First Draft of Report #9 Recommendations for Theft and Damage to Property Offenses

SUBMITTED FOR ADVISORY GROUP REVIEW
August 11, 2017

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrc.dc.gov

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. 9, *Recommendations for Theft and Damage to Property Offenses*, is November 3, 2017 (twelve weeks from the date of issue). Oral comments and written comments received after November 3, 2017 will not be reflected in the Second Draft of Report No. 9. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Chapter 21. Theft Offenses

RCC § 22A-2101. Theft.

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

(1) Knowingly takes, obtains, transfers, or exercises control over;
(2) The property of another;
(3) Without the consent of the owner; and
(4) With intent to deprive that person of the property.

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

(c) *Gradations and Penalties.*

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

(2)*First Degree Theft*.

(A) A person is guilty of first degree theft if the person commits theft and:

(i) The property, in fact, has a value of $25,000 or more; or

(ii) The property, in fact: is a motor vehicle, and the value of the motor vehicle is $25,000 or more.

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

(3)*Second Degree Theft.*

(A) A person is guilty of second degree theft if the person commits theft and:

(i) The property, in fact, has a value of $2,500 or more; or

(ii) The property, in fact, is a motor vehicle.

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

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

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

Commentary

Explanatory Note. *This section establishes the revised theft offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct in which there is an intent to deprive another of property without the owner's consent. The penalty gradations are primarily based on the value of the property involved in the crime. The revised theft offense replaces the theft statute*[1] *in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct—takes, obtains, transfers, or exercises control over an item. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct is taking, obtaining, transferring, or exercising control over an item.

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

Subsection (a)(3) states that the proscribed conduct must be done "without the consent of the owner." The term "consent" requires some indication (by words or actions) of agreement and may be given by a person authorized to do so. Any consent, even if obtained by deception or coercion, negates the element "without the consent of the owner" and the accused is not guilty of theft. "Owner" is defined to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(3), here requiring the accused to be aware to a practical certainty or consciously desire that he or she lacks consent of the owner.

Subsection (a)(4) requires that the defendant had an "intent to deprive" the person of property. "Deprive" is a defined term meaning the owner is unlikely to recover the object or it is withheld permanently or long enough to lose a substantial part of its value or benefit. "Intent" also is a defined term in RCC § 22A-206 meaning the defendant believed his or her conduct was practically certain to "deprive," another defined term meaning a substantial loss of the property. It is not necessary to prove that such a deprivation actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that a deprivation would result.

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

Subsection (c) grades theft primarily according to the value of the property involved.[2] The only deviation from this valuation scheme is the two grades of theft that specifically address theft of motor vehicles, a defined term. However, even in those two grades, the value of the motor vehicle is still the primary factor for grading.[3] "In fact," a defined term, is used in all of

[1] D.C. Code § 22-3211.

[2] For example, if the value of the property has any value, it is Fourth Degree Theft; if the value of the property is, in fact, $250,000 or more, it is Aggravated Theft.

[3] Second Degree Theft includes theft of a motor vehicle, which includes motor vehicles with a greater value than the $2,500 threshold for other property in the same grade. Effectively, this deviation allows for low-value motor vehicles to be treated as higher value property, with correspondingly greater penalties than they would otherwise receive if graded within the value thresholds of Third or Fourth Degree Theft. However, per the language in First

the theft gradations to indicate that there is no culpable mental state requirement as to the value of the property or the fact that the property is a motor vehicle. The defendant is strictly liable as to the value of the property or the fact that it is a motor vehicle.

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

First, the revised theft offense no longer includes conduct that constitutes "obtaining property by trick," "false pretense," "deception," "false token," or "larceny by trick."[4] Under current law, such conduct is criminalized both as theft[5] and fraud.[6] Currently, a defendant may be convicted of both theft and fraud based on the same act or course of conduct, even though he or she must be concurrently sentenced for these convictions.[7] In the RCC, conduct that constitutes "obtaining property by trick," "false pretense," "deception," or "larceny by trick" is criminalized only in RCC § 22A-2201, the revised fraud offense. Conduct previously known as "larceny by trust," "embezzlement," or obtaining property by "tampering" remains part of theft, except insofar as such conduct involves obtaining consent by deception and is therefore part of the revised fraud statute (RCC § 22A-2201). This change reduces unnecessary overlap among offenses and improves the proportionality of the theft and fraud statutes by eliminating multiple punishments for the same conduct.

Second, the revised theft offense eliminates as a separate means of proving liability for theft that the defendant have an intent to "appropriate"[8] property. Currently, District law defines "appropriate" as "to take or make use of without authority or right."[9] As applied to the current theft statute, the definition of "appropriate" means that any unauthorized taking or use of property, no matter how brief, can suffice for a theft conviction and is punishable the same as the more serious intent to interfere with property that is required to prove "with intent to deprive."[10] In the RCC, conduct that currently is punishable under the "with intent to appropriate" language in the current theft statute instead will be punished under the unauthorized use of property offense in section RCC § 22A-2102. This change improves the proportionality of the revised theft offense by distinguishing conduct of greater and lesser seriousness. The change also reduces the overlap that currently exists between theft and theft-related offenses such as unauthorized use of a motor vehicle,[11] receiving stolen property,[12] and taking property without right,[13] which either require a lesser intent or no intent with regards to the defendant's level of interference with property.

Degree Theft, the theft of a motor vehicle valued at $25,000 or more is no different than the theft of any other property valued $25,000 or more in that grade.

[4] D.C. Code § 22-3211(a)(3).

[5] D.C. Code § 22-3211.

[6] D.C. Code § 22-3221.

[7] D.C. Code § 22-3203. However, as described in the commentary to section RCC § 22A-2003, even if the imprisonment sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences.

[8] D.C. Code § 22-3211(b)(2).

[9] D.C. Code § 22-3201(1).

[10] D.C. Code §§ 22-3201(2), 22-3211(b)(1).

[11] D.C. Code § 22-3215.

[12] D.C. Code § 22-3232.

[13] D.C. Code § 22-3213.

Third, the provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offenses," bars multiple convictions for the revised theft and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses, including theft, based on the same act or course of conduct.[14] However, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised theft offense and other closely-related offenses, RCC §22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Fourth, the revised theft statute increases the number and type of grade distinctions, grading primarily based on the value of the property. The current theft offense is limited to two gradations based solely on value.[15] By contrast, the revised theft offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. In addition, the Second Degree Theft gradation includes theft of a motor vehicle. Effectively, this deviation allows for theft of low-value motor vehicles to be treated as higher value property, with correspondingly greater penalties than they would otherwise receive if treated as Third or Fourth Degree Theft. This special treatment of low-value motor vehicles recognizes that such vehicles are often targeted for theft. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. The gradations in the revised offense also create consistency with the dollar-value distinctions in related theft and fraud offenses.

Fifth, the revised theft offense eliminates the special recidivist theft penalty set forth in current D.C. Code § 22-3212(c).[16] The current recidivist theft penalty provides that a defendant convicted of first or second degree theft who has two or more prior convictions for theft not committed on the same occasion shall be sentenced to a term of imprisonment of not more than 15 years and is subject to a mandatory minimum term of imprisonment of one year. This special enhancement is highly unusual in current District law, and rarely used according to available felony conviction data.[17] There is no clear basis for singling out recidivist thefts as compared to

---

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

[15] First degree theft involves property with a value of $1,000 or more and is punished as a serious felony; second degree theft involves property valued at less than $1,000 and is a misdemeanor.

[16] D.C. Code § 22-3212:

> (c) A person convicted of theft in the first or second degree who has 2 or more prior convictions for theft, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 15 years and for a mandatory-minimum term of not less than one year, or both. A person sentenced under this subsection shall not be released from prison, granted probation, or granted suspension of sentence, prior to serving the mandatory-minimum.
>
> (d) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for theft if he or she has been convicted on at least 2 occasions of violations of:
>
> (1) § 22-3211;
>
> (2) A statute in one or more jurisdictions prohibiting theft or larceny; or
>
> (3) Conduct that would constitute a violation of § 22-3211 if committed in the District of Columbia.

[17] First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code: Penalty Enhancements.

other offenses of equal seriousness. The general recidivism enhancement in section RCC § 22A-806 will provide enhanced punishment for recidivist theft consistent with other offenses, improving the overall consistency and proportionality of the RCC.

Beyond these five substantive changes to current District law, three other aspects of the revised theft statute may be viewed as a substantive change of law.

First, the revised theft statute eliminates the evidentiary provision for theft of services that is in subsection (c) of the current theft statute.[18] The evidentiary provision states that "proof" of certain facts "shall be prima facie evidence that the person had committed the offense of theft." The provision neither specifies the government's burden of proof for those facts nor states whether the finding of prima facie evidence is a mandatory presumption that the trier of fact must make or a permissive presumption that the trier of fact may, but is not required, to make. There is no District case law concerning the theft of services provision. It appears that the language in the theft of services provision is superfluous[19] and deletion of the provision clarifies the revised theft offense.

Second, the revised theft offense requires a culpable mental state of knowledge for subsections (a)(1)-(a)(2), concerning whether the accused's conduct constituted taking, obtaining, transferring, or exercising control over the property, and whether the property met the definitions of "property" and "property of another." The current theft statute does not specify a culpable mental state for these elements and no case law exists directly on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[20] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[21]

Third, the gradations in subsection (c), by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property or the motor vehicle, or whether the property is a motor vehicle. The current statute is silent as to what culpable mental state applies to the value of the property. There is no District case law on what mental state, if any, applies to the current theft value gradations, although District practice does not appear to apply a mental state to the values in the current gradations.[22] Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[23] Clarifying that the value of the property or the fact that the property

[18] D.C. Code § 22-3211(c).

[19] In practice, it is unclear whether there are fact patterns where it could be said the government would satisfy the requirements of the theft of services provision and not also established a prima facie case for theft. Indeed, the theft of services evidentiary provision requires the government to establish additional facts beyond what the theft offense requires—for example that the services were rendered "in circumstances where payment is ordinarily made immediately upon the rendering of services or prior to departure from the place where the services were obtained."

[20] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[21] *See, e.g.*, RCC § 22A-2201.

[22] D.C. Crim. Jur. Instr. § 5.300.

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

is a motor vehicle are matters of strict liability in the revised theft gradations clarifies and potentially fills a gap in District law.

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

First, subsection (a)(1) of the revised theft offense no longer uses the phrase "wrongfully obtains or uses" that is in the current theft statute,[24] and eliminates superfluous language[25] in the long list of predicate conduct. These changes in wording do not affect the limited District case law interpreting this part of the definition of "wrongfully obtains or uses," such as *In re D.D.*[26] and *Dobyns v. United States*.[27] No change to the scope of the theft statute is intended by these changes.

Second, subsection (a)(3) of the revised theft statute requires that the defendant act "without the consent of the owner." This element is intended to clarify the meaning of the ambiguous phrase "without authority or right" recognized under current theft law. The current theft statute does not distinguish "without authority or right" as a separate element.[28] "Without authority or right" is merely part of the current statutory definition of "appropriate," one of the statutorily specified means of committing theft.[29] Regardless of the status of "without authority or right" as a separate element in the statute, both the legislative history[30] and current practice as reflected by the Redbook jury instruction for theft[31] acknowledge that theft requires an additional element similar to "without authority or right," although they each use different language to discuss it.

The "consent" of the "owner," defined terms which includes agents of the owner, has been recognized in DCCA case law as providing a grant of authority or right which negates theft.[32] However, a person may have authority or right to deprive another of their property without consent of the owner, such as in the case of a police seizure of contraband or other government operations. To the extent that there is a government seizure of property of another

[24] D.C. Code § 22-3211(a).

[25] Superfluous terms are: "making an unauthorized use" or unauthorized "disposition," and "interest in or possession of property." The remaining terms in the definition of "wrongfully obtains or uses" are included in either the revised theft offense or revised fraud offense (RCC § 22A-2201).
takes, obtains, transfers, or exercises control over

[26] 775 A.2d 1096 (D.C. 2001).

[27] 30 A.3d 155 (D.C. 2011).

[28] D.C. Code § 22-3211.

[29] However, in at least one instance the D.C. Court of Appeals (DCCA) has suggested that proof that a defendant act "without authority or right" also is required when the defendant committed theft by an "intent to deprive." *Russell v. United States*, 65 A.3d 1177, 1181 (D.C. 2013) ("[W]e are satisfied that appellants 'wrongfully obtained' [Federal Aviation Administration] property, 'without authority or right,' specifically intending at the time to deprive the [Federal Aviation Administration] of property that the evidence shows had value. Accordingly, the statutory elements of second-degree theft have been satisfied.").

[30] 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 16-17 (discussing how "wrongfully" was added to the phrase "obtains or uses" to "insure that purely innocent transactions are excluded from the scope" of the theft offense and 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.").

[31] D.C. Crim. Jur. Instr. § 5.300 cmt. 5-33 to 5-34 (discussing why "against the will" and "against the will or interest" were added to parts of the theft jury instruction).

[32] *Nowlin v. United States*, 782 A.2d 288, 290, 292-93 (D.C. 2001) (discussing the importance of the fact that there was another individual "authorized" to sign checks on the auto body shop account as it pertains to whether the defendant "knew" he was not "entitled" to cash the check); *Russell*, 65 A.3d at 1777-81, n. 27 (discussing the doctrine of apparent authority).

without consent of the owner, that does not constitute theft under the revised statute. No change in the scope of theft liability is intended by the substitution of "consent of the owner" for "authority or right." The definitions of "consent" and "owner" are discussed in more detail in the commentary to RCC § 22A-2001.

Third, subsection (a)(4) of the revised theft statute requires only that the defendant act "with intent to deprive the other of the property." The language "a right to the property or a benefit of the property" that is in subsection (b) of the current theft offense has been deleted as surplusage, given that the definition of "deprive" in RCC § 22A-2001 refers to the property's "value" and "benefit." No change to the scope of the theft statute is intended by this change.

Fourth, subsection (a)(3) of the revised theft statute specifies a "knowingly" mental state requirement as to the fact that the accused was without the owner's consent. Although the current theft statute is silent as to the applicable culpable mental state, D.C. Court of Appeals (DCCA) case law has applied a knowledge requirement to a similar element.[33] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[34]

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

First, eliminating dual liability for theft by deception under the current theft and fraud statutes follows a strong majority of jurisdictions' nationwide. Most jurisdictions,[35] including nearly all jurisdictions with reformed criminal codes, as well as the American Law Institute's Model Penal Code (MPC),[36] consolidate theft-type offenses such that a theft by deception can only result in one conviction. The Proposed Federal Criminal Code includes deceptive theft as a type of theft, but does not have a broad fraud statute that overlaps with it.[37] The RCC's specific manner of eliminating the dual liability for theft by deception—by removing such liability from

---

[33] *Russell v. United States*, 65 A.3d 1177 (D.C. 2013) ("Thus, to be clear, in order to show that the accused took the property 'without authority or right,' the government must present evidence sufficient for a finding that 'at the time he obtained it,' he 'knew that he was without the authority to do so.'") (citations omitted); *Nowlin v. United States*, 782 A.2d 288, 291-293 (D.C. 2001); *Peery v. United States*, 849 A.2d 999, 1001 (D.C. 2004) (listing the elements of second degree theft and then stating that "The question we address is whether the government presented sufficient evidence to prove that, at the time *Peeery* used the AMEX card for personal purchases, he knew that he was without the authority to do so.").
The DCCA has also stated that the culpable mental state of the current theft offense is one of "specific intent." *See, e.g.*, *Price v. United States*, 985 A.2d 434, 438 (D.C. 2009).

[34] *See, e.g.*, RCC § 22A-2201.

[35] Alaska Stat. Ann. § 11.46.100; Ala. Code § 13A-8-2; Ark. Code Ann. § 5-36-103; Ariz. Rev. Stat. Ann. § 13-1802; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, §§ 843 and 844; Ga. Code Ann. § 16-8-12; Haw. Rev. Stat. Ann. § 708-830; Idaho Code Ann. § 18-2403; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. §§ 35-43-4-1 and -2; Kan. Stat. Ann. § 21-5801; La. Stat. Ann. § 14:67; Me. Rev. Stat. tit. 17-A, §§ 351 and 354; Md. Code Ann., Crim. Law § 7-104; Mass. Gen. Laws Ann. ch. 266, § 30; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-512; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; N.Y. Penal Law § 155.05; N.D. Cent. Code Ann. § 12.1-23-02; Ohio Rev. Code Ann. § 2913.02; Okla. Stat. Ann. tit. 21, § 1701; Or. Rev. Stat. Ann. § 164.015; 18 Pa. Stat. and Cons. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3; Tenn. Code Ann. §§ 39-11-106 and 39-14-103; Tex. Penal Code Ann. §§ 31.01 and 31.03; Utah Code Ann. § 76-6-405; Wash. Rev. Code Ann. § 9A.56.020; Wis. Stat. Ann. § 943.20.

[36] MPC § 223.1.

[37] Proposed Federal Criminal Code § 1732.

the revised theft statute and transferring it to the revised fraud statute—is unusual. However, few jurisdictions have separate fraud statutes of general applicability[38] like the District's current fraud statute[39] and, as noted above, most jurisdictions rely on a sweeping consolidation of all theft-type offenses. However, the RCC solves the problem of dual liability without instituting a broader change to current District law to consolidate theft-type offenses.

Second, limiting the offense to "with intent to deprive the other of the property" and deleting "with intent to appropriate" as an alternative basis of liability in the revised theft offense is broadly supported by law in other jurisdictions. The equivalent theft laws in the 50 states, the MPC,[40] and the Proposed Federal Criminal Code[41] overwhelmingly require intent or purpose to "deprive" in their theft offenses, and have definitions of "deprive" that require permanent or substantial interference with the property. There appear to be just three states with theft statutes that clearly include an intent or purpose to temporarily interfere with property.[42] Limiting the revised theft offense to "with purpose to deprive" and eliminating "with intent to appropriate" will conform D.C.'s revised theft statute to the national trend, as well as improve the proportionality of the revised offense.

Third, regarding the bar on multiple convictions for the revised theft offense and overlapping property offenses, a generalization to other jurisdictions for all the offenses would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offense similar to the revised theft offense and other overlapping property offenses. For example, where the offense most like the revised theft offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences statute[43] or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[44] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[45]

Specifically, regarding theft, unauthorized use of a motor vehicle (UUV), and receiving stolen property (RSP), a majority of American jurisdictions prohibit multiple convictions arising from the same act or course of conduct, as well as the Model Penal Code (MPC) and the Proposed Federal Criminal Code. In several states, multiple convictions for these offenses are

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

[39] D.C. Code § 22-3221.

[40] MPC § 223.2.

[41] Proposed Federal Criminal Code § 1732.

