 22A-2102.
[231] RCC § 22A-2104.
[232] RCC § 22A-2503.
[233] RCC § 22A-2504.
[234] RCC § 22A-2201.
[235] RCC § 22A-2202.
[236] RCC § 22A-2203.
[237] RCC § 22A-2204.
[238] RCC § 22A-2205.
[239] RCC § 22A-2208.
[240] RCC § 22A-2401.
[241] RCC § 22A-2402.
[242] RCC § 22A-2301.

Relation to Current District Law. The revised definition of "property" is unchanged from the current definition.[243]

Relation to National Legal Trends. The Model Penal Code (MPC) defines "property" as "anything of value" and has an open-ended list of items that are of value, such as real estate and tangible and intangible personal property.[244] The Proposed Federal Criminal Code has as a similar definition.[245]

Many of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[246] have a definition of "property," but the precise language varies.[247]

> **(21) "Property of another" means any property in which a person other than the accused has an interest which the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property. The term "property of another" does not include any property in the possession of the accused in which that other person has only a security interest.**

Explanatory Note. In the RCC, the revised definition of "property of another" generally builds upon separate, civil law determinations of property rights. With the exception of property in the possession of the accused that the other person has only a security interest, the definition of "property of another" follows civil law determinations of property rights.

This definition of "property of another" replaces the current definition in Chapter 32 of Title 22 of the D.C. Code.[248] The RCC definition is used in: property offense definitions,[249] theft,[250] unauthorized use of property,[251] shoplifting,[252] criminal damage to property,[253] criminal

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[243] D.C. Code 22-3201(2A) ("'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.").

[244] MPC § 223.0(6) ("'property' means anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.").

[245] Proposed Federal Criminal Code § 1741(f) ("'property' means any money, tangible or intangible personal property, property (whether real or personal) the location of which can be changed (including things growing on, affixed to, or found in land and documents although the rights represented thereby have no physical location), contract right, chose-in-action, interest in or claim to wealth, credit, or any other article or thing of value of any kind. 'Property' also means real property the location of which cannot be moved if the offense involves transfer or attempted transfer of an interest in the property.").

[246] *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.

[247] *See, e.g.*, Tenn. Code Ann. § 39-11-106; Kan. Stat. Ann. § 21-5111; Ark. Code Ann. § 5-36-101; N.H. Rev. Stat. Ann. § 637:2.

[248] D.C. Code 22-3201(4) ("'Property of another' means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.").

[249] RCC § 22A-2001.

[250] RCC § 22A-2101.

[251] RCC § 22A-2102.

graffiti,[254] fraud,[255] forgery,[256] identity theft,[257] financial exploitation of a vulnerable adult,[258] and extortion.[259]

Property is "property of another" when a person has an interest in the property with which the accused is not privileged to interfere, regardless of whether the accused also has an interest in that property. It is irrelevant that the other person may be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband.[260] In addition, this language does not categorically determine issues of joint ownership, such as, for example, whether a spouse can steal from a spouse or a partner can steal from a partnership. The phrase "regardless of whether the accused also has an interest in that property" in the revised definition clarifies that having joint ownership or other property interests in an item does not necessarily mean it is not "property of another." The state of civil law as to whether a joint owner or person with a property interest has a right to interfere with the other joint owner's right to an item will continue to control whether that property is "property of another," as it does under current District law.

The second sentence of the revised definition of "property of another" establishes a narrow exclusion for security interests. Under this part of the revised definition, an individual who is a debtor cannot steal, misappropriate, or damage property in his or her possession in which the other person—the complainant—has only a security interest. Civil remedies such as contract liability, rather than criminal liability, address this situation between the debtor and creditor. However, under the revised definition, a third party can be criminally liable for stealing, misappropriating, or damaging property that is in the possession of the debtor because the debtor does not have only a security interest in that property, the debtor also has a possessory interest.

Relation to Current District Law. The revised definition of "property of another" narrows the scope of the security interest exception that is in the current definition of "property of another."[261] The last sentence of the current definition of "property of another" states that "property of another" excludes property in the possession of the accused as to which "any" person has only a security interest. As a result, any offense that requires property to be "property of another" excludes from its coverage a broad category of property. The legislative history for the current definition of "property of another" contains conflicting explanations of the intended

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[252] RCC § 22A-2104.
[253] RCC § 22A-2503.
[254] RCC § 22A-2504.
[255] RCC § 22A-2201.
[256] RCC § 22A-2204.
[257] RCC § 22A-2205.
[258] RCC § 22A-2208.
[259] RCC § 22A-2301.
[260] For example, a second thief can steal previously stolen property or contraband from the first thief, even though the second thief may not be able to sue the first thief in civil court to recover the property or contraband.
[261] D.C. Code 22-3201(4) ("'Property of another' means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.").

meaning of the exclusion of security interests.[262] The legislative history does not recognize that its explanations conflict with one another, which indicates that the Council likely did not intend to exclude all property in which another person has a security interest. The revised definition of "property of another" narrows the exclusion for security interests to situations where "the other person"—the complaining witness—is the party that has the security interest. Civil remedies such as contract liability, rather than criminal liability, address this situation. The revised definition of "property of another" does not change the limited D.C. Court of Appeals (DCCA) case law holding that the government does not have to prove the security interest exception as an element of shoplifting.[263] By narrowing the exclusion for security interests that exists in current law, the revised definition of "property of another" clarifies the definition and reduces a gap in District law.

The revised definition of "property of another" deletes the reference to "government" in the first sentence of the current definition.[264] The reference is surplusage because the revised definition of "property of another" incorporates the revised definition of "person." The revised definition of "person" in 22A-2001 includes governments, corporations, and other legal entities. Deleting the reference to government clarifies the definition without changing District law.

The revised definition of "property of another" deletes the language "without consent" in the current definition.[265] Deleting this language simplifies the determination of when property constitutes "property of another" by separating the issue of whether the defendant must act without consent. The revised property offenses separately address the issue of whether the defendant must act without consent. Deleting "without consent" does not change the revised property offense statutes.

The revised definition deletes the sentence, "The term 'property of another' includes the property of a corporation or other legal entity established pursuant to an interstate compact" that is in the current definition.[266] The sentence is superfluous because the revised definition of

[262] The legislative history for the 1982 Theft Act notes that the definition of "property of another" "does not extend to *property in which the other person* has only a security interest. Thus, the ordinary credit transaction is not included in this definition." *Extension of Comments on Bill No. 4-193* at 17 (emphasis added). However, the legislative history also notes that "property of another" "is not intended to cover property that is in *a person's* possession and in which another person has only a security interest." *Id.* at 4 (emphasis added). Given the different wordings in the explanations of "property of another," it appears that the drafters of the 1982 Theft Act did not consider or realize that the definition of "property of another" may exclude *all* property that has a security interest from theft offenses.

[263] *Alston v. United States*, 509 A.2d 1129, 1130-1131 (D.C. 1986) ("there was no intention [on the part of the Council] to transform the exception for property in which a security interest is held by another in the definitional section into an element of the offense of shoplifting which must be proved by the government in its case in chief. We therefore may not impose that requirement of prof on the government in shoplifting cases.").

[264] D.C. Code 22-3201(4) ("'Property of another' means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.").

[265] D.C. Code 22-3201(4) ("'Property of another' means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.").

[266] Id.

"property of another" incorporates the revised definition of "person." The revised definition of "person" in 22A-2001 includes corporations and other legal entities.

Finally, the revised definition deletes "infringe upon" that is in the current definition of "property of another."[267] The revised definition specifies "not privileged to interfere," rendering "infringe upon" superfluous. Deleting "not privileged to interfere" does not change District law.

Relation to National Legal Trends. The Model Penal Code (MPC) has a definition of "property of another"[268] that is substantively identical to the revised definition in the RCC, as does the Proposed Federal Criminal Code.[269] Specifically, the definitions in the MPC[270] and the Proposed Federal Criminal Code[271] have a more narrow exclusion of security interests than D.C. definition currently does. The security interest exclusion in these models only applies to property in the possession of the defendant in which the other person, the complaining witness or victim of the crime, has a security interest.

The MPC's definition of "property of another" has been widely adopted by the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[272] (hereafter "reformed code jurisdictions"). With regards to the security interest exclusion, the reformed code jurisdictions with a security interest exclusion similar to D.C.'s clearly apply it only to property in the possession of the defendant in which the other person, the complaining witness or victim of the crime, has a security interest.[273]

The MPC, Proposed Federal Criminal Code, and reformed code jurisdictions' definitions of "property of another" support other changes to the revised definition of "property of another" in the RCC. For instance, the MPC[274] and jurisdictions[275] do not include "without consent" as

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[267] *Id*.