[42] Fla. Stat. § 812.014 ("A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently" deprive or appropriate."); Ga. Code Ann. § 16-8-12; 13; -1 (requiring intent to deprive for theft by taking and theft by deception, but defining "deprive," in part, as "to withhold property of another permanently or temporarily."); *State v. Crittenden*, 146 Wash. App. 361, 370, 189 P.3d 849, 853 (2008) (stating that the crime of theft in Wash. Rev. Code Ann. § 9A.56.020 requires as an element an "intent to deprive," but that it is not an intent to permanently deprive).

[43] D.C. Code § 22-3203.

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

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

barred because they are alternative means of committing the same consolidated "theft" offense.[46] In many other states, these overlapping theft-type offenses are statutorily barred from providing liability for multiple convictions,[47] or case law bars such liability.[48] 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[49] recognizes that UUV is necessary to punish conduct that falls short of theft. Similarly, the MPC[50] and the Proposed Federal Criminal Code,[51] 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.

Fourth, the revised theft offense's expansion to five gradations, ranging to a value of $250,000 or more and including a provision effectively elevating the worth of low-value cars, reflect national trends. The overwhelming majority of the 50 states[52] as well as the MPC[53] and

---

[46] 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, § 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.

[47] 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. One state prohibits convictions for both UUV and theft for the same property involved in the same transaction through merger at sentencing. Md. Code Ann., Crim. Law § 7-105(2).

[48] 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; *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).
Five states view 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).

[49] 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.").

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

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

[52] Only 9 states' theft offenses are limited to two grades based on value. Mass. Gen. Laws Ann. ch. 266, § 30(1); Mont. Code Ann. § 45-6-301; N.C. Gen. Stat. Ann. § 14-73.1; Okla. Stat. Ann. tit. 21, § 1704 and § 1705; 11 R.I. Gen. Laws Ann. § 11-41-5 and § 11-41-7; Vt. Stat. Ann. tit. 13 § 2501, § 2502, § 2503; Va. Code Ann. § 18.2-95 and -96; W.Va. Code Ann. § 61-3-13; Wyo. Stat. Ann. § 6-3-402. However, most of these states have additional grades or additional qualifications within the two grades, such as theft of a firearm, theft of a motor vehicle, etc., further emphasizing that D.C.'s two grade system is one of the narrowest in the country.

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

Proposed Federal Criminal Code[54] have more than two grades of penalties for theft, unlike the current District theft statute, which is limited to two grades. Amongst the 50 states, four or five gradations are the most common numbers.[55] A recent study by the Pew Charitable Trusts found that since 2001, at least 35 states have raised the amount of their felony thresholds for theft in order to "prioritize costly prison space for more serious offenders and ensure that value-based penalties take inflation into account.[56] States "that increased their thresholds reported roughly the same average decrease in crime as the 22 states that did not change their theft laws."[57] The study further found that raising the felony theft threshold did not affect the "overall" property crime or larceny rates, and that the amount of a state's felony threshold "is not correlated with its property crime and larceny rates."[58] As a whole, there has been a "long nationwide decline in property crime and larceny rates that began in the early 1990s."[59]

The gradations in the revised theft offense for theft of a motor vehicle of differing values also reflect national trends. At least 21 of the 50 states[60] as well as the MPC[61] and the Proposed Federal Criminal Code[62] have a gradation of theft specifically for a car, or a separate offense that penalizes theft of car. Fourteen of these states and the MPC grade theft of a motor vehicle without regard to the motor vehicle's value.[63] The remaining states that do grade theft of a motor vehicle on the basis of its value generally grade theft of motor vehicle more seriously than the theft of other property.[64]

---

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

[55] In determining how many "grades" a state has, enhancements were excluded as were separate offenses for theft of a motor vehicle or theft from a person. Ala. Code §§ 13A-8-3, -4, -4.1-5; Alaska Stat. Ann. § 11.46.120, .130, .140, .150; Ark. Code Ann. § 5-36-103; Del. Code Ann. tit. 11, §§ 841, 841A; Fla. Stat. Ann. § 812.014; Haw. Rev. Stat. Ann. §§ 708-830.5, -831, -832, -833; Iowa Code Ann. § 714.2; Kan. Stat. Ann. § 21-5801; Ky. Rev. Stat. Ann. § 514.030; La. Stat. Ann. § 14:67; Me. Rev. Stat. tit. 17-A, § 353; Md. Code Ann., Crim. Law § 7-104; Mich. Comp. Laws §§ 750.356, .357; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.030; Neb. Rev. Stat. Ann. § 28-518; N.J. Stat. Ann. § 2C:20-2; N.M. Stat. Ann. § 30-16-1; N.Y. Penal Law §§ 155.25, .30, .35, .40, .42; N.D. Cent. Code Ann. § 12.1-23-05; Or. Rev. Stat. Ann. §§ 164.043, .045, .055, .057; Utah Code Ann. § 76-6-412; Wis. Stat. Ann. § 943.20.

[56] *The Effects of Changing State Theft Penalties*, PEW CHARITABLE TRUSTS, http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/02/the-effects-of-changing-state-theft-penalties, (last updated February 24, 2017).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] For this survey, statutes that allow either a temporary or permanent intent to interfere with property or a temporary or permanent interference were included. Ala. Code § 13A-8-3(b); Cal. Penal Code § 487 (d)(1); Conn. Gen. Stat. Ann. § 53a-122 through § 53a-124; Del. Code Ann. tit. 11, § 841A; Ind. Code Ann. § 35-43-4-2.5; Iowa Code Ann. § 714.2(2); La. Stat. Ann. § 14:67.26; Minn. Stat. Ann. § 609.52(3)(3)(d); Mo. Ann. Stat. § 570.030(3)(3)(a); Nev. Rev. Stat. Ann. § 205.228; N.J. Stat. Ann. § 2C:20-2(b)(2)(b); N.Y. Penal Law § 155.30(8); N.D. Cent. Code Ann. §12.1-23-05(3)(d); Ohio Rev. Code Ann. § 2913.02(B)(5); Okla. Stat. Ann. tit. 21, § 1720; 18 Pa. Stat. Ann. § 3903(a.1); S.C. Code Ann. § 16.1-21-60(B); Utah Code Ann. § 76-6-412(1)(a)(ii); Fla. Stat. Ann. § 812.014(2)(c)(6); Miss. Code Ann. § 97-17-42; Wash. Rev. Code Ann. § 9A.56.050.

[61] MPC § 223.1(2)(a).

[62] Proposed Federal Criminal Code §1735(2)(d).

[63] Cal. Penal Code § 487 (d)(1); Del. Code Ann. tit. 11, § 841A; Ind. Code Ann. § 35-43-4-2.5; Ohio Rev. Code Ann. § 2913.02(B)(5); S.C. Code Ann. § 16.1-21-60(B); Fla. Stat. Ann. § 812.014(2)(c)(6); N.J. Stat. Ann. § 2C:20-2(b)(2)(b); N.D. Cent. Code Ann. §12.1-23-05(3)(d); 18 Pa. Stat. Ann. § 3903(a.1); Mo. Ann. Stat. § 570.030(3)(3)(a); Ala. Code § 13A-8-3(b); Okla. Stat. Ann. tit. 21, § 1720; Utah Code Ann. § 76-6-412(1)(a)(ii); Wash. Rev. Code Ann. § 9A.56.050.

[64] Conn. Gen. Stat. Ann. §§ 53a-122, 123, -124, 125, -125a, -125b; Iowa Code Ann. § 714.2; La. Stat. Ann. §§ 14:67:67.26; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. §§205.220, .222, .228, .240; N.Y. Penal Law §§ 155.25, .30, .35, .40, .42.

Fifth, the deletion of the current theft recidivist penalty[65] would further bring the revised theft offense into conformity with national trends. Most states, the MPC, and the Proposed Federal Criminal Code do not have a theft-specific recidivist penalty, and of those states that do have a theft-specific recidivist penalty, the District's current statute is the most severe in the nation. Of the 23 states with theft-specific recidivist penalties,[66] the highest maximum penalty is ten years, but it only applies when the property has a value of $1,000 or more but less than $20,000.[67] The next highest maximum possible penalty is seven years,[68] regardless of the value of the property, which is far lower than the maximum possible sentence of 15 years under current D.C. law. In addition, none of the 23 states appear to require a mandatory minimum sentence like D.C.'s current theft-specific recidivist penalty.

[65] D.C. Code § 22-3212(c).

[66] Alaska Stat. Ann. § 11.46.130; 11.46.140; Cal. Penal Code § 490.2; Fla. Stat. Ann. § 812.014; Ga. Code Ann. § 16-8-12; Haw. Rev. Stat. Ann. § 708-803; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-4-2; Iowa Code Ann. § 714.2; Kan. Stat. Ann. § 21-5801; La. Stat. Ann. § 14:67; Me. Rev. Stat. tit. 17-A, § 360; Md. Code Ann., Crim. Law § 7-104; Mich. Comp. Laws Ann. § 750.356; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.040; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-518; N.H. Rev. Stat. Ann. § 637:11; N.C. Gen. Stat. Ann. § 14-72; 11 R.I. Gen. Laws Ann. § 11-41-24; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-412; Va. Code Ann. § 18.2-104.

[67] Mich. Comp. Laws Ann. § 750.736(2)(b)).

[68] N.H. Rev. Stat. Ann. § 637:11(II)(b.

RCC § 22A-2102. Unauthorized Use of Property

(a) *Offense.* A person commits the offense of unauthorized use of property if that person:
  (1) Knowingly takes, obtains, transfers, or exercises control over;
  (2) The property of another;
  (3) Without the effective consent of the owner.

(b) Definitions. The term "possess" has the meaning specified in § 22A-202, the term "knowingly" has the meaning specified in § 22A-206, and the terms "effective consent," "consent," "property," "property of another," and "owner," have the meanings specified in § 22A-2001.

(c) Penalty: Unauthorized use of property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Explanatory Note. *This section establishes the unauthorized use of property (UUP) offense in the Revised Criminal Code (RCC). UUP covers conduct that results in the taking, obtaining, transferring, or exercising of control over property of another without the owner's effective consent. UUP criminalizes behavior that does not rise to the level of conduct "with intent to deprive the other person of the property" in the revised theft offense (RCC § 22A-2101), the revised fraud offense (RCC § 22A-2201), or the revised extortion offense (RCC § 22A-2301). The revised UUP offense replaces the taking property without right (TPWR) statute*[69] *in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct—takes, obtains, transfers, or exercises control over an item. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) of the offense to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct is taking, obtaining, transferring, or exercising control over an item.

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

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

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

[69] D.C. Code § 22-3216.

Subsection (c) establishes a single grade of UUP. Unlike several other theft-related offenses, UUP does not grade based upon the value of the property.

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

First, the revised UUP offense eliminates the current statute's asportation requirement that the defendant "carries away"[70] the property of another and extends liability if the defendant merely "takes," "obtains," "transfers," or "exercises control" over the property without carrying it away. The DCCA has never interpreted the scope of the asportation requirement in the current TPWR statute, but in the context of other offenses has stated it is a minimal requirement.[71] It is unclear, however, why a slight physical movement of property should make the difference between an unauthorized, temporary action being criminal and non-criminal. Elimination of the asportation requirement and expansion of the revised UUP offense improves the proportionality of the statute and makes it a clear lesser included offense of the revised theft, fraud, and extortion statutes.

Second, subsections (a)(2) and (a)(3) applies a "knowingly" mental state to the elements "property of another" and "without the effective consent of the owner." The current TPWR statute merely requires that the defendant engage in conduct "without right" and does not specify a mental state for this element.[72] Case law interpreting the current TPWR statute has construed the phrase without right to mean without the consent of the owner, but has not required a knowledge culpable mental state as to the lack of consent.[73] Similarly, case law suggests that something less than a knowledge culpable mental state is necessary for the element that the property is "property of another."[74] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[75] Requiring a knowing culpable mental state also makes the revised UUP offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[76]

---

[70] D.C. Code § 22-3216.

[71] *Simmons v. United States*, 554 A.2d 1167, 1171 & n. 9(D.C. 1989) ("We have made clear in several cases that the slightest moving of an object from its original location may constitute an asportation." (citing *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967) and *Ray v. United States*, 229 A.2d 161, 162 (D.C.1967)).

[72] The DCCA has stated that the culpable mental state of the current TPWR offense is one of "general intent." *See Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995). "General intent" is not used in or defined in the statute for TPWR, but the DCCA has said that it is frequently defined as "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[73] *Tibbs v. United States*, 507 A.2d 141, 143 (D.C. 1986) ("Only two legal principles can be distilled from the existing case law. First, we held very recently . . . that '[p]roperty cannot be taken 'without right' if it is taken with the knowledge and consent of the owner, or one authorized to consent on his behalf.' . . . Second, it is established that to convict a person of taking property without right, the government need not prove any specific intent; a general intent to commit the proscribed act is all that the law requires." (internal citations omitted).).

[74] *Schafer v. United States*, 656 A.2d 1185, 1189 (D.C. 1995) ("In other words, in the context of this particular case, we must determine whether substantial evidence in the record demonstrates that in removing the television set appellant actually knew, or had reason to know that it was the property of another, not his own.").

[75] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[76] *See, e.g.*, RCC § 22A-2201.

Third, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised UUP offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[77] However, UUP is not among those offenses and, as described in the commentary to RCC § 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised UUP offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Fourth, the revised UUP statute, through the general culpability principles for self-induced intoxication in RCC § 22A-209, allows a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current TPWR statute is a general intent crime,[78] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary intent for the crime.[79] At the same time, the DCCA has also interpreted the current statute to incorporate a negligence-like culpable mental state, which is not a form of culpability that is susceptible to being negated by self-induced intoxication.[80] As a result, a defendant charged under the current statute would have no basis for even raising—let alone presenting evidence in support of—a claim that he or she, due to his or her self-induced intoxicated state, lacked the necessary intent. By contrast, per the revised UUP offense, a defendant would both have a basis for, and be allowed to raise, a claim of this nature since the revised UUP offense is subject to a more demanding culpable mental state of knowledge.[81] Likewise, where appropriate, under the revised UUP offense the defendant would be entitled to a jury instruction clarifying that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in UUP. This change improves the clarity, consistency, and proportionality of the offense.

Beyond these four main changes to current District law, three other aspects of the revised UUP statute may be viewed as a substantive change in law.

---

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

[78] *See Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995).

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

[80] *See Schafer*, 656 A.2d at 1188.

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

First, the revised UUP offense is made a lesser included offense[82] of the revised theft,[83] fraud,[84] and extortion[85] offenses. The current TPWR statute is silent as to whether it constitutes a lesser included offense of the current theft,[86] fraud,[87] and extortion[88] offenses. Based on legislative history,[89] the DCCA has recognized that the current TPWR statute is a lesser included offense of theft,[90] although the current TPWR statute appears to fail the DCCA's current "elements test" as to whether it is a lesser included offense of theft.[91] There is no case law on point with respect to fraud or extortion and these offenses also appear to fail the DCCA's current "elements test."[92] Regardless, the revised UUP statute is clearly a lesser included offense of the revised theft, fraud, and extortion statutes insofar as it has no elements not included in these offenses. Making the revised UUP statute a clear lesser included offense of the revised theft, fraud, and extortion statutes removes an unnecessary gap in liability for temporary takings and improves the overall proportionality of these statutes.

Second, subsection (a)(1) of the revised UUP offense requires a culpable mental state of knowledge, concerning whether the accused's conduct constituted taking, obtaining, transferring, or exercising control over the property. The current statute does not specify a culpable mental state for this element and no case law exists directly on point.[93] Applying a knowledge culpable

[82] By being a lesser included offense, a person cannot be convicted of both UUP and theft or UUP and fraud, or UUP and extortion for the same act or course of conduct. *See, e.g., Mooney v. United States*, 938 A.2d 710, 723 (D.C. 2007) (discussing how multiple punishments that result from convictions of a greater and a lesser-included offense are prohibited by the Double Jeopardy Clause unless there is clear legislative intent that punishment should be imposed for both offenses). In addition, the defendant is on notice from the time of indictment for theft, fraud, or extortion, that he may be convicted of the lesser included offense. *See Woodard v. United States*, 738 A.2d 254, 259 n. 10 (D.C. 1999) ("the law is settled that an indictment on a greater offense puts the indictee on notice that the prosecution might also press a lesser-included charge"); *see also Schmuck v. United States*, 489 U.S. 705, 718, 109 S. Ct. 1443, 1452, 103 L. Ed. 2d 734 (1989) ("The elements test . . . permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge."). Upon a showing of some evidence, the defendant may demand an instruction to the jury on the lesser included offense of UUP to accompany theft, fraud, or extortion charges. *Woodward v. United States*, 738 A.2d at 261 ("Any evidence, however weak, is sufficient to support a lesser-included instruction so long as a jury could rationally convict on the lesser-included offense after crediting the evidence.").

[83] RCC § 22A-2101.

[84] RCC § 22A-2201.

[85] RCC § 22A-2301.

[86] D.C. Code § 22-3211.

[87] D.C. Code § 22-3221.

[88] D.C. Code § 22-3251.

[89] The legislative history for the 1982 Theft Act indicates that the Council of the District of Columbia intended for TPWR to be a lesser included offense of theft. 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 ("[I]t is intended that the offense of taking property without right continue to be treated as a lesser included offense of the consolidated theft offense.").

[90] *Moorer v. United States*, 868 A.2d 137, 143 (D.C. 2005).

[91] *Moorer v. United States*, 868 A.2d at 140 ("Under the elements test, one offense is included within another if "(1) the lesser included offense consists of some, but not every element of the greater offense; and (2) the evidence is sufficient to support the lesser charge."). Because the asportation element of the current TPWR statute is not required by the current theft, fraud, or extortion statutes, the current TPWR statute does not appear to be a lesser included offense of the current theft, fraud, or extortion statutes.

[92] See *Byrd v. United States*, 598 A.2d 386, 390 (D.C. 1991) (*en banc*).

[93] Insofar as the current TPWR offense has been held to be a "general intent crime," courts have consistently held that there must be an "intent to commit the proscribed act" which here consists of the taking. *See, e.g., Fogle v.*

mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[94] Requiring a knowing culpable mental state also makes the revised UUP offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense. [95]

Third, the revised UUP offense requires that the person act "without the effective consent of the owner." The current TPWR statute requires that the defendant act "without right." This phrase has been interpreted by the DCCA to refer to "consent of the owner, or one authorized to consent on his behalf,"[96] and to exclude instances where the consent was "the product of trickery" or where the person had consent to take the item for one purpose but then exceeded the terms of that consent.[97] The revised UUP requirement that the person act "without the effective consent of the owner," uses definitions for "consent,"[98] "effective consent,"[99] and "owner"[100] that are consistent across property offenses and also appears to be consistent with existing case law on the current TPWR statute. The change improves the clarity and consistency of the revised UUP offense.

Relation to National Legal Trends. *The UUP offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends. Only a few of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[101] (hereafter "reformed code jurisdictions") have statutes that generally criminalize the temporary unauthorized use or taking of property.[102]*

First, all of the six reformed code jurisdictions with comparable statutes proscribe a wide range of conduct beyond "takes and carries away" in the current TPWR statute.[103] None of the comparable statutes in the six reformed code jurisdictions has an asportation element like the current TPWR statute does.[104]

United States, 336 A.2d 833, 835 (D.C. 1975). However, case law provides no greater specificity as to the nature of the required intent for TPWR.

[94] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[95] *See, e.g.*, RCC § 22A-2101.

[96] *Fussell v. United States*, 505 A.2d 72 (D.C. 1986).

[97] *Baggett v. United States*, 528 A.2d 444 (D.C. 1987).

[98] RCC § 22A-2001.

[99] *Id.*

[100] *Id.*

[101] *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.

[102] *See, e.g.*, Ohio Rev. Code Ann. § 2913.04(A), (D), (E), (F); Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3(a), (d); Mont. Code Ann. § 45-6-305; Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803. The MPC declined to extend criminal liability to the temporary deprivation of movable property other than motor vehicles, but recognized that a few states had such statutes. MPC § 223.9 cmt. at 271-72. The Proposed Federal Criminal Code also declined to extend criminal liability to the temporary deprivation of movable property other than motor vehicles.

[103] *See, e.g.*, Ohio Rev. Code Ann. § 2913.04; Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3; Mont. Code Ann. § 45-6-305; Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803.

[104] D.C. Code § 22-3216.

Second, codifying a "knowingly" mental state to the element "without the effective consent of the owner" also reflects national trends. As of 2015, it appears just one of the 50 states has a statute that criminalizes the temporary taking of particular property with no culpable mental state requirement.[105] Among the six reformed code jurisdictions with comparable statutes to UUP,[106] all of them specify a "knowingly" culpable mental state[107] or require the defendant to act "with intent to" temporarily deprive the owner of the property.[108] It is difficult to generalize about the elements to which the culpable mental states apply in these jurisdictions due to the varying rules of construction.

Third, regarding the bar on multiple convictions for the revised unauthorized use of property offense and overlapping property offenses, a generalization to other jurisdictions for all the offenses would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offense similar to the revised unauthorized use of property offense and other overlapping property offenses. For example, where the offense most like the revised unauthorized use of property offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences statute[109] or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[110] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[111]

Fourth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[112] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[113] Among

[105] N.C. Gen. Stat. Ann. § 14-72.4 (concerning the unauthorized taking or sale of a dairy milk case or milk crate).
[106] *See, e.g.*, Ohio Rev. Code Ann. § 2913.04(A), (D), (E), (F); Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3(a), (d); Mont. Code Ann. § 45-6-305; Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803.
[107] Ohio Rev. Code Ann. § 2913.04(A), (D), (E), (F); Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3(a), (d); Mont. Code Ann. § 45-6-305.
[107] N.C. Gen. Stat. Ann. § 14-72.4
[108] Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803.
[109] D.C. Code § 22-3203.
[110] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[111] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[112] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).
[113] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[114]

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

RCC § 22A-2103. Unauthorized Use of a Motor Vehicle

(a) *Offense.* A person commits the offense of unauthorized use of a motor vehicle if that person:
  (1) Knowingly operates or rides as a passenger in;
  (2) A motor vehicle;
  (3) Without the effective consent of the owner.

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

(c) *Gradations and Penalties*.
  (1) *First Degree Unauthorized Use of a Motor Vehicle*. A person is guilty of first degree unauthorized use of a motor vehicle if the person commits unauthorized use of a motor vehicle by knowingly operating the motor vehicle. First degree unauthorized use of a motor vehicle is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Unauthorized Use of a Motor Vehicle.* A person is guilty of first degree unauthorized use of a motor vehicle if the person commits unauthorized use of a motor vehicle by knowingly operating or riding as a passenger in the motor vehicle. Second degree unauthorized use of a motor vehicle is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *No Multiple Convictions for Unauthorized Use of a Rented or Leased Motor Vehicle or Carjacking.* No person may be convicted of unauthorized use of a motor vehicle and either unauthorized use of a rented or leased motor vehicle, D.C. Code § 22-3215, or carjacking, RCC § 22A-1XXX based on the same act or course of conduct. A person may be found guilty of any combination of these offenses, but only one judgment of conviction may be entered pursuant to the procedural requirements in RCC § 22A-2003(c).

Commentary

Explanatory Note. *This section establishes the unauthorized use of a motor vehicle (UUV) offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes the use of a motor vehicle without the effective consent of the owner. The UUV penalty gradations are based on whether the defendant operates the motor vehicle or merely rides as a passenger. The revised UUV offense replaces portions of the unauthorized use of motor vehicles statute[115] in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct—conduct that operates or rides as a passenger in an item. "Operates" and "rides as a passenger in" exclude actions necessary to enter the motor vehicle, and passive actions undertaken within an unmoving vehicle.[116] Subsection (a)(1) also specifies a culpable mental state to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct is operating or riding as a passenger. As will be discussed, the revised UUV

[115] D.C. Code § 22-3215. Specifically, the revised UUV offense replaces D.C. Code § 22-3215 (b), (d)(1)-(d)(3). The remaining portions of D.C. Code § 22-3215, concerning rented and leased cars under certain conditions, are not part of the RCC and will remain in D.C. Code § 22-3215, subject to conforming amendments as necessary.

[116] E.g. opening a door, or sitting in or listening to a radio in an unmoving vehicle. Mere presence in a motor vehicle without consent of the owner is criminalized by RCC § 22A-2602, trespass of a motor vehicle.

offense is graded based upon whether the person knowingly "operates" (first degree) or knowingly "operates or rides as a passenger in" (second degree).

Subsection (a)(2) requires that what the defendant "operates" or "rides as a passenger in" is a "motor vehicle," a defined term that includes any vehicle propelled by an internal-combustion engine or electricity. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the element in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item is a motor vehicle.

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

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

Subsection (c) grades UUV based upon whether the defendant's use of the motor vehicle is by operating the motor vehicle or merely riding as a passenger. First degree UUV, in subsection (c)(1), requires that the defendant commit UUV by knowingly operating the motor vehicle. Second degree UUV, in subsection (c)(2), requires that the defendant commit UUV by knowingly operating or riding as a passenger in the motor vehicle.

Subsection (d) bars multiple convictions for UUV and unauthorized use of a rented or leased motor vehicle, or UUV and carjacking, based on the same act or course of conduct.

Relation to Current District Law. *The revised UUV statute changes existing District law in five main ways that fill gaps in District law, reduce overlap with other offenses, and improve the proportionality of the penalties.*

First, through the revised definition of "motor vehicle,"[117] the revised UUV offense includes any vehicle propelled by an internal-combustion engine or electricity. The current definition of "motor vehicle," and thus the scope of the current UUV offense, is limited to "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."[118] D.C. Court of Appeals (DCCA) case law has held explicitly held that all-terrain vehicles[119] and mopeds[120] fall within the current definition of "motor

[117] RCC § 22A-2001.

[118] D.C. Code § 22-3215(a).

[119] 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." *Stancil v. United States*, 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.

[120] 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*

vehicle." The revised UUV offense would broaden the range of covered vehicles to include motorized watercraft, aircraft, and land vehicles. The change eliminates possible gaps in the offense and clarifies the statute.

Second, the provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offenses," bars multiple convictions for the revised UUV and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses, including UUV, based on the same act or course of conduct.[121] However, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised UUV offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Third, the revised UUV offense eliminates any offense-specific penalty enhancements. The current UUV statute includes a special recidivist penalty[122] and a special penalty for committing UUV during a crime of violence or to facilitate a crime of violence.[123] These special enhancements are highly unusual in current District law, and there is no clear basis for singling out UUV for recidivist and crime of violence enhancements as compared to other offenses of equal seriousness. The general recidivism enhancement in section RCC § 22A-806 will provide enhanced punishment for recidivist UUV consistent with other offenses, improving the overall

---

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.

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

[122] D.C. Code § 22-3215(d)(3).

> (3)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who has 2 or more prior convictions for unauthorized use of a motor vehicle or theft in the first degree, not committed on the same occasion, shall be fined not less than $5,000 nor more than $15,000, or imprisoned for not less than 30 months nor more than 15 years, or both.
>
> (B) For the purposes of this paragraph, a person shall be considered as having 2 prior convictions for unauthorized use of a motor vehicle or theft in the first degree if the person has been twice before convicted on separate occasions of:
>
> (i) A prior violation of subsection (b) of this section or theft in the first degree;
>
> (ii) A statute in one or more other jurisdictions prohibiting unauthorized use of a motor vehicle or theft in the first degree;
>
> (iii) Conduct that would constitute a violation of subsection (b) of this section or a violation of theft in the first degree if committed in the District of Columbia; or
>
> (iv) Conduct that is substantially similar to that prosecuted as a violation of subsection (b) of this section or theft in the first degree.

[123] D.C. Code § 22-3215(d)(2):

> (2)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who took, used, or operated the motor vehicle, or caused the motor vehicle to be taken, used, or operated, during the course of or to facilitate a crime of violence, shall be:
>
> (i) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, consecutive to the penalty imposed for the crime of violence; and
>
> (ii) If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.
>
> (B) For the purposes of this paragraph, the term "crime of violence" shall have the same meaning as provided in § 23-1331(4).

proportionality of the criminal code. For UUV committed during a crime of violence or to facilitate a crime of violence, the defendant will continue to be liable for both UUV and the crime of violence. This change improves the proportionality of the revised UUV offense and other offenses by treating recidivism and crimes of violence in a more consistent fashion across specific offenses.

Fourth, the revised UUV offense creates two gradations for penalties, based upon whether the defendant committed UUV by operating the motor vehicle or committed UUV by merely riding as a passenger in the motor vehicle. The current UUV statute is limited to a single grade,[124] and it is unclear whether it reaches use as a passenger. However, liability for UUV as a passenger has been upheld in case law.[125] In the revised UUV offense, liability for a passenger is explicitly adopted as a lesser grade of the offense. Codifying UUV case law for a passenger in the RCC does not change District case law establishing that mere presence in the vehicle is insufficient to prove knowledge, such as *In re Davis*[126] and *Stevens v. United States*.[127] Nor does codification of UUV for a passenger change the requirement in existing case law that a passenger is not liable if he or she does not have a reasonable opportunity to exit the vehicle upon gaining knowledge that its operation is unauthorized.[128] The term "operating" includes any of use of the vehicle besides riding as a passenger and actions necessary to enter the motor vehicle, and passive actions undertaken within an unmoving vehicle.[129] This change clarifies current law and improves the proportionality of the revised UUV statute by differentiating less serious conduct.

Fifth, the revised UUV offense explicitly bars multiple convictions for UUV and unauthorized use of a rented or leased motor vehicle, or UUV and carjacking, based on the same act or course of conduct. The current UUV statute separately prohibits and punishes both the general type of behavior codified in the revised UUV[130] and conduct that result in the failure to return a rented or leased car under certain conditions.[131] However, there is no settled case law on whether these provisions are merely separate means of committing UUV, or separate UUV offenses for which there may be multiple punishments.[132] Under current case law, a person clearly may be convicted of UUV and carjacking based on conduct involving the same act or course of conduct.[133] The revised UUV offense bars multiple punishments for these combinations of offenses which are so closely related. A person may be found guilty of any combination of offenses, but only one judgment of conviction shall be entered that entails the

[124] D.C. Code § 22-3215(d)(1).

[125] *See, e.g., Bynum v. United States,* 133 A.3d 983, 987 (D.C. 2016); *In re D.P.*, 996 A.2d 1286, 1288 (D.C. 2010); *In re C.A.P.*, 633 A.2d 787, 792 (D.C. 1993); *In re R.K.S.*, 905 A.2d 201, 218 (D.C. 2006); *see also In re T.T.B.*, 333 A.2d 671 (D.C. 1975) ("To sustain a conviction of a passenger in a stolen vehicle of its unauthorized use, the government must show beyond a reasonable doubt that the passenger rode in the vehicle knowing that it was being used without the consent of the owner.").

[126] *In re Davis*, 264 A.2d 297 (D.C. 1970)

[127] 319 F.2d 733 (D.C. Cir. 1963).

[128] *Jones v. United States*, 404 F.2d 212, 216 (D.C. Cir. 1968); *Bynum v. United States*, 133 A.3d 983 (D.C. 2016).

[129] E.g. opening a door, or sitting in or listening to a radio in an unmoving vehicle. Mere presence in a motor vehicle without consent of the owner is criminalized by RCC § 22A-2602, trespass of a motor vehicle.

[130] D.C. Code § 22-3215 (b), (d)(1)-(d)(3).

[131] D.C. Code § 22-3215 (c), (d)(4).

[132] Case law decided before the 1982 Theft Act revision of the UUV statute suggests that, based upon the rental provision's legislative history, the general UUV offense and the UUV offense for rental vehicles are separate offenses. *Evans v. United States*, 417 A.2d 963, 965 (D.C. 1980).

[133] *Allen v. United States*, 697 A.2d 1, 2 (D.C. 1997).

most severe penalty. This change reduces overlap and improves the proportionality of the revised UUV and related statutes.

Sixth, under the revised UUV statute the general culpability principles for self-induced intoxication in RCC § 22A-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current statute is a general intent crime,[134] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary intent for the crime.[135] The DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[136]—the claim that, due to his or her self-induced intoxicated state, the defendant not possess the knowledge required for any element of UUV.[137] By contrast, per the revised UUV offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim of that voluntary intoxication prevented the defendant from forming the knowledge required to prove UUV. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in UUV.[138] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these six main changes to current District law, one other aspect of the revised UUV statute may be viewed as a substantive change in law.

The revised UUV statute requires a "knowingly" culpable mental state in subsection (a)(1) that applies to whether the defendant's conduct involved "operat[ing]" or "rid[ing] as a passenger" in a "motor vehicle" per subsections (a)(1) and (a)(2), and repeats this culpable mental state requirement for the gradations in subsections (c)(1) and (c)(2) (whether one is knowingly operating the motor vehicle per subsection (c)(1), and whether one is knowingly operating or riding as a passenger, per subsection (c)(2)). The current statute does not clearly specify a culpable mental state for these elements and no case law exists directly on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[139] Requiring a knowing culpable mental state is consistent with the current DCCA requirement of knowledge as to the lack of effective consent in subsection (a)(3), discussed below. Requiring a

[134] *See Carter v. United States*, 531 A.2d 956, 960 n.13 (D.C. 1987).

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

[136] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

[137] This is so, moreover, notwithstanding the fact that the defendant, due to his or her self-induced intoxicated state, may not have actually possessed the knowledge required for any element of UUV.

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

[139] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

knowing culpable mental state also makes the revised UUV offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[140]

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

First, "takes" has been deleted from the revised UUV offense. "Takes" has been deleted to emphasize that the import of the revised UUV offense is not the taking of the motor vehicle, but rather its use. Deleting "takes" does not change the scope of the general UUV offense because a temporary "taking" of a motor vehicle necessarily involves its use.

Second, the revised general UUV offense deletes "for his or her own profit, use, or purpose" that is in the current UUV offense. It appears this language does not actually narrow the scope of the UUV offense, as even a person whose ostensible motive is to benefit another would have as his or her own purpose the unauthorized use of the car to benefit that other person. Deleting "for his or her own profit, use, or purpose" clarifies the scope of the revised UUV offense without a substantive change of law.

Third, "causes a motor vehicle to be taken, used or operated" has been deleted from the revised statute. It is unclear what this language could mean other than codifying liability for aiding and abetting, conduct addressed generally for all offenses in section 22A-3XX. Deleting the language is not intended to change the scope of the revised offense.

Fourth, subsection (a)(3) requires a "knowingly" culpable mental state as to the fact that the defendant lacked effective consent of the owner. The current UUV statute requires acting "without the consent of the owner," but does not specify a mental state for the element. DCCA case law, however, requires a "knowing" mental state for this element.[141] There is also case law for UUV expanding "consent of the owner" to an "authorized" person" to give consent,[142] and indicating that a person who uses deception to obtain consent to use a motor vehicle commits UUV.[143] The definition of "consent," discussed in RCC § 22A-2001, extends "consent" to a person who is legally authorized to give consent.

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

First, expanding the definition of "motor vehicle," and, in turn, the scope of the revised UUV offense to include vehicles such as aircraft and watercraft follows a strong majority of

[140] *See, e.g.,* RCC § 22A-2101.

[141] *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

[142] *Agnew v. United States*, 813 A.2d 192 (D.C. 2002) (stating as an element "at the time the appellant took, used, operated, or removed the vehicle . . . she knew he that she did so without the consent of the owner or some other authorized person.") (citations omitted); *In re R.K.S.*, 905 A.2d 201, 218 (D.C. 2006).

[143] *Evans v. United States*, 417 A.2d 963, 966 (D.C. 1980) ("[T]he government's evidence that appellant gave a false identity and false addresses in order to procure the rental agreement was sufficient for a jury to conclude that Hertz did not knowingly consent to appellant's use of the vehicle at the time agreement was signed."). This is a pre-1982 case relying on statutes concerning unauthorized use of motor vehicles that are substantively similar, but not identical, to the current UUV statute.

jurisdictions nationwide. Of the 40 states with UUV offenses,[144] a majority includes aircraft and watercraft,[145] as do the Model Penal Code (MPC)[146] and the Proposed Federal Criminal Law Code.[147]

Second, the RCC's elimination of overlap between theft of a motor vehicle, receiving stolen property (RSP), and UUV brings these offenses in line with national trends. Of the 40 states with UUV offenses,[148] the majority bar liability for both UUV and theft in regards to the same car involved in a single act or course of conduct.[149] The MPC and the Proposed Federal

[144] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[145] 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. 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.

[146] MPC § 223.9

[147] Proposed Federal Criminal Code § 1736.

[148] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[149] A variety of mechanisms prevent the overlap, the most common of which is that the UUV offense requires an intent to temporarily deprive the owner of the motor vehicle, whereas the theft offense requires intent to deprive. Ariz. Rev. Stat. Ann. § 13-1803; Kan. Stat. Ann. § 21-5803; Iowa Code Ann. § 714.7; La. Stat. Ann. § 14:68.4; Mich. Comp. Laws Ann. § 750.414; Nev. Rev. Stat. Ann. § 205.2715; N.J. Stat. Ann. § 2C:30-10; S.C. Code Ann. § 16-21-60(B); S.D. Codified Laws § 22-30A-12; Utah Code Ann. § 41-1a-1314; Va. Code Ann. § 18.2-102; Idaho Code Ann. § 49-227; W. Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102; Tenn. Code. Ann. § 39-14-106; Haw. Rev. Stat. Ann. § 708-836 (specified in commentary). Overlap in other states is prevented by including UUV

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[150] recognizes that UUV is necessary to punish conduct that falls short of theft.