[268] MPC § 223.0(7) ("property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.").

[269] Proposed Federal Criminal Code § 1741(g) ("'Property of another' means property in which a person other than the actor or in which a government has an interest which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. 'Owner' means any person or a government with an interest in property that is 'property of another' as far as the actor is concerned.").

[270] MPC § 223.0(7).

[271] Proposed Federal Criminal Code § 1741(g).

[272] *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.

[273] For some of these jurisdictions, the term "owner" is used instead of "property of another," or the security interest exception is codified as a general statement of principle rather than as part of a definition. *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 857; Ky. Rev. Stat. Ann. § 514.010; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1; N.D. Cent. Code Ann. § 12.1-23-10; 18 Pa. Cons. Stat. Ann. § 3901; S.D. Codified Laws § 22-1-2; Me. Rev. Stat. tit. 17-A, § 352.

[274] MPC § 223.0(7) ("property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property

the current definition of "property of another" does in D.C.[276] The Proposed Federal Criminal Code does.[277]

The Model Penal Code (MPC) definition of "property of another" includes a statement "regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband."[278] Many of the jurisdictions that have comprehensively reformed their criminal codes influenced by the MPC and have a general part also include such a statement.[279]

(22) "Services" includes, but is not limited to:
- **(A) Labor, whether professional or nonprofessional;**
- **(B) The use of vehicles or equipment;**
- **(C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;**
- **(D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;**
- **(E) Admission to public exhibitions or places of entertainment; and**
- **(F) Educational and hospital services, accommodations, and other related services.**

Explanatory Note. In the Revised Criminal Code (RCC), the revised definition of "services" codifies an open-ended list of items that constitute "services."

This definition of "services" replaces the current definition in Chapter 32 of Title 22 of the D.C. Code.[280] The RCC definition is used in: property offense definitions,[281] forgery,[282] and financial exploitation of a vulnerable adult civil provisions.[283]

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and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.").

[275] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 857; Ky. Rev. Stat. Ann. § 514.010; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1.

[276] D.C. Code 22-3201(4) ("'Property of another' means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.").

[277] Proposed Federal Criminal Code § 1741(g) ("'Property of another' means property in which a person other than the actor or in which a government has an interest which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. 'Owner' means any person or a government with an interest in property that is 'property of another' as far as the actor is concerned.").

[278] MPC § 223.0(7).

[279] *See, e.g.*, Alaska Stat. Ann. § 11.46.990; Del. Code Ann. tit. 11, § 857; S.D. Codified Laws § 22-1-2; Ky. Rev. Stat. Ann. § 514.010.

[280] D.C. Code 22-3201(5) ("'Services' includes, but is not limited to: (A) Labor, whether professional or nonprofessional; (B) The use of vehicles or equipment; (C) Transportation, telecommunications, energy, water,

Relation to Current District Law. The revised definition of "services" is unchanged from the current definition.[284]

Relation to National Legal Trends. The Model Penal Code (MPC) does not define "services." The Proposed Federal Criminal Code does, with close-ended list of items that constitute "services."[285]

Many of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[286] have a definition of "services," but the precise language varies.[287]

(23) "United States Attorney" means the United States Attorney for the District of Columbia.

Explanatory Note. The definition of "United States Attorney" provides a concise way to describe the United States Attorney for the District of Columbia.

This term is statutorily defined for Chapter 9A of Title 22 of the D.C. Code, regarding criminal abuse and neglect of vulnerable adults.[288] The RCC definition is used in: financial exploitation of a vulnerable adult civil provisions.[289]

Relation to Current District Law. The RCC definition of "United States Attorney" is identical to the statutory definition under current law.[290]

(24) "Value" means:
(A) The fair market value of the property at the time and place of the offense; or
(B) If the fair market value cannot be ascertained:

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sanitation, or other public utility services, whether provided by a private or governmental entity; (D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere; (E) Admission to public exhibitions or places of entertainment; and (F) Educational and hospital services, accommodations, and other related services.").

[281] RCC § 22A-201.

[282] RCC § 22A-2204.

[283] RCC § 22A-2209.

[284] D.C. Code 22-3201(5) ("'Services' includes, but is not limited to: (A) Labor, whether professional or nonprofessional; (B) The use of vehicles or equipment; (C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity; (D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere; (E) Admission to public exhibitions or places of entertainment; and (F) Educational and hospital services, accommodations, and other related services.").

[285] Proposed Federal Criminal Code § 1741(i) ("'Services' means labor, professional service, transportation, telephone, mail or other public service, gas, electricity and other public utility services, accommodations in hotels, restaurants or elsewhere, admission to exhibitions, and use of vehicles or other property.").

[286] *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.

[287] *See, e.g.*, Ala. Code § 13A-8-10; Haw. Rev. Stat. Ann. § 708-800; Me. Rev. Stat. Ann. tit. 17-A, § 357; S.D. Codified Laws § 22-1-2.

[288] D.C. Code § 22-932.

[289] RCC § 22A-2009.

[290] D.C. Code § 22-932(3).

(i) For property other than a written instrument, the cost of replacement of the property within a reasonable time after the offense;

(ii) For a written instrument constituting evidence of debt, such as a check, draft, or promissory note, the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied; and

(iii) For any other written instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument.

(C) Notwithstanding subsections (A) and (B) of this section, the value of a payment card is $[X] and the value of an unendorsed check is $[X].

Explanatory Note. In the RCC, the revised definition of "value" applies to all property offenses that require "value" as an element.

This definition of "value" replaces the current definition in Chapter 32 of Title 22 of the D.C. Code.[291] The RCC definition is used in: theft,[292] fraud,[293] payment card fraud,[294] check fraud,[295] forgery,[296] identity theft,[297] financial exploitation of a vulnerable adult,[298] possession of stolen property,[299] trafficking of stolen property,[300] and extortion.[301]

Subsection (A) states that the "value" of property is its fair market value, a defined term per RCC § 22A-2001, which means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied. "Owner" is a defined term per RCC § 22A-2001 meaning a person holding an interest in property that the accused is not privileged to interfere with. Moreover, the "value" is based on the fair market value at the time and place of the offense.

Subsection (B) provides alternative methods of determining "value" for written instruments and other property when the fair market value cannot be ascertained. These are rare situations when there is no evidence as to fair market value.[302]

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[291] D.C. Code 22-3201(7) ("'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument.").

[292] RCC § 22A-2101.

[293] RCC § 22A-2201.

[294] RCC § 22A-2202.

[295] RCC § 22A-2203.

[296] RCC § 22A-2204.

[297] RCC § 22A-2205.

[298] RCC § 22A-2208.

[299] RCC § 22A-2401.

[300] RCC § 22A-2402.

[301] RCC § 22A-2301.

[302] *See State v. Ohms*, 309 Mont. 263, 267 (2002) (interpreting the definition of "value," which required that replacement value be considered only when the market value "cannot be satisfactorily ascertained," as meaning "if the State is unable to present evidence of the stolen item's market value, it must establish that the market value of the stolen item cannot be ascertained before it resorts to the alternative of establishing value by proof of replacement value alone."); *State v. Foster*, 762 S.W.2d 51, 53 (Mo. Ct. App. 1988) (stating that "cost of replacement was not an authorized manner of proof" because "the state offered no evidence of the value of the items taken at the time and place of the crime" and "there is no basis for finding that the items could not have been appraised, or that evidence

Subsection (B)(i) specifies that, for property other than written instruments, a defined term per RCC 22A-2001, when fair market value cannot be ascertained, "value" is the cost of replacement of the property within a reasonable time after the offense.[303]

Subsections (B)(ii) and (b)(iii) clarify the methods of valuation for written instruments, a defined term in RCC 22A-2001, when fair market value cannot be ascertained.[304] Subsection (B)(ii) applies to written instruments that are "evidence of debt," such as checks, a defined term in RCC 22A-2001, drafts, or promissory notes. The "value" of such a written instrument is the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.[305] Subsection (B)(iii) applies to written instruments other than evidence of debt "that create[s], release[s], discharge[s], or otherwise affect[s] any other valuable legal right, privilege, or obligation."[306] The "value" of such written instruments is "the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument."