Other jurisdictions' treatment of liability for both UUV and RSP involving the same act or course of conduct is more variable. A few states bar liability for both offenses in regards to the same car involved in a single act or course of conduct,[151] although at least one state appears to explicitly allow dual liability.[152] Overall, however, there is a lack of statutory authority that squarely addresses the issue of RSP and UUV convictions for the same act or course of conduct. In addition, a few states appear to not have a specific RSP offense.[153] In the MPC, liability for both UUV and RSP based on the same act or course of conduct is barred because RSP is a form of theft, and the commentary recognizes that UUV is necessary to punish conduct that falls short of theft.[154] Similarly, the Proposed Federal Criminal Code includes RSP as a type of theft and the commentary recognizes that UUV is necessary to punish conduct that falls short of theft.[155]

Third, the RCC's deletion of the UUV-specific recidivist enhancement and the enhancement for committing UUV during a crime of violence or to facilitate a crime of violence reflect national trends. Only 9 of the 40 states with UUV offenses[156] have UUV-specific

---

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).

Finally case law 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).

[150] 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.").

[151] Two states prevent overlap by including UUV as a type of theft, Minn. Stat. Ann. § 609.52(2)(17); Me. Rev. Stat. tit. 17-A, § 360. Maryland has a merger at sentencing provision for theft and UUV and includes RSP in the definition of "theft." Md. Code Ann., Crim. Law §§ 7-105(2), 7-104.

Several states prohibit overlap between UUV and RSP by requiring an intent to temporarily deprive the owner of the motor vehicle for UUV, and requiring for RSP an intent to deprive. Kan. Stat. Ann. § 21-5801; Utah Code Ann. § 76-6-408; Nev. Rev. Stat. Ann. § 205.275; Idaho Code Ann. § 18-2403.

[152] *Commonwealth v. Thompson*, 2015 WL 7722270 (Pa. Super. Ct. Nov. 30, 2015) (affirming convictions for RSP and UUV for the same motor vehicle) (non-precedential).

[153] Tenn. Code Ann. § 39-14-101; Wyo. Stat. Ann. § 6-3-402.

[154] 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.").

[155] 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.").

[156] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. §

recidivist penalties.[157] The MPC and Proposed Federal Criminal Code do not have UUV-specific penalties. Of the few states with UUV-specific recidivist penalties, the highest maximum penalty is 9 years,[158] which is significantly less than the 30 year maximum possible penalty in the District's current UUV recidivist penalty. Five years is the most common maximum possible penalty in these 9 states with UUV-specific recidivist penalties,[159] with the remaining states having lower maximum penalties.[160] None of the 40 states with UUV offenses[161] or the MPC[162] or the Proposed Federal Criminal Code[163] enhance UUV if the defendant used the motor vehicle during the course of or to facilitate a crime of violence or a similar type of crime. However, four states generally penalize using the vehicle in the commission of a felony or a crime or with the intent to do so.[164]

Fourth, establishing multiple gradations for UUV follows national trends. More than half the 40 jurisdictions with a UUV offense[165] have multiple gradations of UUV.[166] The MPC only

---

2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[157] Kan. Stat. Ann. § 21-5803; Neb. Rev. Stat. Ann. § 28-516; Conn. Gen. Stat. Ann. § 53a-119b; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; N.Y. Penal Law §§ 165.05, .06, .08; W. Va. Code Ann. § 17A-8-4; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1.

[158] N.M. Stat. Ann. § 30-16D-1.

[159] Conn. Gen. Stat. Ann. § 53a-119b; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mass. Gen. Laws Ann. ch. 90, § 24.

[160] Kan. Stat. Ann. § 21-5803 (5 to 7 months if the defendant has one prior misdemeanor conviction or no prior convictions); Neb. Rev. Stat. Ann. § 28-516 (2 years); N.Y. Penal Law §§ 165.06 (4 years); W. Va. Code Ann. § 17A-8-4 (3 years).

[161] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[162] MPC § 223.9.

[163] Proposed Federal Criminal Code § 1736.

[164] N.Y. Penal Law § 165.08; Utah Code Ann. § 41-1a-1314; Colo. Rev. Stat. Ann. § 18-4-409; Vt. Stat. Ann. tit. 23, § 1094.

[165] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat.

has one grade of UUV,[167] but the Federal Proposed Criminal Code has two.[168] There is less precedent for grading operating a motor vehicle more seriously than riding as a passenger, in part because only eight states explicitly codify liability for UUV for a passenger.[169] However, three of these eight states do grade UUV for a passenger less seriously than the general UUV offense,[170] like the UUV offense in the RCC. The MPC declined to criminalize a passenger's non-operational use of a vehicle without the owner's consent,[171] as did the Proposed Federal Criminal Code.[172] The most common method of grading UUV amongst the 40 states with UUV offenses[173] is based upon whether the defendant has prior convictions.[174] However, many of the

---

Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[166] Ala. Code § 13A-8-11 (grading based on whether the defendant used force or threat of force); Alaska Stat. Ann. §§ 11.46.360, .365 (grading based on several factors, including the type of vehicle); Ariz. Rev. Stat. § 13-1803 (grading based on whether the defendant "took unauthorized control" over a vehicle or was "transported or physically located" in the vehicle); Colo. Rev. Stat. Ann. § 18-4-409 (grading based on several factors, including the value of the vehicle); Conn. Gen. Stat. Ann. § 53a-119b (grading based on whether defendant has prior conviction); Kan. Stat. Ann. § 21-5803 (grading based on whether defendant has prior conviction); Ky. Rev. Stat. Ann. § 514.100 (grading based on whether defendant has prior conviction); Me. Rev. Stat. tit. 17-A, § 360 (grading based on whether defendant has prior conviction); N.J. Stat. Ann. § (grading based on type of vehicle and whether defendant was passenger); N.Y. Penal Law §§ 165.05, .06, .08 (grading based on whether defendant has prior conviction and whether defendant had the intent to use the vehicle in the course of or the commission of specified offenses, or in the immediate flight therefrom); N.D. Cent. Code Ann. § 12.1-23-06 (grading based on the value of the use of the vehicle and the cost of retrieval and restoration); Ohio Rev. Code Ann. § 2913.03 (grading based on whether the victim was an elderly person or disabled adult); Utah Code Ann. §§ 41-1a-1314 (grading based on several factors, including if the motor vehicle was used to commit a felony); N.C. Gen. Stat. Ann. § 14-72.2 (grading based on type of vehicle); Wash. Rev. Code Ann. §§ 9A.56.070, .075 (grading based on whether defendant was a passenger); Minn. Stat. Ann. § 609.52 (grading based on value of the vehicle); Va. Code Ann. § 18.2-102 (grading based on the value of the vehicle); Wis. Stat. Ann. § 943.23 (grading based on whether defendant was a passenger); Neb. Rev. Stat. Ann. § 28-516 (grading based on whether defendant had a prior conviction); Idaho Code Ann. § 49-227 (grading based on the amount of damage caused to the vehicle and the value of the property taken from the vehicle); Mass. Gen. Laws Ann. ch. 90, § 24 (grading based on whether defendant has prior conviction); N.M. Stat. Ann. § 30-16D-1 (grading based on whether the defendant has prior conviction); Vt. Stat. Ann. tit. 23, § 1094 (grading based on several factors, including whether used the vehicle in the commission of a felony); W.Va. Code Ann. § 17A-8-4 (grading based on whether defendant has a prior conviction).

[167] MPC § 223.9.

[168] Proposed Federal Criminal Code §1736(3).

[169] Ariz. Rev. Stat. Ann. § 13-1803(A)(2); Del. Code Ann. tit. 11, § 853(1); Me. Rev. Stat. tit. 17-A, § 360(1)(A); N.J. Stat. Ann. § 2C:20-10(d); N.Y. Penal Law § 165.03(1); Or. Rev. Stat. Ann. § 164.135(1)(a); Wash. Rev. Code Ann. § 9A.56.075(1); Wis. Stat. Ann. § 943.23(4m).

[170] Ariz. Rev. Stat. Ann. § 13-1803(A)(2); Wash. Rev. Code Ann. § 9A.56.075(1); Wis. Stat. Ann. § 943.23(4m).

[171] MPC § 223.9 cmt. at 273.

[172] Proposed Federal Criminal Code § 1736.

[173] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat.

remaining states grade UUV on other factors such as the type of vehicle involved[175] or the value of the vehicle or amount of damage done to the vehicle.[176]

Fifth, the revised UUV statute prohibits convictions for both UUV and carjacking, RCC § 22A-1XXX, and UUV and the District's unauthorized use of a rented or leased motor vehicle, D.C. Code 22-3215 based on the same act or course of conduct. Neither the MPC nor the Proposed Federal Criminal Code has a carjacking offense. Case law addressing this issue in the 50 states is scant. However, in at least three states, UUV or an equivalent offense to the revised UUV offense in the RCC is a lesser included offense of carjacking.[177] A few of the states with failing to return rented or leased vehicle statutes appear to avoid multiple convictions with UUV for the same act or course of conduct by making failing to return rented or leased vehicles an alternative means of committing the general UUV offense.[178] At least one state appears to avoid multiple convictions by making failure to return a rented or leased vehicle a grade of the general UUV offense.[179] Neither the MPC nor the Proposed Federal Criminal Code have offenses that specifically prohibit failing to return rented or leased motor vehicles.

Sixth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[180] In practical effect, this

---

Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[174] Conn. Gen. Stat. Ann. § 53a-119b; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; N.Y. Penal Law §§ 165.05, .06, .08; Neb. Rev. Stat. Ann. § 28-516; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; W.Va. Code Ann. § 17A-8-4.

[175] Alaska Stat. Ann. §§ 11.46.360, .365 (grading based on several factors, including the type of vehicle) N.J. Stat. Ann. § (grading based on type of vehicle and whether defendant was passenger); N.C. Gen. Stat. Ann. § 14-72.2 (grading based on type of vehicle).

[176] Colo. Rev. Stat. Ann. § 18-4-409 (grading based on several factors, including the value of the vehicle);); N.D. Cent. Code Ann. § 12.1-23-06 (grading based on the value of the use of the vehicle and the cost of retrieval and restoration); Minn. Stat. Ann. § 609.52 (grading based on value of the vehicle); Va. Code Ann. § 18.2-102 (grading based on the value of the vehicle; Idaho Code Ann. § 49-227 (grading based on the amount of damage caused to the vehicle and the value of the property taken from the vehicle).

[177] *Fryer v. State*, 732 So. 2d 30, 33 (Fla. Dist. Ct. App. 1999) (stating that grand theft auto, which includes as an alternative element that the defendant acted with the intent temporarily deprive, "appears to be a necessarily lesser included offense of carjacking."); *State v. Ector*, 2012 WL 3201985 at 8 (Tenn. Crim. App. 2012) (unpublished) ("Unauthorized use of a motor vehicle is a lesser-included offense of carjacking."); *State v. Talbert*, 2007 WL 466762 at 1 (La. App. 1 Cir. 2007) ("Defendant . . . was charged by bill of information with carjacking, a violation of LSA-R.S. 14:64.2. . . . Defendant was tried by a jury and convicted of the lesser and included offense of unauthorized use of a motor vehicle, a violation of LSA-R.S. 14:68.4.).

[178] Ala. Code § 13A-8-11; Del. Code Ann. tit. 11, § 853; N.Y. Penal Law §§ 165.05, .06, .08; Or. Rev. Stat. Ann. § 164.135.

[179] Alaska Stat. Ann. §§ 11.46.360, .365.

[180] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the

means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[181] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[182]

extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[181] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

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

§ 22A-2104. Shoplifting

(a) *Offense*. A person commits the offense of shoplifting if that person:
  (1) Knowingly:
    (A) Conceals or takes possession of;
    (B) Removes, alters, or transfers the price tag, serial number, or other identification mark that is imprinted on or attached to; or
    (C) Transfers from one container or package to another container or package;
  (2) Personal property of another that is displayed, held, stored, or offered for sale;
  (3) With intent to take or make use of the property without complete payment.

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

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

(d) *No Attempt Shoplifting Offense*. It is not an offense to attempt to commit the offense described in this section.

(e) *Qualified Immunity.* A person who displays, holds, stores, or offers for sale personal property as specified in subsection (a)(2), or an employee or agent of such a person, who detains or causes the arrest of a person in a place where such property is displayed, held, stored, or offered for sale shall not be held liable for detention, false imprisonment, malicious prosecution, defamation, or false arrest, in any proceeding arising out of such detention or arrest, if:
  (1) The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed in that person's presence, an offense described in this section;
  (2) The manner of the detention or arrest was reasonable;
  (3) Law enforcement authorities were notified within a reasonable time; and
  (4) The person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time.

Commentary

Explanatory Note. *This section establishes the revised shoplifting offense and penalty for the Revised Criminal Code (RCC). Shoplifting addresses theft-like conduct specific to stores and retail establishments, but does not require an intent to deprive the owner of property. There are no penalty gradations. The revised shoplifting offense replaces the existing shoplifting statute*[183] *in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct—conduct that conceals, removes, transfers, etc. over an item. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct is concealing, removing, transferring, etc. over an item.

Subsection (a)(2) describes the element that what the defendant must conceal, etc. is "property," a defined term meaning an item of value which includes goods, services, and cash.

[183] D.C. Code § 22-3213.

Further, the property must be "property of another," a defined term which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, and the personal property of that other person. The personal property of another also must be "displayed, held, stored, or offered for sale." Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the elements in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item is personal property of another that is displayed, held, stored, or offered for sale.

Subsection (a)(3) states that the proscribed conduct must be done "with intent to take or make use of without complete payment." This is a lesser intent than "with intent to deprive the other of the property" that the revised theft offense requires in RCC § 22A-2101. "Intent" is a defined term in RCC § 22A-206 meaning the defendant believed his or her conduct was practically certain to "take or make use," of the property without complete payment. It is not necessary to prove that such a taking or use without complete payment actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that such a taking or use would result.

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

Subsection (c) establishes a single grade of shoplifting. Unlike several other property offenses, shoplifting does not grade based upon the value of the property.

Subsection (d) prohibits charging attempted shoplifting. Conduct constituting attempted shoplifting may be chargeable as attempted theft or attempted unauthorized use of property, however.

Subsection (e) provides qualified immunity to specified individuals for detention, false imprisonment, malicious prosecution, defamation, and false arrest in any proceedings arising from the detention or arrest of a person suspected of shoplifting. The subsection lists requirements for the detention or arrest that must be met for the immunity to apply.

Relation to Current District Law. *The revised shoplifting statute changes District law in two main ways that clarify and reduce unnecessary overlap that currently exists in the District criminal code between shoplifting and several related offenses, including theft and unauthorized use of property.*

First, the language in subsection (a)(1)(C) has been simplified to refer to transfer from any container or package (regardless of the purpose of the container). By contrast, the current shoplifting statute limits the container involved to those concerning sale or display.[184] There is no case law interpreting the scope of this language. The revised language in (a)(1)(C), in combination with the requirement in subsection (a)(2) that the property involved be "displayed, held, stored, or offered for sale," effectively broadens the offense to include transfers between containers that store or otherwise hold property. The nature of the container is irrelevant if the action is done with intent to take or make use of the property without complete payment per subsection (a)(3). This change clarifies the statute and reduces possible litigation over whether a given container may be a display or sales container.

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

[184] D.C. Code Ann. § 22-3216(a)(3) (""knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.").

act or course of conduct.[185] However, shoplifting is not among those offenses and, as described in the commentary to section RCC § 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised shoplifting offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Beyond these two substantive changes to current District law, one other aspect of the revised shoplifting statute may be viewed as a substantive change of law.

Per subsection (a)(3) of the shoplifting offense, engaging in the specified conduct "with intent to take or make use of the property without complete payment" is the sole intent for shoplifting. The current shoplifting statute requires the specified conduct either be "with intent to appropriate without complete payment" or "with intent to defraud the owner of the value of the property." The term "defraud" is not defined in the current offense and there is no case law on point for shoplifting. The revised shoplifting statute inserts the current statute's definition of "appropriate"—"to take or make use without authority or right"[186]—into the intent requirement "to appropriate without complete payment," but eliminates the intent to defraud alternative requirement. "Defraud" is a common law term with an unclear meaning. In the context of shoplifting, it is unclear what the use of "defraud" would criminalize that is not already covered by conduct undertaken "with intent to take or make use of the property without complete payment." This change in the revised shoplifting statute clarifies the offense.

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

First, subsections (a)(1) and (a)(2) of the revised shoplifting offense apply a culpable mental state of "knowingly" to each type of proscribed conduct and to whether the property is "personal property of another that is displayed, held, stored, or offered for sale." The current shoplifting statute[187] requires a "knowingly" culpable mental state for the offense. Although it is unclear to which elements the culpable mental state applies under the current shoplifting statute, it would be difficult for a defendant to satisfy either of the "with intent to" requirements in the current statute without knowing that it was the personal property of another that is offered for sale. The requirement of a "knowingly" culpable mental state for subsections (a)(1) and (a)(2) is not intended to change existing law on shoplifting.

Second, in subsection (a)(1)(B), "transfers" has been added so that the subsection prohibits conduct which "removes, alters, or transfers" price tags or other specified marks. The current shoplifting statute is limited to "removes or alters" price tags or other specified marks. There is no case law interpreting the scope of this language. Transferring a price tag is accomplished by removing or altering the price tag, an action already covered in the current statute. Adding "transfers" to the statute merely clarifies the scope of the revised shoplifting offense in a common situation.

Third, the revised shoplifting statute expands the element in subsection (a)(2) by providing liability if the property is "displayed, held, stored, or offered for sale." The current

[185] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct.").
[186] D.C. Code § 22-3201(1).
[187] D.C. Code § 22-3216.

shoplifting statute requires that the property be "offered for sale."[188] In *Harris v. United States*, the D.C. Court of Appeals (DCCA) held that the current shoplifting statute extended "at least to merchandise held . . . in reasonably close proximity to the customer area and intended for prompt availability to customers when and as needed."[189] The addition of "displayed . . . for sale," "held . . . for sale," and "stored . . . for sale" codifies *Harris* as to the scope of "offered for sale" in the current shoplifting statute and is not intended to change District law on shoplifting. Under the revised element in subsection (a)(2), the property should be in "reasonably close proximity" to the customer area and readily available to customers as needed. Merchandise on a truck in a loading dock, for example, would not fall within the scope of the revised offense.

Lastly, there are two minor changes to the language in the qualified immunity provision in subsection (e). The current qualified immunity subsection refers to, "A person who offers tangible personal property for sale to the public."[190] The term "offers" is not defined in the statute and there is no case law on point. The revised subsection (e) expands "offers" to "displays, holds, stores, or offers for sale" in order to match the revised element in subsection (a)(2). Similarly, the revised shoplifting statute no longer refers to "tangible personal property." Instead, it refers to "personal property" as specified in subsection (a)(2) so that the qualified immunity provision matches the element.

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

Approximately 28 states have separate shoplifting statutes.[191] Several other states do not have separate shoplifting statutes, but codify special evidentiary presumptions for their theft statutes that are specific to shoplifting.[192] Neither the Model Penal Code (MPC) nor the Proposed Federal Criminal Code has a shoplifting offense.