Subsection (C) first provides that, notwithstanding subsections (A) and (B), the "value" of a "payment card," a defined term in RCC 22A-2001, meaning an instrument of any kind (including an instrument known as a credit card or debit card) issued for use of the cardholder for obtaining or paying for property, is set at $[X]. Second, the "value" of a check that has not been endorsed, i.e. a blank check unsigned on the front by the drawer, is set at $[X]. These fixed valuations only apply to the payment cards and blank checks themselves, not property that is obtained by use of the payment card or check.[307]

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of their value at the time of the crime could not be satisfactorily ascertained" when the definition of "value" was "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime."); *Washington v. State*, 2013 Ark. App. 148, 3 (not reported in S.W.3d) ("Replacement value equals 'value' under the theft-of-property statute only if the market value cannot be ascertained. . . . [h]ere, there was evidence of market value . . . .").

[303] The facts of *State v. Ohms*, 309 Mont. 263 (2002) provide an example. The property at issue was a stolen masonry saw and the felony threshold for value was $1,000. *Ohms*, 309 Mont. at 264. At trial, the owner testified that he had purchased the used saw approximately nine years earlier for $400. *Id.* at 266. He also testified that after the purchase he had the motor rebuilt for $600. *Id.* An expert testified that an entirely new unit would be priced at $3,924. The definition of "value" in Montana allows evidence of replacement value only if market value "cannot be satisfactorily ascertained." *Id.* The court held that the state could not use replacement value because the state did not first establish that the market value of the property could not be ascertained. *Id.* at 267.

Washington v. State, 2013 Ark. App. 148, 3 (not reported in S.W.3d) ("Replacement value equals 'value' under the theft-of-property statute only if the market value cannot be ascertained. . . . [h]ere, there was evidence of market value . . . .").

[304] Examples of written instruments whose fair market value can be reasonably ascertained include some public and corporate bonds and securities.

[305] For example, if a check is made out to an individual in the amount of $1,000 the value of that check normally is $1,000, the face amount of indebtedness. However, in one jurisdiction, the court used such an "ordinarily" caveat in a similar definition of "value" to determine that the value of a forged check was not the face amount of indebtedness. *See State v. Skorpen*, 57 Wash.App. 144, 149 (1990) ("The State argues that the value of the check 'shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount . . .' . In order to avoid rendering part of this phrase superfluous, it must be construed so as to recognize the possibility of situations in which the amount due or collectible on a written instrument is not its face amount.").

[306] For example, relying on such language, a case in New York held that two automobile registrations were "of value" because, in part, "the complainant herein has had his privilege to drive his vehicle suspended by the theft of its registration certificates. These certificates give rise at least to prosecution for theft of the piece of paper upon which proof of compliance with New York vehicle laws is indicated."). *People v. Saunders*, 82 Misc. 2d 542, 371 N.Y.S.2d 352 (Crim. Ct. 1975).

[307] For example, theft of a purse containing three payment cards and a checkbook yields a set valuation of $[X] that can be used for determining the gradation of theft—without requiring proof of available credit for each card or

Relation to Current District Law. The RCC definition of "value" provides a set value for a payment card of $[X] and an unendorsed check at $[X], per subsection (C). Under the current statutory definition of "value," the "value" of a payment card is the amount of property "that has been or can be obtained through its use, or the amount promised or paid by the credit card, [or] check."[308] There is no case law on the meaning of this phrase.[309] The revised definition of "value" sets a fixed amount to provide a fairer and more efficient means of calculating the value of an unused payment card or blank check, items commonly involved in property crimes. The revised definition dispenses with proof of the amount of credit or funds available to a given card or bank account at the time of the property crime. Doing so also avoids disparate valuation of people's credit cards and checks based on their available credit or size of their bank account.[310] The provision instead strikes a balance between the greater, but unrealized, harm that the owner of the card or check could suffer if the stolen card or check was used, with the relatively minor, actual, inconvenience to the owner of losing the card or check. It also punishes more harshly a defendant who takes multiple cards or checks, as opposed to a defendant that takes only one card or check. Providing for more consistent punishment of property crimes based on unused payment cards and blank checks improves the proportionality of the offense.

In subsection (B), the revised definition provides a number of alternate means of determining the value of written instruments and other property in the rare case when fair market value cannot be ascertained. The current statutory definition of "value" does not address such situations. The limited D.C. Court of Appeals (DCCA) case law on "value" does not provide a clear rule for instances when fair market value cannot be ascertained, although several cases refer generally to the "value" of an object as its "useful, functional purpose."[311] The provisions

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amount of funds available for the check at the time of the offense. If the thief should then use a stolen payment card or check to obtain cash, goods, or property from a storeowner, the value of the property obtained from the storeowner would constitute a separate loss, with value being easily determined by the fair market value of the property received.

[308] D.C. Code 22-3201(7) ("'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument.").

[309] There is limited case law on the value of a credit card under the District's pre-1982 Theft Act laws. In *In re V.L.M.*, a receiving stolen property case, the DCCA stated that a "currently usable credit card, was of obvious monetary value to its owner, and indeed, to anyone else who might attempt to use it to obtain gasoline on credit." *In re V.L.M.*, 340 A.2d 818, 820 (D.C. 1975). Beyond this statement, there is no indication in *In re V.L.M.* how the DCCA valued the credit card. The trial court found that the credit card had no value in excess of $100, but the trial court's reasoning, and whether the DCCA approved of this method of valuation, is unclear. To the extent that *In re V.L.M.* supports a method of valuation for credit cards different from the standard in subsection (b)(3) of the revised definition of "value," the revised definition of "value" is a change in law.)

[310] For example, theft of a purse with two payment cards connected to accounts of $300 each would, if aggregated, provide a basis for theft of $600 under current law—graded as third degree theft in the RCC or a 180 day misdemeanor under current law. A purse with the same number of cards but in the name of a wealthier person who has credit limits of $15,000 each would, if aggregated, provide a basis for theft of $30,000—graded as first degree theft in the RCC or a 10 year felony under current law.

[311] *See Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C. 1988) ("[T]he value of an item is to be determined by its 'useful functional purpose.' " (quoting Jenkins v. United States, 374 A.2d 581, 586 n.9 (D.C. 1977))). Note, however, that several cases referring to the "useful functional purpose" standard of value appear to be primarily concerned with establishing that the object has some minimal value for a lowest grade of liability. See, e.g., *Jenkins v. United States*, 374 A.2d 581, 586 n. 9 (D.C.1977) (broken window has some value); *Paige v. United States*, 183 A.2d 759 (D.C.Mun.App.1962) (vent fastener for auto window had some value); *Wills v. United States*, 147 A.3d

in subsection (B) appear to be consistent with the application of this "useful, functional purpose" standard, and are not intended to change the application of such a flexible standard for establishing whether an item has some minimal value.[312] The revised definition of "value" fills a gap in the existing statutory definition about valuation when fair market value cannot be readily ascertained.

Subsection (A) of the revised definition provides that, generally, the fair market value of property shall determine its "value." This codifies District case law for theft and theft-related offenses that establishes that "value" means "fair market value,"[313] as well as District case law recognizing that "fair market value" must be determined at the time[314] and place[315] of the offense. In addition, this part of the revised definition of "value" reflects current District practice.[316]

None of the above-mentioned changes to District law affect long-standing District case law on the evidentiary requirements for proving "value." Some of this case law predates the Theft and White Collar Crimes Act of 1982, which significantly revised the District's theft and theft-related offenses.[317] To the extent that this case law is still good law, the revised definition of "value" does not change it—except as to payment cards. Nor does the revised definition of "value" change any first degree theft cases on "value" decided after the 1982 Theft Act.[318] — except as to payment cards.

Relation to National Legal Trends. The Model Penal Code (MPC) determines "value" for its theft and theft related offenses as "the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal."[319] The MPC's approach has been adopted by a minority of the 29 states that have comprehensively reformed their criminal

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761, 775 n. 12 (D.C. 2016) (keys had some value). The revised definition of value in RCC 22A-2001 does not affect such cases' determination that the objects at issue had some value.

[312] Compare RCC 22A-2001 (24)(B)(ii)("For a written instrument constituting evidence of debt, such as a check, draft, or promissory note, the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied;") with *Jeffcoat* at 1303 (regarding appellant's wrongful taking of a check filled out for $150 but not cashed, "When appellant received the check from Thompson, its useful functional purpose was to enable him to acquire $150 in cash.").

[313] *See, e.g., Foreman v. United States*, 988 A.2d 505, 507 (D.C. 2010);

[314] *See, e.g., Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C. 1988) ("The value of property is determined at the time the crime through which it is acquired occurs.");.