First, regarding the transfer of merchandise between containers, of the 28 states that have separate shoplifting statutes,[193] at least 17 codify as a means of committing shoplifting conduct

---

[188] D.C. Code § 22-3213(a).

[189] *Harris v. United States*, 602 A.2d 1140, 1142 (D.C. 1992). The court further characterized the merchandise at issue in the case as "merchandise contained in a storeroom off the customer sales area, which is used to replenish stock in the sales area or which is available as a source of sizes, colors, or the like not on display in the sales area." *Id.* at 1141.

[190] D.C. Code § 22-3213(d).

[191] Alaska Stat. Ann. § 11.46.220; Ariz. Rev. Stat. Ann. § 13-1805; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 840; Haw. Rev. Stat. Ann. § 708-833.5; Ill. Comp. Stat. Ann. 5/16-25; N.H. Rev. Stat. Ann. § 637:3-a; N.J. Stat. Ann. § 2C:20-11; 18 Pa. Stat. Ann. § 3929; Tenn. Code Ann. § 39-14-146; Utah Code Ann. § 76-6-602; Wis. Stat. Ann. § 943.50; Wyo. Stat. Ann. § 6-3-404; S.C. Code Ann. § 16-13-110; Neb. Rev. Stat. Ann. § 28-511.01; Mich. Comp. Laws Ann. § 703.356d; Cal. Penal Code § 459.5; Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577; 11 R.I. Gen. Laws Ann. § 11-41-20; N.M. Stat. Ann. § 30-16-19; Idaho Code Ann. § 18-4624; W. Va. Code Ann. § 61-3A-1; Va. Code Ann. § 18.2-103; Ga. Code Ann. § 16-8-14; Miss. Code Ann. § 97-23-93; Okla. Stat. Ann. tit. 21, § 1731.

[192] *See, e.g.*, Ark. Code Ann. §5-36-116; Colo. Rev. Stat. Ann § 18-4-406; Mo. Ann. § 570.030.

[193] Alaska Stat. Ann. § 11.46.220; Ariz. Rev. Stat. Ann. § 13-1805; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 840; Haw. Rev. Stat. Ann. § 708-833.5; Ill. Comp. Stat. Ann. 5/16-25; N.H. Rev. Stat. Ann. § 637:3-a; N.J. Stat. Ann. § 2C:20-11; 18 Pa. Stat. Ann. § 3929; Tenn. Code Ann. § 39-14-146; Utah Code Ann. § 76-6-602; Wis. Stat. Ann. § 943.50; Wyo. Stat. Ann. § 6-3-404; S.C. Code Ann. § 16-13-110; Neb. Rev. Stat. Ann. § 28-511.01; Mich. Comp. Laws Ann. § 703.356d; Cal. Penal Code § 459.5; Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577; 11 R.I. Gen. Laws Ann. § 11-41-20; N.M. Stat. Ann. § 30-16-19; Idaho Code Ann. § 18-4624; W. Va. Code Ann. § 61-3A-1; Va. Code Ann. § 18.2-103; Ga. Code Ann. § 16-8-14; Miss. Code Ann. § 97-23-93; Okla. Stat. Ann. tit. 21, § 1731.

substantially similar or identical to subsection (a)(1)(C) in the revised shoplifting statute.[194] Nine of these 17 states prohibit transferring the property at issue from one container or package to another, without additional requirements for the container or package.[195] These states may, however, have requirements for the property at issue, such that it be displayed for sale, like the RCC does.[196] In seven of the remaining states, the statute prohibits transferring property that is displayed for sale or intended for sale in a container to any other container.[197]

Second, regarding the bar on multiple convictions for the revised shoplifting offense and overlapping property offenses, a generalization to other jurisdictions for all the offenses would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offense similar to the revised shoplifting offense and other overlapping property offenses. For example, where the offense most like the revised theft offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences statute[198] or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[199] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[200]

Specifically for shoplifting, in at least six[201] of the twenty-eight states with shoplifting statutes, [202] multiple convictions for these offenses are barred because they are alternative means of committing the same consolidated "theft" offense. All states[203] that treat shoplifting as an

[194] Ariz. Rev. Stat. Ann. § 13-1805(A)(4); Del. Code Ann. tit. 11, § 840(a)(5); Haw. Rev. Stat. Ann. § 708-833.5(c); Ill. Comp. Stat. Ann. 5/16-25(a)(3); N.H. Rev. Stat. Ann. § 637:3-a(II)(d); N.J. Stat. Ann. § 2C:20-11(b)(4); Tenn. Code Ann. § 39-14-146(a)(4); Utah Code Ann. § 76-6-602(3); S.C. Code Ann. § 16-13-110(A)(3); Neb. Rev. Stat. Ann. § 28-511.01(1)(c); Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577(3); 11 R.I. Gen. Laws Ann. § 11-41-20(b)(3); N.M. Stat. Ann. § 30-16-19(A)(4); W. Va. Code Ann. § 61-3A-1(a)(4); Ga. Code Ann. § 16-8-14(a)(3); Miss. Code Ann. § 97-23-93(2)(d).

[195] Ariz. Rev. Stat. Ann. § 13-1805(A)(4); Haw. Rev. Stat. Ann. § 708-833.5(c); Tenn. Code Ann. § 39-14-146(a)(4); Neb. Rev. Stat. Ann. § 28-511.01(1)(c); Vt. Stat. Ann. tit. 13, § 2577(3); 11 R.I. Gen. Laws Ann. § 11-41-20(b)(3); W. Va. Code Ann. § 61-3A-1(a)(4); Ga. Code Ann. § 16-8-14(a)(3); Miss. Code Ann. § 97-23-93(2)(d).

[196] Ariz. Rev. Stat. Ann. § 13-1805(A) ("merchandise displayed for sale."); 11 R.I. Gen. Laws Ann. § 11-41-20(b)(3) ("any merchandise displayed, held, stored of offered for sale in a retail mercantile establishment.").

[197] Ill. Comp. Stat. Ann. 5/16-25(a)(3); N.H. Rev. Stat. Ann. § 637:3-a(II)(d); N.J. Stat. Ann. § 2C:20-11(b)(4); Utah Code Ann. § 76-6-602(3); S.C. Code Ann. § 16-13-110(A)(3); Mass. Gen. Laws Ann. ch. 266, § 30A; N.M. Stat. Ann. § 30-16-19(A)(4);

[198] D.C. Code § 22-3203.

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

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

[201] Conn. Gen. Stat. Ann. §53a-119; Haw. Rev. Stat. ann. § 708-833.5; N.H. Rev. Stat. Ann. § 637:3-a(II); Tenn. Code Ann. § 39-14-146; Neb. Rev. Stat. Ann. § 28-511.01; Idaho Code Ann. § 18-4624.

[202] Alaska Stat. Ann. § 11.46.220; Ariz. Rev. Stat. Ann. § 13-1805; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 840; Haw. Rev. Stat. Ann. § 708-833.5; Ill. Comp. Stat. Ann. 5/16-25; N.H. Rev. Stat. Ann. § 637:3-a; N.J. Stat. Ann. § 2C:20-11; 18 Pa. Stat. Ann. § 3929; Tenn. Code Ann. § 39-14-146; Utah Code Ann. § 76-6-602; Wis. Stat. Ann. § 943.50; Wyo. Stat. Ann. § 6-3-404; S.C. Code Ann. § 16-13-110; Neb. Rev. Stat. Ann. § 28-511.01; Mich. Comp. Laws Ann. § 703.356d; Cal. Penal Code § 459.5; Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577; 11 R.I. Gen. Laws Ann. § 11-41-20; N.M. Stat. Ann. § 30-16-19; Idaho Code Ann. § 18-4624; W. Va. Code Ann. § 61-3A-1; Va. Code Ann. § 18.2-103; Ga. Code Ann. § 16-8-14; Miss. Code Ann. § 97-23-93; Okla. Stat. Ann. tit. 21, § 1731.

[203] *See, e.g.*, Ark. Code Ann. §5-36-116; Colo. Rev. Stat. Ann § 18-4-406; Mo. Ann. § 570.030.

evidentiary presumption for theft also effectively bar multiple punishments for shoplifting and theft because shoplifting is not a separate offense. Research was not conducted to determine whether shoplifting statutes in other jurisdictions are lesser included offenses of theft.

§ 22A-2105. Unlawful Creation or Possession of a Recording.

(a) *Offense.* A person commits the offense of unlawful creation or possession of a recording if that person:
  (1) Knowingly makes, obtains, or possesses;
  (2) Either:
    (A) A sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972, or
    (B) A sound recording or audiovisual recording of a live performance;
  (3) Without the effective consent of the owner;
  (4) With intent to sell, rent, or otherwise use the recording for commercial gain or advantage.

(b) *Definitions*. In this section:
  (1) "Audiovisual recording" means a material object upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any;
  (2) "Sound recording" means a material object in which sounds, other than those accompanying a motion picture or other audiovisual recording, are fixed by any method now known or later developed, from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device; and
  (3) The term "possess" has the meaning specified in § 22A-202, the terms "knowingly," and "intent," have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "consent," "effective consent," "property," "property of another," "owner," and "value," have the meanings specified in § 22A-2001.

(c) *Exclusion from Liability.* Nothing in this section shall be construed to prohibit:
  (1) Copying or other reproduction that is in the manner specifically permitted by Title 17 of the United States Code; or
  (2) Copying or other reproduction of a sound recording that is made by a licensed radio or television station or a cable broadcaster solely for broadcast or archival use.

(d) *Permissive Inference.* A fact finder may, but is not required to, infer that a person had an intent to sell, rent or otherwise use the recording for commercial gain or advantage if the person possesses 5 or more unlawful recordings either of the same original sound recording or the same live performance.

(e) *Gradations and Penalties*.
  (1) *First Degree Unlawful Creation or Possession of a Recording*. A person is guilty of first degree unlawful creation or possession of a recording if the person commits the offense and, in fact, the number of unlawful recordings made, obtained, or possessed was 100 or more. First degree unlawful creation or possession of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Unlawful Creation or Possession of a Recording.* A person is guilty of second degree unlawful creation or possession of a recording if the person commits the offense and, in fact, any number of unlawful recordings were made, obtained, or possessed. Second degree unlawful creation or possession of a

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

(f) *Forfeiture.* Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

Commentary

Explanatory Note. *This section establishes the unlawful creation or possession of a recording (UCPR) offense and penalty gradations for the Revised Criminal Code (RCC). The revised offense proscribes making, obtaining, or possessing a sound recording that is a copy of an original sound recording fixed before February 15, 1972, or a sound recording or audiovisual recording of a live performance, without the effective consent of the owner and with intent to derive commercial gain or advantage. The revised offense is structured to avoid criminalizing conduct that is preempted by federal legislation protecting copyright. The revised offense is graded based on the number of unlawful recordings that the defendant made, obtained, or possessed. The revised UCPR offense replaces the commercial piracy statute*[204] *in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct—making, obtaining, or possessing an item. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be knowledge, a term defined at RCC § 22A-206 and here requiring the accused be aware to a practical certainty or consciously desire that his or her conduct is making, obtaining, or possessing an item.

Subsection (a)(2) states that what defendant must make, obtain, or possess is either a sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972, or a sound recording or audiovisual recording of a live performance. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the elements in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that the item is the specified kind of audiovisual or sound recording.

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

Subsection (a)(4) requires proof of an intent to sell, rent, or otherwise use the recording for commercial gain or advantage. "Intent" also is a defined term in RCC § 22A-206 meaning the defendant believed his or her conduct was practically certain to sell, rent, or otherwise use the recording for commercial gain or advantage. It is not necessary to prove that such commercial advantage occurred, just that the defendant believed to a practical certainty, or consciously desired, that such advantage would result.

[204] D.C. Code § 22-3214.

Subsection (b) defines "audiovisual recording" and "sound recording" for the revised UCPR statute, and cross-references applicable definitions located elsewhere in the RCC.

Subsection (c) contains two broad exclusions from liability under the revised UCPR statute for copying of recordings permitted by federal law and copying by licensed radio, television, and cable broadcasters for broadcast or archival use.

Subsection (d) contains a permissive inference as to the defendant's intent. If the defendant possesses five or more unlawful recordings either of the same original sound recording or the same live performance, a fact finder may, but is not required to, infer that a person had an intent to sell, rent, or otherwise use the recording for commercial gain or advantage.

Subsection (e) grades the revised UCPR statute offense based on the number of unlawful recordings that the defendant made, obtained, or possessed. It is first degree unlawful creation or possession of a recording if the defendant, in fact, made, obtained, or possessed 100 or more unlawful recordings. It is second degree unlawful creation or possession of a recording if, in fact, any number of unlawful recordings were made, obtained, or possessed. "In fact," a defined term, is used in all of the UCPR gradations to indicate that there is no culpable mental state requirement as to the number of unlawful recordings. The defendant is strictly liable as to the number of unlawful recordings.

Subsection (f) provides for the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

Relation to Current District Law. *The revised UCPR offense changes existing District law in six main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised UCPR offense no longer includes proprietary information within its scope. The current commercial piracy statute concerns not only sound recordings, but "proprietary information" which is broadly defined to include "any [] information, the primary commercial value of which may diminish if its availability is not restricted."[205] The revised UCPR offense eliminates the current statute's definition of "proprietary information" as well as references to "proprietary information" in the offense elements. Deleting "proprietary information" improves the clarity of the revised UCPR offense and reduces unnecessary overlap that currently exists between commercial piracy, theft, and other property offenses in the D.C. Code.[206] This overlap exists because the current definition of "property" is "anything of value,"[207] which includes intellectual property. Per this broad definition of "property," the current theft, taking property without right, and other property offenses create liability for taking proprietary information, independent of the inclusion of "proprietary information" in the current commercial piracy statute. Since the RCC retains the broad definition of "property" as "anything of value" (RCC § 22A-2001), multiple property offenses will continue to cover takings of proprietary information without effective consent or consent.

[205] D.C. Code § 22-3214(a)(2) ("'Proprietary information' means customer lists, mailing lists, formulas, recipes, computer programs, unfinished designs, unfinished works of art in any medium, process, program, invention, or any other information, the primary commercial value of which may diminish if its availability is not restricted.").

[206] It should also be noted that federal law makes theft or misappropriation of trade secrets a federal offense, but allows for state action. U.S. Economic Espionage Act of 1996, effective January 1, 1997.

[207] D.C. Code § 22-3201(3).

Second, the revised UCPR offense applies a "knowingly" mental state to the element in subsection (a)(3) that the defendant acted "without the effective consent of the owner." The current commercial piracy statute requires "knowing or having reason to believe" for the "without the consent of the owner" element. There is no case law interpreting "having reason to believe" in the current commercial piracy statute, however legislative history suggests that it may be intended to be a lesser culpable mental state than "knowingly."[208] However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[209] Requiring a knowing culpable mental state also makes the revised UCPR offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[210]

Third, the revised UCPR offense increases the number and type of grades. The current commercial piracy offense is a misdemeanor, regardless of the number of unlawful recordings the defendant at issue.[211] By contrast, the revised UCPR statute has two gradations, depending on the number of unlawful recordings the defendant makes, obtains, or possesses. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. The gradations in the revised offense also create consistency with the distinctions in the revised unlawful labeling of a recording statute.[212]

Fourth, subsection (f) of the revised UCPR offense requires the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The current commercial piracy offense does not contain a forfeiture provision, however, the current[213] and revised[214] unlawful labeling of a recording statute and several other offenses[215] under current District law have similar forfeiture provisions. Providing a forfeiture provision improves the proportionality of the offense and may deter large-scale prohibited copying.

Fifth, the provision in RCC § 22A-2002, "Aggregation of Property Value To Determine Property Offense Grades," allows aggregation of value for the revised UCPR offense based on a single scheme or systematic course of conduct. The current commercial piracy offense is not part of the current aggregation of value provision for property offenses.[216] The revised UCPR

---

[208] The legislative history suggests that a mistake as to whether or not a person has permission must be reasonable. "[I]t is a defense under this section that the defendant honestly and reasonably believed that he or she made the copy with the owner's permission or possessed a copy which was legitimate." 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 28.

[209] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[210] *See, e.g.*, RCC § 22A-2101.

[211] D.C. Code § 22-3214(d) ("Any person convicted of commercial piracy shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

[212] RCC § 22A-2207.

[213] D.C. Code § 22-3214.01(e) ("Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section.").

[214] RCC § 22A-2207.

[215] *See, e.g.*, D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).

[216] 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

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

Sixth, the provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offenses," bars multiple convictions for the revised UCPR and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses, including the current commercial piracy statute, based on the same act or course of conduct.[217] However, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised UCPR offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

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

First, the revised UCPR offense explicitly applies to audiovisual recordings for live performances. The current commercial piracy statute, through its definition of "phonorecords,"[218] excludes sound recordings of audiovisual works. However, the current commercial piracy statute separately criminalizes obtaining a copy of "proprietary information" without consent, which may cover illicit audiovisual recordings. State protection of live performances is not limited by federal copyright law[219] and the current deceptive labeling statute[220] and the revised deceptive labeling statute[221] extend to audiovisual recordings. Including audiovisual recordings for live performances in the revised UCPR statute potentially fills a gap in existing law or, to the extent there is liability in current law, improves the clarity and consistency of the offense.[222]

Second, the revised statute requires a culpable mental state of knowledge as to the elements in subsection (a)(1) ("makes, obtains, or possesses"), and subsection (a)(2) (regarding the requirements of the recording). No mental state is provided in the current statute regarding these elements, and there is no clear case law on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[223] Requiring a knowing culpable mental state also makes the revised UCPR offense consistent with the revised theft statute and other

---

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.").

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

[218] D.C. Code § 22-3214(a)(3).

[219] 17 USC 1101(d).

[220] D.C. Code § 22-3214.01.

[221] RCC § 22A-2206.

[222] It should be noted that nothing about expanding the unlawful creation or possession of a recording statute to included audiovisual recordings of live performances changes the offense's limited protection of sound recordings. As under the current commercial piracy statute, D.C. Code § 22-3214(e), the unlawful creation or possession of a recording statute is limited to sound recordings fixed prior to February 15, 1972. This limitation exists to avoid preemption by federal copyright law. 17 U.S.C. § 301(c).

[223] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[224]

Third, the revised UCPR offense uses a new definition of "owner," the same definition consistently applied to other property offenses.[225] The current commercial piracy offense's definition of "owner"[226] is very specific, referring either to the person who owns the original fixation, the exclusive licensee with reproduction and distribution rights, or in the case of a live performance, the performer. No case law exists construing this definition. However, the definition's rigid categories may lead to unintuitive outcomes in some fact patterns.[227] The revised UCPR statute is intended to more broadly identify the relevant person whose consent must be obtained. Ordinarily, it is expected that the parties specified under the current statute would be the relevant owners, but the revised definition provides flexibility where property rights are not arranged in the manner anticipated by the current statute. The revised UCPR is intended to reduce potential gaps in the offense and improve the consistency of definitions across property offenses.