[315] *See Long v. United States*, 156 A.3d 698 (D.C. 2017) (stating in a receiving stolen property case that "[p]roperty value . . . is its market value at the time and place stolen, if there is a market for it.") (quoting *Hebron v. United States*, 837 A.2d 910, 913 n.3 (D.C. 2003) (quoting LaFave, Criminal Law, § 8.4(b) (3d ed. 2000))).

[316] D.C. Crim. Jur. Instr. § 3.105 (jury instruction for "value" stating, in part, that "[v]alue means fair market value at the time when and the place where the property was allegedly" obtained).

[317] In *Eldridge v. United States*, the DCCA noted that first degree theft under the 1982 Theft Act is the "rough equivalent" to the former statutory offense of grand larceny and adopted "*in toto*" for first degree theft "the proof requirements on the issue of value" established in pre-1982 case law for grand larceny. *Eldridge v. United States*, 492 A.2d 879, 881-82. *Eldridge* lists the following cases and citations as representative of this body of case law, although the list is not exclusive: *Malloy v. United States*, 483 A.2d 678, 680-81 (D.C. 1984); *Moore v. United States*, 388 A.2d 889 (D.C. 1978); *Williams v. United States*, 376 A.2d 442 (D.C. 1977); *Wilson v. United States*, 358 A.2d 324 (D.C. 1976); *Boone v. United States*, 296 A.2d 449 (D.C. 1972); *United States v. Thweatt*, 140 U.S. App. D.C. 120, 433 F.2d 1226 (1970).

[318] *See, e.g., Zellers v. United States*, 682 A.2d 1118 (D.C. 1996); *Hebron v. United States*, 837 A.2d 910 (D.C. 2003); *Chappelle v. United States*, 736 A.2d 212 (D.C. 1999); *Terrell v. United States*, 721 A.2d 957 (D.C. 1988); *Foreman v. United States*, 988 A.2d 505 (D.C. 2010).

[319] MPC § 223.1(2)(c).

codes influenced by the MPC and have a general part[320] (hereafter "reformed code jurisdictions"). The Proposed Federal Criminal Code has a similar approach, "The amount involved in a theft . . . shall be the highest value by any reasonable standard, regardless of the actor's knowledge of such value, of the property or services which were stolen by the actor, or which the actor believed that he was stealing, or which the actor could reasonably have anticipated to have been the property or services involved."[321]

The majority of the reformed code jurisdictions have adopted definitions of "value" that are substantively similar or identical to the RCC definition of "value,"[322] with the exception of the payment card and unendorsed check provision in subsection (c). However, at least one reformed code jurisdiction has a similar provision.[323]

(25) "Vulnerable adult" means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests.

Explanatory Note. The definition of "vulnerable adult" means persons of 18 years of age or older, who have mental or physical limitations of sufficient degree. The limitation must "substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests."

This term is statutorily defined for Chapter 9A of Title 22 of the D.C. Code, regarding criminal abuse and neglect of vulnerable adults.[324] The RCC definition of "vulnerable adult" is taken verbatim from the current D.C. Code. The RCC definition is used in: financial exploitation of a vulnerable adult or elderly person.[325]

Relation to Current District Law. The RCC definition of "vulnerable adult" is identical to the statutory definition under current law.[326]

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "vulnerable adult."

(26) "Written instrument" includes, but is not limited to, any:

(A) Security, bill of lading, document of title, draft, check, certificate of deposit, and letter of credit, as defined in Title 28;

(B) A will, contract, deed, or any other document purporting to have legal or evidentiary significance;

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[320] *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.

[321] Proposed Federal Criminal Code § 1735(7).

[322] Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.980; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code Ann. § 5-36-101; Conn. Gen. Stat. Ann. § 53a-121; Del. Code Ann. tit. 11, § 224; Haw. Rev. Stat. Ann. § 708-801; Me. Rev. Stat. tit. 17-A, § 352; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.020; Mont. Code Ann. § 45-2-101; N.Y. Penal Law § 155.20; Or. Rev. Stat. Ann. § 164.115; 18 Pa. Stat. Ann. § 3903; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.08; Wash. Rev. Code Ann. § 9A.56.010.

[323] N.H. Rev. Stat. Ann. § 637:2(V)(c).

[324] D.C. Code § 22-932.

[325] RCC § 22A-2208.

[326] D.C. Code § 22-932 (3).

(C) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity;

(D) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for or warrant or right to subscribe to or purchase any of the foregoing items;

(E) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or

(F) Other instrument commonly known as a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.

Explanatory Note. The definition of "written instrument" provides a non-exhaustive list of common written instruments. "Written instrument" can include other instruments not listed under this definition.

The term "written instrument" is currently defined in the D.C. Code forgery offense.[327] The RCC definition is used in: forgery[328] and the definition of value.[329]

Relation to Current District Law. The revised definition of "written instrument" is consistent with current District law. The revised definition differs slightly by explicitly including "a will, contract, deed, or any other document purporting to have legal or evidentiary significance." However, including these documents in the definition of "written instrument" does not change current law, as the list of documents in the definition of "written instrument" in the current D.C. Code is also non-exhaustive.

***Relation to National Legal Trends*.** The Model Penal Code (MPC) defines the term "writing" more generally, to include a "printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege, or identification."[330] The specific list of items and documents that constitute a "writing" is not identical to that used in the definition of "written instrument," but both definitions are intended to be broad enough to capture virtually any form of written information.

[327] D.C. Code § 22-3241 (a)(3).
[328] RCC § 22A-2204.
[329] RCC § 22A-2001 (24).
[330] MPC § 224.1.

RCC § 22A-2002. Aggregation To Determine Property Offense Grades.

When a single scheme or systematic course of conduct could give rise to multiple charges of the same offense, the government instead may bring one charge and aggregate the values, amounts of damage, or quantities of the property in the scheme or systematic course of conduct to determine the grade of the offense. This rule applies to the following offenses:

(a) § 22A-2101 Theft;
(b) § 22A-2105 Unlawful Creation or Possession of a Recording;
(c) § 22A-2201 Fraud;
(d) § 22A-2202 Payment Card Fraud;
(e) § 22A-2203 Check Fraud;
(f) § 22A-2204 Forgery;
(g) § 22A-2205 Identity Theft;
(h) § 22A-2206 Unlawful Labeling of a Recording;
(i) § 22A-2208 Financial Exploitation of a Vulnerable Adult;
(j) § 22A-2301 Extortion;
(k) § 22A-2401 Possession of Stolen Property;
(l) § 22A-2402 Trafficking of Stolen Property;
(m) § 22A-2403 Alteration of Motor Vehicle Identification Number; and,
(n) § 22A-2503 Criminal Damage to Property.

Commentary

Explanatory Note. *For specified offenses in the Revised Criminal Code (RCC), this section permits the government to aggregate the values, amounts of damage, or quantities of property involved in a single scheme or course of conduct in order to bring one charge of a more serious grade, instead of multiple charges of a less serious grade. Aggregation is permitted regardless of whether the property was taken, transferred, etc. from one person or several, provided that the taking, transferring, etc. was pursuant to one scheme or course of conduct. The revised aggregation to determine property offense grades statute ("aggregation statute") replaces the "Aggregation of amounts received to determine grade of offense" statute*[331] *in the current D.C. Code.*

Relation to Current District Law. *The revised aggregation statute changes existing District law in one main way that improves the proportionality of offense penalties and promotes the efficient administration of justice.*

The revised aggregation statute expands the number of offenses for which values and quantities of property may be aggregated to fourteen. Under the current aggregation statute only six statutes are subject to aggregation. The eight criminal offenses[332] added in the revised

[331] D.C. Code § 22-3202 ("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.").

[332] The eight offenses are: § 22A-2105 Unlawful Creation or Possession of a Recording; § 22A-2203 Check Fraud; § 22A-2204 Forgery; § 22A-2206 Unlawful Labeling of a Recording; § 22A-2208 Financial Exploitation of a

aggregation statute comprise all the property offenses in the RCC which have more than one gradation based on the quantity, value, or damage done to property. Some of the added offenses seem particularly likely to involve a scheme or systematic course of conduct involving multiple properties.[333] The expansion of offenses subject to the aggregation statute improves the administrative efficiency and proportionality of these offenses.

Beyond this one main change to current District law, one other aspect of the revised aggregation statute may be viewed as a substantive change in law.

The revised aggregation statute refers generally to "the values, amounts of damage, or quantities of the property in the scheme or systematic course of conduct." By contrast, the current aggregation statute refers to property "received pursuant to" a scheme or systematic course of conduct in a violation of a specified offense. There is no case law interpreting this phrase in the current statute. The revised statute's reference to "the values, amounts of damage, or quantities of the property in the scheme or systematic course of conduct" is intended to cover all the ways in which property may be the subject of one of the listed crimes, not just "receives."[334] This change clarifies the aggregation statute and improves the proportionality of the referenced offenses by making all means of committing the offense (not just "receiving") subject to aggregation.

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

The revised aggregation statute clarifies that the amounts that are relevant in aggregation are based on the property involved in the crime. "Property" is a defined term per RCC 22A-2001 that means "anything of value," and includes goods, services, and cash. In many offenses, it is the values of the relevant property that may be aggregated.[335] For some offenses, however, it is the quantity of property, not the value, which may be aggregated.[336] In still other offenses, it is the amount of damage that may be aggregated.[337]

The revised aggregation statute states that aggregation is only for a single scheme or systematic course of conduct in violation of any one of the listed offenses. The current aggregation statute clearly refers to aggregation being for "determining the grade of *the* offense

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Vulnerable Adult; § 22A-2301 Extortion; § 22A-2401 Possession of Stolen Property; § 22A-2403 Alteration of Motor Vehicle Identification Number; and § 22A-2503 Criminal Damage to Property.

[333] E.g., § 22A-2403 Alteration of Motor Vehicle Identification Number, which specifically applies not only to motor vehicles but to motor vehicle parts, in part targets fences of stolen property similar to the trafficking in stolen property offense.

[334] There is no indication in the legislative history or otherwise that the use of the word "receives" was intended to omit property that was stolen or part of a fraudulent scheme that a person exercised control over, transferred, paid for, etc., but never "received."

[335] For example, if a thief watching an unattended table walks by and commits theft under RCC § 22A-2101 by taking a coat and a purse left at the table, those items may be aggregated as being stolen pursuant to the same act or course of conduct. The value of those items would be added together to determine the appropriate grade of theft.

[336] For example, a person who, in violation of unlawful creation or possession of a recording (UCPR) per RCC § 22A-2105, one afternoon unlawfully makes 60 copies of one sound recording and 60 copies of different sound recording as part of the same act or course of conduct, may be charged with felony UCPR instead of two misdemeanor charges of UCPR pursuant to the revised aggregation statute. The number of recordings would be added together to determine the appropriate grade of UCPR.

[337] For example, if a person throws a rock through a display case, breaking multiple glass objects in violation of criminal damage to property (CDP) per RCC § 22A-2503, those items may be aggregated as being damaged pursuant to the same act or course of conduct. The amount of damage to each item would be added together to determine the appropriate grade of CDP. (See Commentary to RCC § 22A-2503).

and the sentence for *the* offense" (emphasis added).[338] There is no case law on point. The revised statute clarifies that only property involved in a scheme or systematic course of conduct for one offense may be aggregated.

Relation to National Legal Trends. The revised aggregation statute follows many jurisdictions[339] which have statutes that closely follow the Model Penal Code (MPC)[340] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[341] However, many other jurisdictions' aggregation statutes are silent as to damage to property offenses, nor does the MPC's Criminal Mischief[342] offense explicitly provide for aggregation.

[338] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft)… *or* § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense."(emphasis added)).

[339] 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; 18 Pa. Stat. Ann. § 3903; S. D. Cod. Laws § 22-30A-18; Tex. Penal Code § 31.09.

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

[341] 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.

[342] Model Penal Code § 220.3.

RCC § 22A-2003. Limitation on Convictions for Multiple Related Property Offenses.

(a) *Theft, Fraud, Extortion, Stolen Property, or Property Damage Offenses.* A person may be found guilty of any combination of offenses contained in Chapters 21, 22, 23, 24 or 25 for which he or she satisfies the requirements for liability; however, the court shall not enter a judgment of conviction for more than one of these offenses based on the same act or course of conduct.

(b) *Trespass and Burglary Offenses.* A person may be found guilty of any combination of offenses contained in Chapters 26 and 27 for which he or she satisfies the requirements for liability; however, the court shall not enter a judgment of conviction for more than one of these offenses based on the same act or course of conduct.

(c) *Judgment to be Entered on Most Serious Offense.* Where subsections (a) or (b) prohibit judgments of conviction for more than one of two or more offenses based on the same act or course of conduct, the court shall enter a judgment of conviction for the offense, or grade of an offense, with the most severe penalty; provided that, where two or more offenses subject to subsection (a) or (b) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses.

Explanatory Note. *The "Limitation on Convictions for Multiple Related Property Offenses" statute ("limitation on multiple convictions statute") of the Revised Criminal Code (RCC) prohibits a defendant from being convicted of two or more qualifying property offenses when those convictions arise from a single act or course of conduct. The RCC statute prevents the imposition of multiple punishments for the commission of substantively similar, overlapping property offenses in order to improve sentencing proportionality. The RCC statute concerns only the sentencing stage of criminal proceedings and does not preclude a defendant from being charged with, or from a jury being instructed on, two or more covered offenses. Moreover, any conviction vacated pursuant to the limitation on multiple convictions statute will not be an acquittal on the merits, such that a conviction vacated pursuant to subsection (c) may be re-instated in appropriate circumstances.*[343] *The RCC limitation on multiple convictions statute replaces the consecutive sentences statute in the current D.C. Code.*[344]

Relation to Current District Law. *The RCC limitation on multiple convictions statute changes existing District law in two main ways that reduce unnecessary overlap between offenses and improve the proportionality of offense penalties.*

First, the RCC limitation on multiple convictions statute bars convictions for all but the most serious of substantially overlapping property offenses based on the same act or course of conduct. The current consecutive sentences statute,[345] in contrast, only bars consecutive

[343] E.g., where the judgment of conviction is overturned on appeal for reasons that do not affect the offense(s) vacated under RCC § 22A-2003.

[344] *See* D.C. Code § 22-3203 ("(a) A person may be convicted of 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; provided, that no person shall be consecutively sentenced for any such combination or combinations that arise from the same act or course of conduct. (b) Convictions arising out of the same act or course of conduct shall be considered as one conviction for purposes of any application of repeat offender sentencing provisions...").

[345] *Id.*

sentences for some overlapping property offenses, and, even then, multiple convictions for those offenses are authorized.

The D.C. Court of Appeals (DCCA) has consistently upheld the imposition of multiple convictions for offenses listed in the current consecutive sentences statute,[346] even though in some cases the court has said such convictions are against "law and logic."[347] As the DCCA has noted, a legislature has complete power to determine whether multiple punishments for the same or related offenses are warranted.[348] The DCCA has rejected legal challenges claiming that the Council did not understand that the consecutive sentences statute amounted to the imposition of multiple punishments for overlapping offenses based on the same act or course of conduct. [349] The legislative history underlying the current consecutive sentences statute does not offer a policy rationale for why the D.C. Council opted to allow for concurrent sentences rather than creating a bar on multiple convictions. However, the statutory text is clear.

To help ensure that that the imposition of punishments is proportionate, transparent, and consistent, the RCC statute goes beyond barring consecutive sentences to barring multiple convictions for less serious overlapping property offenses committed during the same act or course of conduct. To the extent that substantially overlapping property offenses are not uniformly charged and sentenced, there is a potential for disparate outcomes for criminal conduct of equivalent seriousness.[350] The imposition of concurrent sentences also multiplies some often-overlooked financial and collateral consequences. For instance, every District conviction subjects a person to a court assessment of $50 to $5,000,[351] may increase liability under statutory recidivist provisions,[352] may result in increased sentences for any future crime,[353] and may

[346] *See, e.g.*, *Sutton v. United States*, 988 A.2d 478, 491 (D.C. 2010).

[347] *See Cannon v. United States*, 838 A.2d 293, 299–300 (D.C.2004) ("As a matter of both law and logic, appellant 'cannot be convicted of both theft and receipt of stolen goods with respect to the same property.'").

[348] *Youssef v. United States*, 27 A.3d 1202, 1206 (D.C. 2011) ("'The Double Jeopardy Clause of the Fifth Amendment prohibits a second prosecution for a single crime, and it protects the defendant against multiple punishments for the same offense.' *Ellison v. United States*, 919 A.2d 612, 614 (D.C.2007) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). However, insofar as it applies to the latter 'problem of multiple punishments imposed following a single trial, [the Double Jeopardy Clause] limits only the authority of courts and prosecutors.' (*Lindbergh*) *Byrd v. United States*, 598 A.2d 386, 388 (D.C.1991) (en banc); *see also Albernaz v. United States*, 450 U.S. 333, 334, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Thus, where the 'legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the ... jury may impose cumulative punishment under such statutes in a single trial.' *Missouri v. Hunter*, 459 U.S. 359, 368–69, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).").