Fourth, the revised UCPR offense codifies a permissive inference, that is, an inference that the fact finder may make, but is not required to make as to the defendant's intent in subsection (d). The current commercial piracy statute contains a "presumption" of intent but does not specify whether the inference is a mandatory inference that the trier of fact must make, or a permissive inference.[228] The legislative history does not clearly state whether the presumption is mandatory or permissive, although some language suggests a mandatory presumption.[229] There is no case law on point. The revised UCPR is intended to clarify the nature of the presumption of intent.

Fifth, the gradations in subsection (e), by use of the phrase "in fact," codify that no culpable mental state is required as to the number of unlawful recordings made, obtained, or possessed. The current statute is silent as to what culpable mental state applies to these circumstances. There is no District case law on what mental state, if any, applies to the current gradations based on the number of recordings. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[230] Clarifying that the number of unlawful recordings is a matter of strict liability in the revised UCPR gradations clarifies District law.

---

[224] *See, e.g.*, RCC § 22A-2101.

[225] RCC § 22A-2001(14) ("'Owner' means a person holding an interest in property that the accused is not privileged to interfere with.").

[226] D.C. Code § 22-3214(a)(1):

> (1) "Owner", with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.

[227] E.g., a person who has reproduction but not distribution rights (the current statute refers to a licensee with rights to "reproduce and distribute"), or a person who by contractual agreement with someone other than the performer has the rights to reproduce recordings of a live performance, may not be considered an "owner" under the current definition.

[228] D.C. Code § 22-3214(b) ("A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance.").

[229] *Extension of Comments on Bill No. 4-193* at 29 ("If such a fact is established, the offender will be presumed to have acted with the requisite intent.").

[230] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to

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

First, subsection (a)(1) of the unlawful creation or possession of a recording statute requires that the defendant "makes, obtains, or possesses." This language, particularly "possesses" is intended to include all the conduct prohibited by "reproduces or otherwise copies, possesses, buys or otherwise obtains" in the current commercial piracy statute.

Second, subsection (a)(3) of the revised UCPR statute requires that the defendant act without the "effective consent of the owner." The definition of "effective consent" is discussed in RCC § 22A-2001. The current commercial piracy statute simply requires that the defendant act "without the consent of the owner."[231] There is no legislative history or District case law discussing the scope of "consent" in the current commercial piracy statute. Using "effective consent" in the revised UCPR statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. The change in language improves the clarity and consistency of definitions throughout property offenses.

Third, subsection (a)(4) of the revised UCPR statute requires "with intent to sell, rent, or otherwise use the sound recording for commercial gain or advantage." By contrast, the wording in the current commercial piracy statute is "with the intent to sell, to derive commercial gain or advantage, or to allow another person to derive commercial gain or advantage." The revised UCPR statute's addition of "rent" to subsection (a)(4) clarifies a common way of gaining commercial advantage. Deletion of the current statute's intent "to allow another person to derive commercial gain or advantage" prong reflects the fact that ordinary aiding and abetting or conspiracy liability applies to the offense. Consistent with prior legislative history,[232] the revised UCPR statute's language "sell, rent, or otherwise use the recording for commercial gain or advantage" is to be broadly construed.

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

First, removing liability for proprietary information from the revised UCPR offense follows a clear national trend amongst the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[233](hereafter "reformed code jurisdictions. Nearly all of the 29 reformed code jurisdictions have offenses that prohibit the unlawful creation or possession of specific sound and audiovisual recordings.[234]

---

separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[231] D.C. Code § 22-3214(b).

[232] *Extension of Comments on Bill No. 4-193* at 29 ("The phrase 'derive commercial gain or advantage' is intended to encompass any transaction where the person reproducing or possessing the unauthorized phonorecord or copy of proprietary information surrenders ownership and control over it for consideration or any related form of compensation. Consequently, even an individual who does not hold himself or herself out to the public as engaging in a commercial enterprise can be subjected to criminal liability.").

[233] *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.

[234] Ala. Code § 13A-8-81; Alaska Stat. Ann. § 45.50.900; Ariz. Rev. Stat. Ann. § 13-3705; Ark. Code Ann. § 5-37-510; Colo. Rev. Stat. Ann. §§ 18-4-602,4-603, 4-604.3, 604.7; Conn. Gen. Stat. Ann. § 53-142b; Del. Code Ann. tit. 11, §§ 921, 921; Haw. Rev. Stat. Ann. § 482C-1, C-2, C-5; 720 Ill. Comp. Stat. Ann. 5/16-7; Kan. Stat. Ann. § 21-

None of them include proprietary information or intellectual property in their offenses concerning sound and audiovisual recordings. Neither the Model Penal Code (MPC) nor the Proposed Federal Criminal Code has commercial piracy offenses.

Second, applying a "knowingly" culpable mental state to the element in subsection (a)(3) that the defendant acted "without the effective consent of the owner" is consistent with many of the reformed code jurisdictions' commercial piracy statutes. It is difficult to generalize about the required mental state in other jurisdictions for this element due to the varying rules of construction between states. However, a majority of the reformed code jurisdictions with unlawful creation or possession of a recording statutes appear to apply a "knowingly" mental state to the element of without consent or its substantive equivalent.[235]

Third, the UCPR statute increases the number and type of gradations for the offense. The current commercial piracy statute is a misdemeanor, regardless of the number of the unlawful recordings at issue.[236] A majority of the reformed code jurisdictions with commercial piracy statutes have more than one grade of the offense,[237] like the revised UCPR offense. Due to the variety of methods by which the reformed code jurisdictions grade the commercial piracy offense, it is difficult to generalize about the most common number of gradations or the substance of the gradations.[238] The threshold for the number of unlawful recordings at issue also varies amongst the states with reformed code jurisdictions, and in some states depends on the prohibited conduct.[239] One hundred unlawful recordings, however, is a threshold in several

---

5806; Ky. Rev. Stat. Ann. § 434.445; Me. Rev. Stat. tit. 10, § 1261; Minn. Stat. Ann. § 325E.17; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-142, -143; N.H. Rev. Stat. Ann. § 352-A:2, -A:5; N.J. Stat. Ann. § 2C:21-21; N.Y. Penal Law §§ 275.05, .15, .20, .25, .30; N.D. Cent. Code Ann. § 47-21.1-02; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. §§ 164.865, .869; 18 Pa. Stat. Ann. § 4116; S.D. Codified Laws § 43-43A-2; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Utah Code Ann. § 13-10-4; Wash. Rev. Code Ann. §§ 19.25.020, .030; Wis. Stat. Ann. §§ 943.207, .208.

[235] Ala. Code § 13A-8-81; Alaska Stat. Ann. § 45.50.900; Ariz. Rev. Stat. Ann. § 13-3705; Ark. Code Ann. § 5-37-510; Conn. Gen. Stat. Ann. § 53-142b; Haw. Rev. Stat. Ann. §§ 482C-1; -2; Me. Rev. Stat. tit. 10, § 1261; Minn. Stat. Ann. § 325E.17; N.J. Stat. Ann. § 2C:21-21; N.Y. Penal Law §§ 275.05, .15, .20, .25, .30; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. §§ 164.085; .869; 18 Pa. Stat. Ann. § 4116; S.D. Codified Laws § 43-43A-2; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Utah Code Ann. § 13-10-4; Wash. Rev. Code Ann. §§ 19.25.020, .030; Wis. Stat. Ann. §§ 943.207, .208.

[236] D.C. Code § 22-3214(d).

[237] Ala. Code § 13A-8-86; Ariz. Rev. Stat. Ann. § 13-3705; Ark. Code Ann. § 5-37-510; Colo. Rev. Stat. Ann. §§ 18-4-602,4-603, 4-604.3, 604.7; Del. Code Ann. tit. 11, §§ 921, 921; 720 Ill. Comp. Stat. Ann. 5/16-7; Kan. Stat. Ann. § 21-5806; Ky. Rev. Stat. Ann. § 434.445; Me. Rev. Stat. tit. 10, § 1261; Minn. Stat. Ann. § 325E.201; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-142, -143; N.H. Rev. Stat. Ann. § 352-A:2, -A:5; N.J. Stat. Ann. § 2C:21-21; N.Y. Penal Law §§ 275.05, .15, .20, .25, .30; N.D. Cent. Code Ann. § 47-21.1-02; Or. Rev. Stat. Ann. §§ 164.865, .869; 18 Pa. Stat. Ann. § 4116; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Wash. Rev. Code Ann. §§ 19.25.020, .030; Wis. Stat. Ann. §§ 943.207, .208.

[238] For example, several states grade, either in whole or in part, upon the type of prohibited conduct, such as whether the defendant transferred the sounds onto the unlawful recording or merely possessed the unlawful recording. *See, e.g.*, Ala. Code § 13A-8-86; Colo. Rev. Stat. Ann. § 18-4-602, -603, -604; Del. Code Ann. tit. 11, §§ 920, 921; Me. Rev. Stat. tit. 10, § 1261; Mont. Code Ann. §§ 30-13-142, -143; N.H. Rev. Stat. Ann. § 352-A:2. Several states differentiate in the gradations between sound recordings and audiovisual recordings, *e.g.*, Ariz. Rev. Stat. Ann. § 13-3705; 720 Ill. Comp. Stat. Ann. 5/16-7; N.J. Stat. Ann. § 2C:21-21; Wash. Rev. Code Ann. §§ 19.25.020, .030.

[239] *See, e.g.*, Ala. Code § 13A-8-86 Colo. Rev. Stat. Ann. §§ 18-4-602,4-603, 4-604.3, 604.7; Ark. Code Ann. § 5-37-510; N.H. Rev. Stat. Ann. § 352-A:2, -A:5.

of the reformed code jurisdictions that do not differentiate between sound recordings and audiovisual recordings, particularly in lower gradations in those jurisdictions.[240]

Fourth, the addition of the forfeiture provision in subsection (f) of the revised UCPR also reflects national trends. A majority of the reformed jurisdictions with unlawful creation or possession of a recording statutes have similar provisions.[241]

Fifth, regarding the aggregation of quantities of property in a single scheme or systematic course of conduct, the revised UCPR offense follows many jurisdictions[242] which have statutes that closely follow the Model Penal Code (MPC)[243] 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.[244] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[245]

Sixth, regarding the bar on multiple convictions for the revised UCPR offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised UCPR offense and other overlapping property offenses. For example, where the offense most like the revised UCPR is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[246] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[247] while some

[240] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3705; Conn. Gen. Stat. Ann. §§ 53-142b, -142f; Mo. Ann. Stat. § 570.225; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Wash. Rev. Code Ann. §§ 19.25.020, .030.

[241] Ala. Code § 13A-8-4; Ariz. Rev. Stat. Ann. § 13-3705(F); Ark. Code Ann. § 5-37-510(g); Colo. Rev. Stat. Ann. §§ 18-4-606; 720 Ill. Comp. Stat. Ann. 5/16-7(i); Kan. Stat. Ann. § 21-5806(f); Ky. Rev. Stat. Ann. § 434.445(6); Mont. Code Ann. § 30-13-145; N.H. Rev. Stat. Ann. § 352-A:5(III); N.J. Stat. Ann. § 2C:21-21(e); N.D. Cent. Code Ann. § 47-21.1-04; 18 Pa. Stat. Ann. § 4116(f); Tenn. Code Ann. § 39-14-139(g); Tex. Bus. & Com. Code Ann. §§ 641.055; Wash. Rev. Code Ann. §§ 19.25.050.

[242] 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.

[243] 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.")

[244] 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.

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

[246] D.C. Code § 22-3203.

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

jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[248]

National legal trends also support other changes to the revised UCPR offense. There is significant support for including audiovisual recordings for live performances in the scope of the revised UCPR offense. At least 18 of the reformed jurisdictions with offenses that prohibit the unlawful creation or possession of specific sound and audiovisual recordings include live performances in their statutes[249] and a majority of these statutes include audiovisual recordings.[250]

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

[249] Ala. Code § 13A-8-81(2); Ariz. Rev. Stat. Ann. § 13-3705(A)(5); Ark. Code Ann. § 5-37-510(b)(1); Colo. Rev. Stat. Ann. § 18-4-604.3; 720 Ill. Comp. Stat. Ann. 5/16-7(a)(4); Kan. Stat. Ann. § 21-5806(a)(1); Ky. Rev. Stat. Ann. § 434.445(2); Mo. Ann. Stat. § 570.225(1)(2); Mont. Code Ann. § 30-13-142(2); N.H. Rev. Stat. Ann. § 352-A:2(1)(b); N.J. Stat. Ann. § 2C:21-21(c)(3); N.Y. Penal Law §§ 275.15, .20, .25; N.D. Cent. Code Ann. § 47-21.1-02(2); Or. Rev. Stat. Ann. § 164.869; 18 Pa. Stat. Ann. § 4116(d.1); Tenn. Code Ann. § 39-14-139(c)(1); Tex. Bus. & Com. Code Ann. § 641.052; Wash. Rev. Code Ann. §§ 19.25.030; Wis. Stat. Ann. § 943.208.

[250] Ala. Code § 13A-8-81(2); Ariz. Rev. Stat. Ann. § 13-3705(A)(5), (G)(2); Ark. Code Ann. § 5-37-510(b)(1), (a)(3); Colo. Rev. Stat. Ann. § 18-4-604.3; 720 Ill. Comp. Stat. Ann. 5/16-7(a)(4); Ky. Rev. Stat. Ann. § 434.445(2); Mo. Ann. Stat. § 570.225(1)(2); N.J. Stat. Ann. § 2C:21-21(c)(3); N.D. Cent. Code Ann. § 47-21.1-02(2); Or. Rev. Stat. Ann. §§ 164.865(10), .869; Tenn. Code Ann. § 39-14-139(c)(1), (a)(6); Tex. Bus. & Com. Code Ann. §§ 641.001(4), .052; Wash. Rev. Code Ann. §§ 19.25.010(4), .25.030; Wis. Stat. Ann. § 943.208.

Chapter 25. Property Damage Offenses

RCC § 22A-2501. Arson

(a) *Offense.* A person commits the offense of arson if that person:
  (1) Knowingly starts a fire or causes an explosion;
  (2) That damages or destroys;
  (3) A dwelling, building, business yard, watercraft, or motor vehicle.

(b) *Definitions.* The terms "knowingly" and "recklessly," have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, the terms "dwelling," "building," "business yard," and "motor vehicle," have the meanings specified in § 22A-2001, and the term "serious bodily injury" has the meaning specified in § 22A-XXXX.

(c) *Gradations and Penalties.*
  (1) *Aggravated Arson*.
    (A) A person is guilty of aggravated arson if that person commits arson:
      (i) Of what the person knows to be a dwelling or building;
      (ii) Reckless as to the fact that a person who is not a participant in the crime is present in the dwelling or building; and
      (iii) The fire or explosion, in fact, causes death or serious bodily injury to any person who is not a participant in the crime.
    (B) Aggravated arson is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Arson.*
    (A) A person is guilty of first degree arson if that person commits arson:
      (i) Of what the person knows to be a dwelling or building; and is
      (ii) Reckless as to the fact that a person who is not a participant in the crime is present in the dwelling or building.
    (B) First degree arson is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Arson.* A person is guilty of second degree arson if that person commits arson. Second degree arson is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Affirmative Defense.* It is an affirmative defense to commission of second degree arson that the defendant must prove by a preponderance of the evidence, that he or she had a valid blasting permit issued by the District Of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit.

Commentary

Explanatory Note. *This section establishes the revised arson offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly starting a fire or causing an explosion that damages or destroys a dwelling, building, business yard,*

watercraft, or motor vehicle. The penalty gradations are based primarily on the type of property at issue and risk to human life. The revised arson offense replaces the current arson offense,[251] *and the closely-related offenses of burning one's own property with intent to injure or defraud another person*[252] *and placing explosives with intent to destroy or injure property.*[253]

Subsection (a)(1) states the prohibited conduct—starting a fire or causing an explosion. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be knowledge, a term defined at RCC § 22A-206 which here requires the accused must be aware to a practical certainty or consciously desire that his or her conduct is starting a fire or causing an explosion.

Subsection (a)(2) states that the fire or explosion must damage or destroy an item. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the elements in subsection (a)(2), requiring the accused to be aware to a practical certainty or consciously desire that that the fire or explosion damages or destroys the item.

Subsection (a)(3) specifies that the item involved is a dwelling, building, business yard, watercraft, or motor vehicle, each of which is a defined term. Per the rule of construction in § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to the type of structure in subsection (a)(3), requiring the accused to be aware to a practical certainty or consciously desire that the item be a dwelling, building, business yard, watercraft, or motor vehicle.

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

Subsection (c) states the three grades of the revised arson offense.

Subsection (c)(1), aggravated arson, requires the defendant to commit arson as defined in subsection (a), with three additional requirements. First, the defendant must know the structure to be a dwelling or building. Other structures are not covered by aggravated arson. Second, a person who is not a participant in the crime must actually be present in the dwelling or building at the time of the offense. This excludes liability for committing aggravated arson where the only other person present in the dwelling or building is a co-participant in the crime. The defendant need not know that the structure is occupied, but he or she must be reckless as to that fact. "Reckless" is a term defined at RCC § 22A-206 to mean the accused must disregard a substantial and unjustifiable risk that the dwelling or building is occupied by someone not a participant in the crime. Third, the resulting fire or explosion must cause death or serious bodily injury to another person who is not a participant in the crime. Subject to causation limitations, this may also include harm to first responders. "In fact," a term defined in RCC § 22A-206, is used to indicate that there is no culpable mental state requirement as to whether the fire or explosion caused death or serious bodily injury to another person who is not a participant in the crime.

Subsection (c)(2), first degree arson, has the same requirements as aggravated arson except that the final requirement in subsection (c)(1)(A)(iii), (that another person who is not a participant in the crime "in fact" suffered death or serious bodily injury), need not be proven.

Subsection (c)(3) second degree arson, has the same requirements as the base offense in subsection (a). Second degree arson may be committed when the property at issue is a dwelling

[251] D.C. Code § 22-301.
[252] D.C. Code § 22-302.
[253] D.C. Code § 22-3305.

or building that is unoccupied, or when the property is a business yard, watercraft, or motor vehicle, regardless of whether it is occupied.[254]

Subsection (d) establishes an affirmative defense that applies only to second degree arson. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that he or she had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

Relation to Current District Law. *The revised arson statute changes existing District law in ten main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised arson statute specifies culpable mental states of knowledge, recklessness, and strict liability with respect to various elements. "Maliciously" is the only culpable mental state specified in the current arson statute, [255] and it is unclear whether all or just some of the current arson statute elements are modified by the term. The D.C. Court of Appeals (DCCA) has stated that the malice culpable mental state in the current arson requires the government to "prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy."[256] Beyond this, District case law holds that the meaning of malice in the current arson and current malicious destruction of property (MDP) offenses is the same.[257] And, in the context of MDP, the DCCA has recently clarified that as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice either requires the defendant act "purposely" or with a blend of "knowingly" and "recklessly" culpable mental states.[258] In addition, the DCCA has held that use of the culpable mental state of malice requires "the absence of all elements of justification, excuse or recognized mitigation," which creates various defenses typically recognized in the context of murder.[259]

In contrast, the revised arson statute provides definitions for each culpable mental state and specifies the relevant culpable mental states for the revised offense, including knowledge as to subsections (a)(1)-(a)(3), recklessness as to occupancy in subsections (c)(1)(A)(ii) and

[254] If a watercraft or a motor vehicle satisfies the definition of "dwelling" in RCC § 22A-2001, arson of that watercraft or motor vehicle could fall under aggravated arson or first degree arson, if the defendant otherwise satisfies the requirements of those grades.