[349] *Byrd v. United States*, 598 A.2d 386, 393 (D.C. 1991) (Noting that the Council was at least on notice through contemporary judicial opinions as to the fact that concurrent sentences for offenses based on the same act or course of conduct still amounted to multiple punishments).

[350] For example, the relationship between the District's current theft statute and current receiving stolen property (RSP) has been described as an "intimate relationship" *(Byrd v. United States*, 598 A.2d 386, 393 (D.C. 1991)) because only in very unusual instances can one commit theft without committing RSP. If some, but not all, theft-type conduct that legally constitutes a commission of both theft and RSP is not uniformly charged and convicted under both offenses, then some persons will receive sentences for theft and concurrent RSP sentences while others will receive sentences only for theft.

[351] D.C. Code § 4-516(a).

[352] *See, e.g.*, D.C. Code §§ 22-1804, 22-1804(a).

[353] Notably, the District's Voluntary Sentencing Guidelines specify that only the most serious crime out of those committed as part of the same act or course of conduct should be counted when calculating an individual's criminal history score—a major factor in how long an offender is sentenced for a felony. However, other jurisdictions have

adversely affect a person's employment prospects.[354] Barring multiple convictions for substantially overlapping property offenses reduces the possibility that unintended collateral consequences will be imposed, and eliminates a possible source of disproportionality resulting from non-uniform charging and conviction practices, without affecting the term of imprisonment that a defendant will serve

The RCC statute does not change sentencing outcomes for revised property offenses when convictions would otherwise merge under current District law. The DCCA has held that where there is no clear legislative intent to the contrary, two convictions based on the same act or course of conduct merge into one when (and only when) the elements of one offense are necessarily-included in the elements of the other offense.[355] This law is unaffected by the RCC limitation on multiple convictions statute or other provisions of the RCC. Pursuant to an "elements" or "*Blockburger"* test under D.C. Code § 23-112,[356] merger occurs only when it is impossible to commit one offense without necessarily also committing other offense under any set of facts—a pure legal analysis that is based on a comparison of statutory elements alone.[357] The corollary to this rule is that whenever two or more separate but overlapping offenses premised on a single course of conduct *do not* share this relationship, the legislature should be understood to intend for multiple punishments to be imposed.[358] The RCC statutes for many property offenses have been restructured such that they would satisfy an elements test, and, therefore, convictions based on the same act or course of conduct would necessarily merge.[359] The RCC limitation on multiple convictions statute extends the bar on multiple convictions to reach offenses that fail to meet the elements or *Blockburger* test, but still involve substantial overlap.

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varying rules that may lead them to count multiple, concurrently sentenced convictions stemming from a single act or course of conduct as each counting toward an increased criminal history.

[354] For an extensive list of collateral consequences of criminal convictions in the District, see National Inventory of Collateral Consequences of Conviction listing for the District of Columbia, online at https://niccc.csgjusticecenter.org/search/?jurisdiction=13 (last visited August 5, 2017).

[355] *Byrd v. United States*, 598 A.2d 386 (D.C. 1991). Note that merger may occur in any situation where there is clear legislative intent. For instance, the Council specified in legislative history that the District's current offense of TPWR was intended to be a lesser included offense of the current theft offense. Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 36. On the basis of this legislative history, the DCCA has recognized that TPWR is a lesser included offense of theft. *Moorer v. United States*, 868 A.2d 137, 143 (D.C. 2005).

[356] *See Blockburger v. United States*, 284 U.S. 299 (1932); D.C. Code § 23-112 ("A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.").

[357] *Hanna*, 666 A.2d at 859 ("[W]hen more than one offense is founded on the same conduct the merger analysis must focus exclusively on the elements of the various offenses and not on the facts introduced to prove those elements."); *Alfaro v. United States*, 859 A.2d 149, 155 (D.C. 2004) ("In applying the *Blockburger* test, the focus is on the statutorily-specified elements of each offense and not the specific facts of a given case. [] This same elements test is employed when determining whether an offense is a lesser-included offense.") (citing (*David) Lee v. United States*, 668 A.2d 822, 825 (D.C. 1995)).

[358] *Hanna*, 666 A.2d at 854.

[359] For example, the revised Unauthorized Use of Property offense (RCC § 22A-2102) is a clear lesser included offense of the revised Theft (RCC § 22A-2101), Fraud (RCC § 22A-2102), and Extortion (RCC § 22A-2103) statutes because it consists of a subset of the elements that must be proven for those offenses.

The RCC limitation on multiple convictions statute does not raise double jeopardy issues or create significant administrative inefficiency. One rationale proffered for allowing concurrent sentences of substantially overlapping offenses is that, if on appeal the lead sentence is vacated when the grounds for vacating do not affect the concurrent sentences, the conviction and sentence for the overlapping offense(s) remain.[360] However, jeopardy does not attach to a conviction vacated under subsection (c),[361] and the RCC statute does not bar subsequent entry of a judgment of conviction for an offense that was previously vacated under subsection (c). Moreover, as recent DCCA case law has recognized, remands for entry of new judgments of conviction are necessary whenever a conviction is dismissed or overturned on appeal.[362] A conviction vacated pursuant to subsection (c) of the RCC statute may be re-instated at that time with minimal administrative inefficiency. Sentencing for a reinstated charge may entail some additional court time as compared to concurrent sentencing on multiple overlapping charges at the close of a case.[363] However, any loss to procedural inefficiency appears to be outweighed by the benefits of improving penalty proportionality and reducing unnecessary collateral consequences convictions concerning substantially overlapping offenses.[364]

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[360] The most recent change to the Consecutive sentences statute relied on such a rationale. See, e.g., *Statement of Jeffrey A. Taylor, United States Attorney for the District of Columbia to Public Hearing on Bill 18-138, the "Omnibus Anti-Crime Amendment Act of 2009, Bill 18-151, the Public Safety and Justice Amendments Act of 2009* (March 18, 2009) at 6 ("Section 206(b) reverses a Court of Appeals decision that does not permit a person to be convicted of both theft and receiving stolen property for the same conduct/items. The problem is that if the jury picks one offense and the Court of Appeals decides it was the other, a person's conviction would be reversed and, jeopardy having attached, s/he cannot be retried on the other. Theft and *possessing* stolen property are not inconsistent offenses, and a person could be convicted of both. The statute makes clear that, if s/he is convicted of both, s/he can only be sentenced only for one of them. This is a fair resolution of a problematic situation."). Further evidence that this procedural concern may be the government's primary concern in obtaining concurrent sentences for substantially overlapping property offenses may be seen in the government's willingness to drop such lesser convictions post-appeal. *See, e.g., Sydnor v. United States*, 129 A.3d 909, 910 (D.C. 2016) ("However, the government concedes that appellant's RSP conviction should be vacated. *See Cannon v. United States*, 838 A.2d 293, 299–300 (D.C.2004) ("As a matter of both law and logic, appellant 'cannot be convicted of both theft and receipt of stolen goods with respect to the same property.'") (quoting *Roberts v. United States*, 508 A.2d 110, 113 (D.C.1986)); *Byrd v. United States*, 598 A.2d 386, 392 (D.C.1991) (en banc). The government does not argue that both convictions should stand because the sentences are concurrent. *See* D.C.Code § 22–3203 ("A person may be convicted of ... theft *and* receiving stolen property for the same act or course of conduct; provided, that no person shall be *consecutively* sentenced for any such combination...."). (emphasis added). We therefore remand the case to the trial court with instructions to vacate appellant's conviction for receipt of stolen property ("RSP").")

[361] *See, e.g., Warrick v. United States*, 551 A.2d 1332, 1336 (D.C. 1988); *D.C. v. Whitley*, 934 A.2d 387, 389 (D.C. 2007) (citing *United States v. Wilson*, 420 U.S. 332, 353 (1975); *United States v. Wall*, 521 A.2d 1140, 1142 n.2 (D.C. 1987)); *United States v. Shorter*, 343 A.2d 569, 571 (D.C. 1975).

[362] *Duffee v. D.C.*, 93 A.3d 1273, 1274 n.1 (D.C. 2014) ("Because the trial court imposed concurrent sentences on each appellant for FTO and blocking passage, there is no need for resentencing. *Collins v. United States*, 73 A.3d 974, 985 (D.C.2013). The reversal of the FTO convictions requires set-aside of the $50 assessment imposed upon each appellant. *Cf. United States v. Lloyd*, 983 F.Supp. 738, 744 (N.D.Ill.1997) (reversal of conviction on Double Jeopardy grounds requires set-aside of special assessment). We therefore remand for entry of new judgments of conviction based solely on blocking passage.")