[255] D.C. Code § 22-301.

[256] *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (internal citations omitted). The DCCA has further stated that the culpable mental state of the current arson offense is one of "general intent." *Phenis v. United States*, 909 at 163-64. "General intent" is not used in or defined in the current arson statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[257] *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987).

[258] *Harris v. United States*, 125 A.2d 704, 708 n. 3 (D.C. 2015).

[259] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e., a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e., defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

(c)(2)(A)(ii), and strict liability as to causing death or serious bodily injury in subsection (c)(1)(A)(iii). The "knowingly" culpable mental state is consistent with, but somewhat narrower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[260] The "reckless" culpable mental state that the revised statute applies to whether the building or dwelling is occupied also approximates, but is somewhat lower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. A recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[261] and provides liability for reckless behavior that may result in serious property damage. Finally, the strict liability requirement reflects the fact that the accused has already engaged in serious criminal conduct, equivalent to first degree arson, and no further mental state appears necessary for liability as to the consequences based on his or her recklessness at placing a person risk. In fact, if the defendant had a culpable mental state as to such harm, it may also constitute assault or murder.[262] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[263] Replacing "maliciously" in the current arson statute[264] with the culpable mental states of knowledge, recklessness, and strict liability with respect to various elements in the revised arson offense describes clearly the culpable mental states that must be proven for the revised offense.

Eliminating malice from the revised arson statute also eliminates the special mitigation defenses applicable to the current arson offense.[265]

Second, subsection (a)(1) of the revised arson statute requires, in part, that the defendant "causes an explosion." The current arson statute merely requires that the defendant "burn or attempt to burn,"[266] and there is no case law on whether this would include all explosions. At the common law, explosions were excluded from arson if they did not burn the property.[267] Because

---

[260] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[261] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

[262] The aggravated arson gradation is not intended to change the scope of felony murder as it pertains to arson in the RCC. See RCC § 22A-1XXX for details regarding felony murder.

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

[264] D.C. Code § 22-301.

[265] *See* D.C. Crim. Jur. Instr. § 5.100 (requiring as an element of arson that the defendant "acted without mitigation" and defining mitigation, in part, as "Mitigating circumstances exist where a person acts in the heat of passion caused by adequate provocation.").

[266] D.C. Code § 22-301.

[267] John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 362 (1986) ("At common law, it was not arson to damage a dwelling house by means of an explosion unless it caused the house to burn rather than first being torn apart by the blast . . . Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb.").

explosions can be as dangerous, if not more dangerous, than fire and raise similar concerns about occupancy of the location where the explosion takes place, the revised arson statute includes explosions to eliminate a possible gap in liability.[268]

Third, the revised arson statute applies to motor vehicles. The current arson statute specifies a lengthy list of property,[269] including watercraft and railroad cars, but motor vehicles are excluded—perhaps due to the fact that the current arson statute was enacted in 1901. The current arson statute clearly applies to "dwellings" and "houses,"[270] but there is no District case law discussing whether motor vehicles used as a place of habitation or sleeping can qualify as dwelling and houses. By contrast, the revised second degree arson offense includes any motor vehicle, and the revised aggravated arson and first degree arson offenses include any motor vehicles that satisfy the definition of "dwelling" in 22A-2001. The addition of motor vehicles clarifies and eliminates a gap in liability under current law.

Fourth, the revised arson statute eliminates the requirement that the dwelling, building, business yard, watercraft, or motor vehicle be another person's property. The current arson statute requires that the property is "in whole or in part, of another person."[271] The limited DCCA case law construing this phrase merely asserts that the element is satisfied if a person other than the defendant legally owns the property.[272] The revised arson statute changes District law by removing the requirement that the property is "in whole, or in part, of another person." It is inconsistent to permit a defendant who otherwise satisfies the requirements of arson to avoid liability because another person owned all or part of the property. Under the revised arson statute, ownership of the property is irrelevant, with a narrow exception for second degree arson discussed below. The elimination of the "in whole or in part, of another person" requirement clarifies and eliminates a gap in liability under current law.

Fifth, the revised arson statute provides a new affirmative defense in subsection (d). The affirmative defense allows a person to damage or destroy with a fire or explosion a dwelling or building that is unoccupied, or a business yard, watercraft, or motor vehicle regardless of whether it is occupied, with proper government authorization. No comparable statute or case law exists in current District law. Under the revised arson statute's affirmative defense the accused must prove by a preponderance of the evidence that he or she had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit. As there is less potential risk to human life in second degree arson, it is appropriate to permit a defendant to

[268] As described below, another offense in the current D.C. Code also addresses explosives. D.C. Code § 22-3305 prohibits placing, or causing to be placed, near certain property explosives "with intent to destroy, throw down, or injure the whole or any part thereof."

[269] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").

[270] *Id*.

[271] D.C. Code § 22-301.

[272] *Posey v. United States*, 26 App. D.C. 302, 304-05 (D.C. Cir. 1906) (affirming the attempted arson conviction of a defendant that tried to burn down a building he was renting and noting that "the appellant was occupying the building as a tenant does not take it out of the terms of this section."); *Chaconas v. United States*, 326 A.2d 792, 793, 797 (D.C. 1974) (upholding the appellant's conviction for burning a store that his corporation rented); *Byrd v. United States*, 705 A.2d 629, 631, 635 (affirming appellant's conviction for arson and finding that appellant's testimony that is parents owned the house was sufficient for the house to be "in whole or in part, of another person.").

avoid liability when acting with property authority. This change improves the proportionality of the revised offense.

Sixth, the revised arson statute punishes attempted arson the same as most other criminal attempts. The current statute refers to an "attempt to burn" the same as a successful burning,[273] and case law appears to construe this language to mean that attempted arson is punished the same as completed arson.[274] There is no clear rationale for such a special attempt provision in arson as compared to other offenses. Under the revised arson statute, the General Part's attempt provisions[275] will establish liability for attempted arson consistent with other offenses. Differentiating conduct that does and does not result in starting a fire or causing an explosion improves the proportionality of the revised offense.

Seventh, the revised arson statute creates three gradations of arson based primarily upon the type of property at issue and possible risk to human life. The current arson offense does not have any gradations and makes no provision in the arson statute for instances where a person suffers serious injury or death as a result of the arson. Case law requires arson to endanger human life to some degree.[276] However, case law also suggests that liability for firefighters and first responders who are seriously injured or killed while responding to the fire or explosion is not covered in current District law.[277] The aggravated arson gradation differs from current law primarily because it provides liability when a defendant, in fact, caused serious bodily injury or death to any person that is not a participant in the crime. Subject to causation limitations, this would also include harm experienced by first responders.[278] No culpable mental state is required for this element because the defendant has already engaged in serious criminal conduct.[279] Second degree arson primarily changes District law because it includes arson liability in instances where there is no risk to human life. Second degree arson covers arson of a dwelling or building that is unoccupied, or when the property is a business yard, watercraft, or motor vehicle, regardless of whether it is occupied. Increasing the number of gradations for arson, both

[273] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling…").

[274] *Gilmore v. United States*, 742 A.2d 862, 870 (D.C. 1999).

[275] RCC § 22A-301.

[276] *See, e.g., Phenis*, 909 A.2d at 164 ("With respect to arson, the government must prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy.) (internal citations omitted).

[277] In *Lewis v. United States*, the government argued that "by setting a fire which he knew would require the intervention of firefighters to extinguish, [the appellant] consciously disregarded a substantial risk to the lives of the firefighters." *Lewis v. United States*, 10 A.3d 646, 661 n.8 (D.C. 2010). The DCCA acknowledged that "there is some merit to this argument," but noted that in states in which "a risk to a firefighter safety satisfies an element of arson, this decision has been made by the legislature." *Id.* The court stated "[i]n light of these statutes applicable in other states, we refrain from extending the 'risk of harm to human life' element to include a risk to responding emergency personnel since we believe the legislature is more apt to make such a change in our arson law." *Id.*

[278] Where the harm to a first responder is by an unrelated or in no way a foreseeable event, for example an airplane crash landing at the location where the fire occurred, the causal connection between setting a fire to an occupied dwelling and the harm may be too tenuous to sustain liability. See commentary to RCC § 22A-204 Causation, for further explanation of causation requirements in the RCC.

[279] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence. *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

above and below the standard requirements in the current arson statute, improves the proportionality of the revised offense by distinguishing more and less culpable conduct.

Eighth, in revising the arson offense, the RCC deletes two statutes that are closely related to the current arson statute: burning one's own property with intent to injure or defraud another person,[280] and placing explosives with intent to destroy or injure property.[281] In the RCC, conduct currently prohibited by burning one's own property with intent to destroy or injure property is criminalized under multiple revised statutes, including the revised arson statute which now applies to property belonging to anyone.[282] Similarly, in the RCC, conduct currently prohibited by placing explosives with intent to injure or destroy property is criminalized under multiple statutes, including arson which now explicitly includes use of explosives to cause damage.[283] Deleting these offenses reduces unnecessary overlap with the revised arson offense, the revised reckless burning offense in RCC § 22A-2502, and other offenses.

Ninth, the provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised arson offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[284] However, arson is not among those offenses and, as described in the commentary to RCC § 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised arson offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Tenth, under the revised arson statute the general culpability principles for self-induced intoxication in RCC § 22A-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current arson statute is a general intent

[280] D.C. Code § 22-302 ("Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[281] D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

[282] E.g., such conduct would be subject to the revised arson statute if the property was one of the specific property types covered by arson (dwelling, building, etc.) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in RCC §22A-2001. In addition to these property damage offenses, such conduct may well constitute an attempt (RCC § 22A-301) to commit fraud (RCC § 22A-2201), assault (RCC § 22A-1XXX), or murder (RCC § 22A-1XXX) depending on the facts of the case.

[283] E.g., such conduct would be subject to the revised arson statute if the property was one of the specific types covered by arson (dwelling, building, etc.) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in 22A-2001.

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

crime,[285] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming any of the culpable mental state requirements for the offense.[286] This DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[287]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess any of the culpable mental state requirements for arson. By contrast, per the revised arson offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that self-induced intoxication prevented the defendant from forming the knowledge required for various elements of arson. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in arson.[288] This change improves the clarity, consistency, and proportionality of the offense.

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

First, subsection (a)(1) of the revised arson statute requires a defendant, in relevant part, to "start[] a fire." The current arson statute requires that the defendant "burn" the specified property.[289] Several DCCA arson cases refer to conduct to "set" the fire or "set fire to" as if this language were equivalent to "burn,"[290] but no decision is directly on point. The revised arson statute resolves this ambiguity in case law and clarifies the element.

Second, the revised arson statute specifically includes liability for arson in a "business yard," in subsection (a)(3) and eliminates liability for a "railroad car" that is not part of a motorized train. The current arson statute contains some undefined terms like "stable" and "warehouse,"[291] but nothing directly corresponding to a "business yard." There is no District case law construing these terms. As defined in the RCC, a "business yard" is a "securely fenced

[285] *See Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) (citing *Barrett v. United States*, 377 A.2d 62 (D.C. 1977); *Charles v. United States*, 371 A.2d 404 (D.C. 1977)).

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

[287] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

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

[289] D.C. Code § 22-301.

[290] *Lewis v. United States*, 10 A.3d 646, 657 (D.C. 2010) (holding "there is sufficient evidence to prove that Lewis acted maliciously when *he set the fire*") and noting that the issue was whether "Lewis acted with the required *mens rea* of malice when he *set fire to* the house.") (emphasis added); *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (concluding, in part, that the evidence was sufficient that the appellant "intentionally set fire to" his mother's apartment."); *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("the trial judge reasonably could find, as she did, that appellant intentionally set the fire . . .").

[291] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").

or walled land where goods are stored or merchandise is traded,"[292] and as such is an enclosed location where there may be an increased danger to persons who may be present because of a fire or explosion. Inclusion of business yards in the revised offense may eliminate a gap in liability. Similarly, the current arson statute contains the undefined term "railroad car"[293] and there is no District case law interpreting the term. The possibility of harm to a person inside an unconnected railroad car seems quite remote and may reflect the current statute's origin in 1901. Eliminating liability for arson of a "railroad car" not connected to a motorized vehicle clarifies the state of the law.

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

The revised arson statute requires that the fire or explosion damage or destroy a dwelling, building, business yard, watercraft, or motor vehicle. The current arson statute requires only that the defendant "burn" (or attempt to burn) the property specified in the statute.[294] Insofar as burning constitutes some kind of damage or destruction to the property at issue, this change merely clarifies the revised offense.

Relation to National Legal Trends. *The revised arson offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[295]

The first substantive change to District law in the revised arson statute is that the revised offense no longer uses the "malice" mental state that is in the current arson statute. Only 15 of the 50 states use malice in one of their arson statutes.[296] Even where malice is used, the recognition of a mitigation defense to arson is rare and disapproved by experts.[297] The majority of the 35 states that do not have a "malice" culpable mental state requirement instead specify

[292] RCC § 22A-2001(3).
[293] D.C. Code § 22-301.
[294] D.C. Code § 22-301.
[295] There is significant variation in the 50 states as to what conduct constitutes "arson," and some states do not name their offenses in this manner. Research for this commentary section considered the following as arson, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "arson"; 2) Any statutes that pertain to burning property, or starting a fire, etc., including those that require an intent to defraud or injure another; and 3) Any statutes that name offenses codified therein as "reckless burning" or burning with a higher mental state, or substantively similar statutes. The following were excluded: 1) Felony arson offenses; 2) Statutes that name the offenses codified therein "negligent burning" or substantively similar statutes; and 3) Offenses or gradations that pertain to burning, starting a fire, etc., and the production of drugs.
[296] Md. Code Ann., Crim. Law §§ 6-102, -103, -104, -105; Va. Code Ann. § 18.2-77, -79, -80, -81; Cal. Penal Code §§ 451, 451.5, 454; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77, .78; Miss. Code Ann. §§ 97-17-1, -3, -5, -7, -9; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025; N.M. Stat. Ann. §§ 30-17-5 and 30-17-6; N.C. Stat. Ann. § 14-58.2; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; S.C. Code Ann. § 16-11-110; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504; Wash. Rev. Code Ann. §§ 9A.48.020 and .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4; Wyo. Stat. Ann. § 6-3-101.
[297] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 10.4 (2d ed.) ("Outside of homicide law, the concept of [mitigation] doesn't [really] exist."); John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 404 n. 573 (1986) (rejecting the argument of R. Perkins & R. Boyce that a mitigated burning should not be arson and stating that "why should the rule of provocation be applied outside the law of homicide? I find neither history nor policy which supports the application of the rule of provocation to arson."); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1041 (2011) (categorically stating that "[p]rovocation is available as a partial defense only to murder" and that it is not "a defense, partial or otherwise" to non-homicide offenses, which is incorrect in light of District law.

"knowingly," "purposely," or "intentionally" in some or all of their arson statutes.[298] The MPC arson statute requires that the defendant "starts a fire or causes an explosion with the purpose" of destroying or damaging certain property[299] and the Proposed Federal Criminal Code arson statute does not specify a mental state specified for prohibited conduct.[300] Due to the varying rules of statutory interpretation or lack thereof in these states and models, however, it is unclear whether these mental states apply to the prohibited conduct, such as starts a fire or causes an explosion.

The mental state "reckless" as to "the fact that a person who is not a participant in the crime is present in the dwelling or building" in the revised arson statute also generally reflects national trends. Arson statutes in the 50 states overwhelmingly protect arson that endangers human life more seriously than arson that endangers or damages property,[301] but they do so in different ways, making generalization difficult. For example, some states include in their higher levels of arson damaging or endangering an occupied dwelling or building, with varying mental state requirements as to that fact.[302] Other states, like the revised arson statute, use "reckless" as

---

[298] For the purposes of this specific survey, state statutes for "reckless burning," "knowingly burning," and substantively similar offenses, which this commentary otherwise considers "arson," were excluded. *See, e.g.*, N.Y. Penal Law §§ 150.01, .05, .10, .15, .20; Tex. Penal Code § 28.02; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253, -8254; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Ark. Code Ann. § 5-38-301; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Ga. Code Ann. §§ 16-7-60, -61; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040, .060; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1; Minn. Stat. Ann. §§ 609.561, .562, .563, .5631; Mo. Ann. Stat. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Code Ann. § 12.1-21-02; Ohio Rev. Code Ann. §§ 2909..02, .03; Or. Rev. Stat. Ann. § 164.325, .3315; 18 Pa. Stat. Ann. § 3301; S.D. Codified Laws §§ 22-33-9.1, 9.2, 9.3, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-102, -103; Wis. Stat. Ann. §§ 943.02, .03, .04.

[299] For the purposes of this specific survey, the MPC statute for "reckless burning," which this commentary otherwise considers "arson," was excluded. MPC § 220.1(1).

[300] For the purposes of this specific survey, the Proposed Federal Criminal Code offense for "endangering by fire or explosion," which this commentary otherwise considers "arson," was excluded. Proposed Federal Criminal Code § 1701.

[301] *See, e.g.*, Md. Code Ann., Crim. Law §§ 6-102, 6-103; 6-106; Va. Code Ann. § 18.2-77, -79, -80, -81; N.Y. Penal Law §§ 150.01, .05, .10, .15. 20; Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.01; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.2, .3, .4; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14:53; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77; Minn. Stat. Ann. §§ 609.561, .562; Mo. Stat. Ann. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504, -505; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025, .030; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Codified Laws §§ 12.1-21-01, -02; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403; Or. Rev. Stat. Ann. §§ 164.325, .315; 18 Pa. Stat. Ann. § 3301; S.C. Code Ann. §§ 16-11-110, -130; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4-, -6; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, 102; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504, 505, 506; Wash. Rev. Code Ann. §§ 9A.48.020, .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4, -5, -7; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104.