[363] To minimize any difficulties in sentencing on a reinstated charge years after the case was heard, a trial court may, at the time of the original sentencing, prepare a statement for the record noting the alternative sentence that would be recommended should one of the vacated convictions be reinstated.

[364] There may also be some administrative benefits to the RCC limitation on multiple convictions statute for the D.C. Court of Appeals insofar as significantly fewer convictions would be subject to appellate review (those sentenced concurrent to a more serious property offense).

Apart from extending the bar on consecutive sentences to a bar on multiple convictions, the second main change in District law under the RCC limitation on multiple convictions statute is the expansion of which property offenses are deemed to overlap with one another such that multiple punishments for those offenses based on the same act or course of conduct are barred. Under the current consecutive sentences statute, eight criminal offenses[365] are subject to the limitation on concurrent sentencing. Legislative history does not indicate why many property offenses were left out of the current consecutive sentences statute.[366] By contrast, the RCC limitation on multiple convictions statute prohibits multiple convictions for the group of all trespass and burglary offenses, and the group of all theft, fraud, extortion, and damage to property offenses.

As the DCCA has recognized,[367] inclusion of some, but not all, related statutes in a special sentencing regime can lead to "patently illogical" results, depending on the combination of offenses in a person's convictions.[368] Moreover, under current practice in the District,

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[365] The eight offenses are: § 22A-2105 Unlawful Creation or Possession of a Recording; § 22A-2203 Check Fraud; § 22A-2204 Forgery; § 22A-2206 Unlawful Labeling of a Recording; § 22A-2208 Financial Exploitation of a Vulnerable Adult; § 22A-2301 Extortion; § 22A-2401 Possession of Stolen Property; § 22A-2403 Alteration of Motor Vehicle Identification Number; and § 22A-2503 Criminal Damage to Property.

[366] One possible explanation is that when the consecutive sentences statute was originally passed, the DCCA case law provided for merger of substantially overlapping in a broad array of offenses. Prior to the DCCA's adoption of an elements or *Blockburger* test for merger, the court allowed fact-based merger that overlooked minor differences in the elements of two statutes to see if, as applied to the facts of a case, the offense substantially overlapped such that multiple punishments were prohibited. *See, e.g. Worthy v. United States*, 509 A.2d 1157 (D.C.1986). (merging convictions on charges of unauthorized use of vehicle and receiving stolen property). A more prosaic explanation for why some property offenses were not included in the consecutive sentences statute is that many property offenses simply weren't part of the 1982 Theft and White Collar Crime Act and the resulting Chapter of the D.C. Code which contains the Consecutive sentences statute. Not only destruction of property offenses like arson (D.C. Code 22-301), but some fraud-like offenses, such as Making, drawing, or uttering check, draft, or order with intent to defraud (D.C. Code § 22–1510) simply were not part of the 1982 Theft and White Collar Crime Act, and it is unclear whether they were considered at all in the drafting of the consecutive sentences statute.

[367] *Byrd v. United States*, 598 A.2d 386, 393 (D.C. 1991) ("Finally, it is significant to note the anomaly of treating § 22-3803 as inapplicable to RSP. The defendant who was the original thief could, under § 22-3803, be given only concurrent sentences not to exceed ten years, while the one to whom he loaned the car for a joyride could be consecutively sentenced for a potential maximum term of twelve years, as was in fact almost the case here. This is a patently illogical result. While it is not the proper function of any court to gratuitously fill in gaps left by the legislature, *West Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 1148, 113 L.Ed.2d 68 (1991), quoting *Iselin v. United States*, 270 U.S. 245, 250-51, 46 S.Ct. 248, 250, 70 L.Ed. 566 (1926) ("'[w]hat the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court'"), where language is fairly capable of two interpretations, we think it most unlikely that the legislature intended that interpretation which would be "an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'" *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400, 86 S.Ct. 852, 857, 15 L.Ed.2d 827 (1966), quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940).
In sum, we conclude that given the intimate relationship between theft and RSP as discussed above, most notably demonstrated by the "rule of priority," the provisions of § 22-3803 should be interpreted as a manifestation of legislative will to prohibit consecutive sentences for convictions of RSP and UUV arising out of the "same act or course of conduct.").

[368] For example, in a typical case, a person who steals an item from a store might be charged and convicted of theft, receiving stolen property, shoplifting, and taking property without right (TPWR) under current District law—or any combination of these offenses—based on the same act or course of conduct. Under current District law, these offenses are not lesser included offenses of one another and do not merge under an elements test. While the current consecutive sentences statute bars consecutive sentencing for theft and receiving stolen property, neither shoplifting nor TPWR offenses are part of the consecutive sentences statute, so those convictions may be sentenced concurrent or consecutive to one another. Consequently, for these four overlapping offenses, there are many permutations in

convictions for all property offenses arising in the course of the same act or course of conduct—not just those referenced in subsections (a) and (b) of the RCC limitation on multiple convictions statute—are generally subject to an imprisonment sentence for only the most serious offense.[369] Expanding the list of offenses subject to the RCC limitation on multiple convictions statute improves penalty proportionality and is consistent with the District's existing sentencing practice for property offenses.

The remaining changes are clarificatory in nature and do not substantively change District law.

The RCC limitation on multiple convictions statute does not change and is intended to encompass the meaning of the phrase "same act or course of conduct" in current D.C. Code § 22-3203. Per RCC § 22A-202(b), "act" is a defined term meaning "a bodily movement," but course of conduct is undefined. Neither "act" nor "course of conduct" is defined in the current D.C. Code. DCCA case law on merger has provided tests for how to determine whether, in the facts of a particular case, the defendant's criminal conduct constitutes a single act or course of conduct.[370] This case law remains unaffected by the RCC limitation on multiple convictions statute.

The RCC statute does not affect DCCA case law regarding inconsistent offenses that are not both subject to subsection (a) or subsection (b).[371]

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how the same act can be charged, convicted, and sentenced that subject a person to very different penalties, fees, and potential collateral consequences.

[369] The District's Voluntary Sentencing Guidelines (VSG) provide that sentences for property and other offenses committed as part of the same event that are not crimes of violence "must be imposed concurrently." VSG § 7.10 (2016). Also, instead of referring to offenses in the same "act or course of conduct," the VSG applies to offenses committed as part of one "event." "[O]ffenses are part of a single event if they were committed at the same time and place or have the same nucleus of facts." VSG § 7.10 (2016). Note, however, that the VSG are not legally binding, and its policy on concurrent sentencing was broad enough to warrant creation of specific aggravating and mitigating factors to reflect instances where the sentencing judge believes the concurrent sentencing policy yielded a disproportionate penalty. VSG §§ 5.2.2 – 5.2.3. However, in 2015, out of the two nearly two thousand sentences for felony charges, there was no sentencing departure by a judge that cited the concurrent sentencing policy as being too lenient in the case, and four instances where a judge departed from the VSG and cited the concurrent sentencing policy as being too severe. D.C. Sentencing and Criminal Code Revision, 2016 Annual Report, at 81.

[370] *See, e.g.*, *Hanna v. United States*, 666 A.2d 845, 852-53 (D.C. 1995) (Thus, "[i]t is settled law that the doctrine of merger does not apply where the offenses arise out of separate acts or transactions." *Allen v. United States*, 580 A.2d 653, 657 (D.C.1990) (citation and internal quotation omitted). Criminal acts are considered separable for purposes of merger analysis when there is "an appreciable period of time," *id.* at 658, between the acts that constitute the two offenses, or when a subsequent criminal act 'was not the result of the original impulse, but of a fresh one.' *Blockburger* ,284 U.S. at 303, 52 S.Ct. at 181. In evaluating separability of offenses, this court has adopted the so-called "fork-in-the-road" test for determining whether a defendant's conduct is subject to multiple punishments:

> If at the scene of the crime the defendant can be said to have realized that he [or she] has come to a fork in the road, and nevertheless decides to invade a different interest, then his [or her] successive intentions make him [or her] subject to cumulative punishment, and he [or she] must be treated as accepting that risk, whether in fact he [or she] knows of it or not.

Owens, 497 A.2d at 1095 (*quoting Irby v. United States*, 129 U.S.App.D.C. 17, 22-23, 390 F.2d 432, 437-38 (1967) (en banc) (Leventhal, J., concurring)). Thus, where it is clear, under any of these tests, that a defendant has committed more than one criminal act, there is no constitutional bar to the imposition of separate punishments for each act.").

[371] *See* D.C. Crim. Jur. Instr. § 2.400 WHERE THE INDICTMENT CHARGES INCONSISTENT COUNTS ("This instruction, however, remains relevant for inconsistent offenses that are not included in this statute. *See, e.g.*, *U.S. v. Lemonakis*, 485 F.2d 941, 966 (D.C. Cir. 1973) (convictions for burglary and grand larceny were mutually exclusive of conviction for receiving and bringing into the District of Columbia stolen property; vacating burglary and larceny convictions which carried longer sentences cured any prejudice which resulted from the failure to properly instruct);

Relation to National Legal Trends. *The RCC limitation on multiple convictions statute's above-mentioned substantive changes to current District law have mixed support under national legal trends.*

The Supreme Court and lower courts broadly recognize that a criminal conviction, even if concurrent to a more serious conviction, is a separate punishment that has collateral consequences beyond the sentence.[372] However, whether concurrent sentencing is or is not deemed appropriate for multiple offenses committed as part of the same act or course of conduct varies widely across jurisdictions.

The MPC bars multiple convictions not only where one offense is a lesser included offenses of another or includes inconsistent elements, but also, more generally, "where the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct."[373] Several states have followed the MPC in codifying such a bar to multiple offense liability.[374]

Some jurisdictions by statute bar multiple convictions arising out of the same act or course of conduct for most or all crimes.[375] Inversely, some jurisdictions specifically allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[376]

For theft and overlapping offenses like RSP and UUV, liability for both offenses for the same act or course of conduct is generally limited by either statute or case law specific to those offenses. In several states, multiple convictions for these offenses are barred because they are alternative means of committing the same consolidated "theft" offense.[377] In many other states,

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Irby v. U.S., 342 A.2d 33, 39 (D.C. 1975) (robbery and receiving stolen property are legally inconsistent offenses).").

[372] *See Ball v. United States*, 470 U.S. 856, 865 (1985) ("[A] separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.") (emphasis in original).

[373] Model Penal Code 1.07(1) ("Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: (a) one offense is included in the other, as defined in Subsection (4) of this Section; or (b) one offense consists only of a conspiracy or other form of preparation to commit the other; or (c) inconsistent findings of fact are required to establish the commission of the offenses; or (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.").

[374] § 68 Multiple offense limitations 1 Crim. L. Def. § 68 ("Ala. Code § 13A-1-8(b)(4) (1982); Colo. Rev. Stat. § 18-1-408(1)(d) (1978); Ga. Code Ann. § 16-1-7(a)(2) (Michie 1982); Hawaii Rev. Stat. § 701-109(1)(d) (1976); Mo. Ann. Stat. § 556.041(3) (Vernon 1979); Mont. Code Ann. § 46-11-502(4) (1983); N. J. Stat. Ann. § 2C:1-8(a)(4) (West 1982); Okla. Stat. Ann. tit. 21, § 11 (West 1983).").

[375] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654 ("An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.").

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

[377] The following define RSP as a means of committing theft: Alaska Stat. Ann. § 11.46.100; Ariz. Rev. Stat. Ann. § 13-1802; Ark. Code Ann. § 5-36-106; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119; Ga. Code Ann. § 16-8-7; Haw. Rev. Stat. Ann. § 708-830; Idaho Code Ann. § 18-2401; Iowa Code Ann. § 714.1; 720 Ill. Comp. Stat. Ann. 5/16-1; Kan. Stat. Ann. § 21-5801; Md. Code Ann., Crim. Law § 7-104; Me. Rev. Stat. tit. 17-A, §

these overlapping theft-type offenses are statutorily barred from providing liability for multiple convictions,[378] or case law bars such liability.[379] The MPC and the Proposed Federal Criminal Code do not explicitly prohibit convictions for both theft and UUV for the same act or course of conduct, but the commentary for each[380] recognizes that UUV is necessary to punish conduct that falls short of theft. Similarly, the MPC[381] and the Proposed Federal Criminal Code,[382] prohibit a defendant from being convicted of both RSP and theft in regards to the same property involved in a single act or course of conduct.

For other property offenses, statutory provisions generally do not bar multiple convictions for the same act or course of conduct.[383]

There is no consensus expert opinion on how to handle multiple convictions arising out of the same act or course of conduct. As the American Law Institute (ALI) Sentencing Project Commentary recently stated: "No American jurisdiction has formulated a satisfactory approach to the punishment of offenders convicted of multiple current offenses, in large part because of the complexity of the task."[384] The ALI Sentencing Project's new recommendations are that sentencing guideline regimes shall include a general presumption in favor of concurrent sentences,[385] but the ALI does not specifically address multiple convictions for substantially overlapping offenses.

359; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-517; Nev. Rev. Stat. Ann. § 205.0832; N.H. Rev. Stat. Ann. § 637:7; N.J. Stat. Ann. § 2C:20-7; N.D. Cent. Code Ann. § 12.1-23-02; Or. Rev. Stat. Ann. § 164.015; 18 Pa. Stat. and Cons. Stat. Ann. § 3925; S.D. Codified Laws § 22-30A-7; Tenn. Code Ann. § 39-14-101; Tex. Penal Code Ann. § 31.02; Utah Code Ann. § 76-6-403. Similarly, the following states define UUV as a type of theft: Minn. Stat. Ann. § 609.52(2)(17); Me. Rev. Stat. tit. 17-A, § 360, or merger at sentencing, Md. Code Ann., Crim. Law § 7-105(2).

[378] The following states have statutory provisions that prevent convictions for theft and RSP for the same property involved in the same transaction: Del. Code Ann. tit. 11, § 856; Cal. Penal Code § 496; Fla. Stat. Ann. § 812.025; La. Civ. Code Ann. r.P. art. 482.

[379] The following states prohibit convictions for theft and RSP for the same property involved in the same transaction through case law: *Com. v. Corcoran*, 69 Mass. App. Ct. 123, 125, 866 N.E.2d 948, 950 (2007); *State v. Perry*, 305 N.C. 225, 236–37, 287 S.E.2d 810, 817 (1982*) overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010); *Jackson v. Com.*, 670 S.W.2d 828, 832–33 (Ky. 1984) *disapproved of on other grounds by Cooley v. Com.*, 821 S.W.2d 90 (Ky. 1991); *State v. Bleau*, 139 Vt. 305, 308–09, 428 A.2d 1097, 1099 (1981); *State v. Melick*, 131 Wash. App. 835, 840–41, 129 P.3d 816, 818–19 (2006); *City of Maumee v. Geiger*, 45 Ohio St. 2d 238, 244, 344 N.E.2d 133, 137 (1976); *Hammon v. State*, 1995 OK CR 33, 898 P.2d 1287, 1304 CHECK CITE; *State v. Taylor*, 176 W. Va. 671, 676, 346 S.E.2d 822, 827 (1986); *Starks v. Com.*, 225 Va. 48, 54, 301 S.E.2d 152, 156 (1983).In five states views UUV as a lesser included offense, thus preventing convictions for both. *See State v. Willis*, 673 A.2d 1233, 1240 (Del. Super. Ct. 1995); *Jackson v. State*, 270 S.W.3d 649, 652 (Tex. App. 2008); *State v. Shults*, 169 Mont. 33, 35-36 (1976); *Reyna-Abarca v. People*, 2017 WL 745876, 10 (Colo. 2017); *Greer v. State*, 77 Ark. App. 180, 184 (2002).

[380] MPC § 223.9 cmt. at 271 (discussing the requirements for theft under the MPC and noting that "Nevertheless, there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another."); Proposed Federal Criminal Code § 1736 cmt. at 212 (discussing the requirements for theft under the proposed revised federal criminal code and noting that "In defining an offense of borrowing the vehicle, this section has the effect of providing in federal criminal laws a felony-misdemeanor distinction so that a felony charge and conviction in most 'joyriding' cases may be avoided.").

[381] MPC § 223.6 (defining RSP as a theft).

[382] Proposed Federal Criminal Code § 1732(c) (including RSP in theft).

[383] Research was not performed to determine whether these other jurisdictions' statutes were structured as lesser included offenses of one another which would bar multiple convictions.

[384] American Law Institute, Model Penal Code: Sentencing, Commentary to § 6B.08 (Proposed Final Draft, April 2017).

[385] American Law Institute, Model Penal Code: Sentencing, § 6B.08(2) (Proposed Final Draft, April 2017).