[302] *See, e.g.*, Md. Code Ann., Crim. Law § 6-102; Va. Code Ann. §18.2-127(A); N.Y. Penal Law §§ 150.15, .20; Ala. Code § 13A-7-41; Ariz. Rev. Stat. Ann. § 13-1704; Cal. Penal Code § 451; Colo. Rev. Stat. Ann. § 18-4-102; Conn. Gen. Stat. Ann. § 53a-111; Del. Code Ann. tit. 11, § 803; Fla. Stat. Ann. § 806.01; Idaho Code Ann. § 18-802; 720 Ill. Comp. Stat. Ann. 5/20-1.1; Iowa Code Ann. § 712.2; Ky. Rev. Stat. Ann. § 513.020; Minn. Stat. Ann. § 609.5632(2); Neb. Rev. Stat. Ann. § 28-502; N.H. Rev. Stat. Ann. § 634:1; Tenn. Code Ann. § 39-14-302; Utah Code Ann. § 76-6-103; Wash. Rev. Code Ann. § 9A.48.020.

to the fact that human life is endangered in their highest grade of arson, although the precise language varies.[303] Unlike the revised arson statute, these states do not exclude a participant in the crime from the scope of the offense. However, such an exclusion is more common in other states' arson statutes that require damage to or threatening an occupied dwelling or a building.[304] The MPC and the Proposed Federal Criminal Code use "recklessly places another person in danger of death or bodily injury" in the closely-related offenses of reckless burning[305] and endangering by fire or explosion,[306] which essentially function as a second grade of arson in these models. The arson offenses in these models require, in part, starting a fire or causing an explosion with the purpose of destroying a building or occupied structure of another.[307]

The second substantive change is that subsection (a)(1) requires, in part, that the defendant "cause an explosion." There is a clear national trend towards including explosions in arson statutes. A large majority of the 50 states include "causes an explosion" in some or all of their arson statutes or damaging or destroying "by explosives," or similar language.[308] The MPC arson offense also includes "causes an explosion,"[309] as does the Proposed Federal Criminal Code.[310]

A third substantive change to current District law is that the revised arson statute applies to motor vehicles. Aggravated arson and first degree arson include motor vehicles that qualify as "dwellings" as defined in RCC § 22A-2001, and any motor vehicle will suffice for second degree arson that satisfies the definition of "motor vehicle" in RCC § 22A-2001. At least 37 of the 50

---

[303] Tex. Penal Code § 28.02(a)(2)(F) ("when the person is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another."); Alaska Stat. Ann. § 11.46.400(a) ("recklessly places another person in danger of serious physical injury."); Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2) ("recklessly endangers any person or the property of another."); Mo. Ann. Stat. § 569.040(1)(1) "recklessly places such person in danger of death or serious physical injury."); N.D. Cent. Code Ann. § 12.1-21-02(12)(1)(a) ("recklessly places another person in danger of death or bodily injury."); Or. Rev. Stat. Ann. § 164.325(1)(a) ("recklessly places another person in danger of physical injury or protected property of another in danger of damage."); 18 Pa. Stat. Ann. § 3301(a.1) "thereby attempts to cause, or intentionally, knowingly, or recklessly causes bodily injury to another person, including, but not limited to a firefighter, police officer, or other person actively engaged in fighting the fire.").

[304] Md. Code Ann., Crim. Law § 6-102; N.Y. Penal Law §§ 150.15, .20; Del. Code Ann. tit. 11, § 803; Minn. Stat. Ann. § 609.5632(2); Utah Code Ann. § 76-6-103; Wash. Rev. Code Ann. § 9A.48.020.

[305] MPC § 220.1(2) ("recklessly places another person in danger of death or bodily injury.").

[306] Proposed Federal Criminal Code § 1702 ("recklessly places another person in danger of death or bodily injury.").

[307] MPC § 220.1(1); Proposed Federal Criminal Code § 1701.

[308] N.Y. Penal Law §§ 150.01, .05, .10, .15 Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705, -1702; Ark. Code Ann. § 5-38-301, -302; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen Stat. Ann. §§ 53a-111, -112, -113, -114; Del. Code Ann. tit. 11, §§ 801, 802, 803, -804; Fla. Stat. Ann. § 806.01; Ky. Rev. Stat. Ann. §§ 513.020, .030, 040; Me. Rev. Stat. Ann. tit. 17-A, § 802; Mo. Ann. Stat. §§ 569.040, .05, .055, .060; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§, 28-502, -503, -504; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.M. Stat. Ann. §§ 30-17-5, -6; N.D. Cent. Code Ann. §§ 12.1-21-01, -02; Ohio Rev. Code Ann. § 2909.02, .03, .06; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; Or. Rev. Stat. Ann. §§ 164.325, .315, .335; 18 Pa. Stat. Ann. § 3301; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4, -6; S.C. Code Ann. § 16-11-110; S.D. Codified Laws §§ 22-33-9.1, 9.2, 9.3; Tenn. Code Ann. §§ 39-14-301, -302, -303, -304; Utah Code Ann. §§ 76-6-103, -102, -104; Wash. Rev. Code Ann. §§ 9A.48.020, .030, .040, .050; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104; Va. Code Ann. §§ 18.2-77, -79, -80, -81; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.1, .5; Kan. Stat. Ann. § 21-5182; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77, -.78; Minn. Stat. Ann. §§ 609.561, .562.

[309] MPC § 220.1(1).

[310] Proposed Federal Criminal Code § 1701.

states' arson statutes,[311] as well as the Proposed Federal Criminal Code[312] and the MPC,[313] include motor vehicles in the grades of arson that prohibit endangering human life, either specifically including "motor vehicles" in the arson statute or in the definition of "building" or similar term. Half of the states include vehicles in their grades of arson that protect property, without any explicit requirement that the arson endanger human life, like the revised second degree arson offense.[314] The MPC includes vehicles adapted for overnight accommodation of

[311] For this survey, offenses of "reckless burning," "negligent burning," and substantively similar offenses, which this commentary otherwise considers arson, were excluded, as were lower grades of arson. Many of these states have requirements for the motor vehicle or building, such as it must be used for or adapted for the lodging of persons. These requirements exist in the revised aggravated arson and revised first degree arson grades because they only include motor vehicles that satisfy the definition of "dwelling" in 22A-2001.

Md. Code Ann., Crim. Law §§ 6-101 (defining "structure" to include "a vehicle"), 6-102; N.Y. Penal Law §§ 150.20, .15; Tex. Penal Code Ann. § 28.01(a), (d); Ala. Code §§ 13A-7-40 (defining "building" to include vehicles that meet certain requirements), -41; Ariz. Rev. Stat. Ann. §§ 13-1701 (defining "occupied structure" to include vehicles that meet certain requirements), -1704; Ark. Code Ann. § 5-38-301; Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building" to include vehicles that meet certain requirements), -102; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building" to include "vehicle"), -111, -112; Del. Code Ann. tit. 11, §§ 222 (defining "building" to include "vehicle"), 803; Fla. Stat. Ann. § 806.01(1), (3); Ga. Code Ann. § 16-7-60; Idaho Code Ann. §§ 18-801 (defining "structure" to include "vehicle"), -802, -803; 720 Ill. Comp. Stat. Ann. 5/20-1.1; Kan. Stat. Ann. §§ 21-5111 (defining "dwelling" to include vehicles that meet certain requirements), -5812; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building" to include "vehicle"), .020; Mich. Comp. Laws Ann. §§ 750.71 (defining "dwelling" to include vehicles that meet certain requirements), -.72, -73; Minn. Stat. Ann. §§ 609.556 (defining "building" to include "vehicle" that meets certain requirements), -.561; Mo. Ann. Stat. §§ 569.010 (defining "inhabitable structure" to include vehicles that meet certain requirements), -.040; Neb. Rev. Stat. Ann. §§ 28-501 (defining "building" to include vehicles), -502; N.H. Rev. Stat. Ann. § 634:1 (through definition of "occupied structure"); N.M. Stat. Ann. §§ 30-17-5 (through definition of "occupied structure"), -6; N.D. Cent. Code Ann. §§ 12.1-21-08 (defining "inhabited structure" to include vehicles that meet certain requirements), -01, -02; Ohio Rev. Code Ann. §§ 2909.01 (defining "occupied structure" to include vehicles that meet certain requirements), .02; S.D. Codified Laws §§ 22-33-9.5 (defining "occupied structure" to include vehicles that meet certain requirements), -9.1; Utah Code Ann. §§ 76-6-101 (defining "habitable structure" to include vehicles that meet certain requirements), -103; Wyo. Stat. Ann. §§ 6-1-104 (defining "occupied structure" to include vehicles that meet certain requirements), -101.

Several other states include motor vehicles because their arson statutes apply to any property if there is danger to human life. Haw. Rev. Stat. Ann. §§ 708-8251(1)(a), -8252(1)(a), -8253(1)(a); Alaska Stat. Ann. § 11.46.400; Ind. Code Ann. § 35-43-1-1(a)(2); Iowa Code Ann. § 712.1, .2; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); Mont. Code Ann. §§ 45-6-103(1)(c); Or. Rev. Stat. Ann. § 164.325(1)(a)(B), (C); S.C. Code Ann. § 16-11-110; Tenn. Code Ann. § 39-14-302; N.J. Stat. Ann. § 2C:17-1(a)(1), (b)(1); Wash. Rev. Code Ann. § 9A.48.020(1)(a); 18 Pa. Stat. Ann. § 3301(a.1)(1)(i).

[312] Proposed Federal Criminal Code §§ 1701, 1706 (defining "inhabited structure" to include vehicles that meet certain requirements).

[313] MPC §220.1(1)(a), (4).

[314] Md. Code Ann., Crim. Law §§ 6-101 (defining "structure" to include "a vehicle"), 6-103; N.Y. Penal Law §§ 150.10, .05, .01; Tex. Penal Code Ann. § 28.02(a-1); Haw. Rev. Stat. Ann. §§ 708-8251(1)(B), -8252(1)(b), -8253(1)(B), -8254; Colo. Rev. Stat. Ann. §§ 18-4-103; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building" to include "vehicle"), -113; Del. Code Ann. tit. 11, §§ 222 (defining "building" to include "vehicle"), -801, -802; Fla. Stat. Ann. § 806.01(2), (4) (through the definition of "structure"); Ga. Code Ann. § 16-7-61; Idaho Code Ann. §§ 18-801 (defining "structure" to include "vehicle"), -803; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building" to include "vehicle"), .030, .040; La. Stat. Ann. §§ 14:52(A)(1); Mo. Ann. Stat. §§ 569.055;

Mont. Code Ann. § 45-6-103(1)(a); N.J. Stat. Ann. § 2C:17-1(a)(2), (b)(2), (f) (through definition of "structure"); N.M. Stat. Ann. § 30-17-5; Ohio Rev. Code Ann. § 2909.03(A)(1); 18 Pa. Stat. Ann. § 3301(d); Tenn. Code Ann. § 39-14-303; Utah Code Ann. § 76-6-102(1)(b);Wash. Rev. Code Ann. § 9A.48.030; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); Mont. Code Ann. §§ 45-6-103(1)(a), -103; Neb. Rev. Stat. Ann. § 28-504; Kan. Stat. Ann. § 21-5812(a)(1)(C).

persons, or for carrying on business therein, in the closely-related offense of reckless burning,[315] which is essentially a second grade of arson in this model. An additional 14 states have arson statutes that include vehicles because they apply to any property, but have a monetary limit to the value of the property or the amount of damage done.[316] The Proposed Federal Criminal Code's closely-related offense endangering by fire or explosion,[317] which essentially functions as a second grade of arson in this model, prohibits damage to property of another constituting pecuniary loss in excess of $5,000.

The fourth substantive change to District law is that the revised arson statute does not require that the dwelling, building, or business yard be another person's property. The 50 states overwhelmingly include all property, without distinguishing as to ownership, in their grades of arson that protect human life[318] with few exceptions.[319] The Proposed Federal Criminal Code arson offense requires "a building or inhabited structure of another,"[320] but the closely-related offense of endangering by fire or explosion, which essentially functions as a second grade of arson in this model, does not have any ownership requirement for the property when the fire or explosion "place[] another person in danger of death or bodily injury."[321] The MPC maintains a requirement that the property at issue be "of another," but defines "of another" broadly, applicable "if anyone other than the actor has a possessory or proprietary interest therein."[322] Similar to the Proposed Federal Criminal Code, the MPC does not require that the property be

[315] MPC § 220.1(2)(b), (4).

[316] 720 Ill. Comp. Stat. Ann. 5/20-1(a)(1) (any property or any personal property with a value of $150 or more); Ind. Code Ann. § 35-43-1-1(a)(3) (property of another if the pecuniary loss is at least $5,000); Iowa Code Ann. § 712.3(personal property with a value that exceeds $500); Mich. Comp. Laws Ann. §§ 750.74 (personal property with a value of $20,000 or more), .75 (personal property with a value of $1,000 or more, but less than $20,000) , .77 (personal property having a value of $1,000 or less and defendant has one or more specified prior convictions), .78 (personal property of varying values, including $200 or more, but less than $1,000, and less than $200); Minn. Stat. Ann. § 609.562 (real or personal property with a value of more than $1,000); Miss. Code Ann. § 97-17-7 (personal property of the value of $25); Nev. Rev. Stat. Ann. § 205.020 (any unoccupied personal property with a value of $25 or more); N.H. Rev. Stat. Ann. § 634:1(III)(d) (pecuniary loss in excess of $1,000); N.D. Cent. Code Ann. § 12.1-21-02(1)(c) (pecuniary loss in excess of $2,000); Okla. Stat. Ann. tit. 21, § 1403(A) (property worth not less than $50); Or. Rev. Stat. Ann. § 164.315(1)(a)(B) (damage to property exceeds $750); Vt. Stat. Ann. tit. 13, § 504 (personal property with a value of not less than $25.00); W. Va. Code Ann. § 61-3-3 (personal property with a value of not less than $500); Wyo. Stat. Ann. § 6-3-103(a)(ii) (property which has a value of $200 or more).

[317] Proposed Federal Criminal Code § 1702(1)(c).

[318] Md. Code Ann., Crim. Law § 6-102; Va. Code Ann. § 18.2-77; N.Y. Penal Law §§ 150.15, .20; Tex. Penal Code Ann. § 28.02; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253; Alaska Stat. Ann. § 11.46.400; Ala. Code § 13A-7-41; Ariz. Rev. Stat. Ann. § 13-1704; Ark. Code Ann. § 5-38-301(a)(1)(C); Cal. Penal Code §§ 451, 451.5; Conn. Gen. Stat. Ann. §§ 53a-111, -112; Del. Code Ann. tit. 11, § 803; Fla. Stat. Ann. § 806.01(1); Idaho Code Ann. §18-802; 720 Ill. Comp. Stat. Ann. 5/20-1(b), 5/20-1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. § 712.2; Ky. Rev. Stat. Ann. § 513.020; La. Stat. Ann. § 14:51.1; Me. Rev. Stat. tit. 17-A, § 802; Mass. Gen. Laws Ann. ch. 266, § 1; Mich. Comp. Laws Ann. §§ 750.72, .73 Minn. Stat. Ann. § 609.561; Miss. Code Ann. § 97-17-1; Mo. Ann. Stat. § 569.040; Mont. Code Ann. § 45-6-102; Neb. Rev. Stat. Ann. §28-502; Nev. Rev. Stat. Ann. § 205.010; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.C. Gen. Stat. Ann. §§ 14-58, -58.2; N.D. Cent. Code Ann. §§ 12.1-21-01, -02; Ohio Rev. Code Ann. §§ 2909.02, .03; Okla. Stat. Ann. tit. 21, 1401; Or. Rev. Stat. Ann. § 164.325; 18 Pa. Stat. Ann. § 3301; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1; S.C. Code Ann. § 16-11-110; Tenn. Code Ann. § 39-14-302; Utah Code Ann. § 76-6-103; Vt. Stat. Ann. tit. 13, § 502; Wash. Rev. Code Ann. § 9A.48.020; W. Va. Code Ann. § 61-3-1; Wyo. Stat. Ann. § 6-3-101.

[319] Ga. Code Ann. §16-7-60; Kan. Stat. Ann. § 21-5812(a); N.M. § 30-17-5; S.D. Codified Laws § 22-33-9.1; Colo. Rev. Stat. Ann. § 18-4-102; La. Stat. Ann. § 14:51.1.

[320] Proposed Federal Criminal Code § 1701.

[321] Proposed Federal Criminal Code § 1702.

[322] MPC § 220.1(4).

"of another" in the closely-related offense reckless burning when the defendant "recklessly places another person in danger of death or bodily injury."[323]

The fifth substantive change in the revised arson offense is the affirmative defense in subsection (d), which applies only to second degree arson when there is no danger to human life. The affirmative defense reflects a minority position amongst the 50 states. At least ten states have an affirmative defense or exception to liability when only property is at risk and not human life.[324] However, the Proposed Federal Criminal Code has a consent defense when the property is of another,[325] which would apply to arson[326] and the closely-related offense of endangering by fire or explosion,[327] and the MPC has a narrow affirmative defense to arson for insurance fraud purposes that the defendant's conduct "did not recklessly endanger any building or occupied structure of another or place any person in danger of death or bodily injury."[328]

The sixth substantive change to District law is that the revised arson statute no longer includes "attempt to burn" that is in the current arson statute. A small minority of the 50 states include attempt to burn or similar attempt language in their arson statutes,[329] but they are all non-reformed jurisdictions and generally punish attempt lower than completed arson, although there is some overlap with the lower grades of arson. Neither the Proposed Federal Criminal Code[330] nor the MPC[331] include attempt to burn or similar language in their arson statutes.

The seventh substantive change that the revised arson statute makes to current District law is to create three gradations of arson. There does not appear to be any other state with one grade of arson as there is in the District's current arson statute.[332] If the closely-related offense of burning one's own property with intent to injure or defraud another person[333] is considered a grade of arson, the current District law has two grades of arson. Even then, however, the District is in the minority of the 50 states. There appear to be only five states that are limited to two arson gradations.[334] Although it is difficult to compare gradations amongst states given the variety in arson offenses, the vast majority of states have more than two arson gradations, with three and four gradations being the most common.[335] The Proposed Federal Criminal Code has

[323] MPC § 220.1(2).
[324] N.Y. Penal Law §§ 150.05, .10; Tex. Penal Code Ann. § 28.02(c); Alaska Stat. Ann. § 11.46.410; Ala. Code §§ 13A-7-42, -43; Del. Code Ann. tit. 11, §§ 801, 802; Ky. Rev. Stat. Ann. §§ 513.030, .040; Me. Rev. Stat. tit. 17-A, § 802; Mo. Ann. Stat. § 569.050; Neb. Rev. Stat. Ann. § 28-504; Iowa Code Ann. § 712.1(1)
[325] Proposed Federal Criminal Code § 1708.
[326] Proposed Federal Criminal Code § 1701.
[327] Proposed Federal Criminal Code § 1702.
[328] MPC § 220.1(1)(b).
[329] Cal. Penal Code § 455; Miss. Code Ann. §97-17-9; Nev. Rev. Stat. § 205.025; Okla. Stat. Ann. tit. 21, § 1404; 11 R.I. Gen. Laws Ann. § 11-4-6; S.C. Code Ann. § 16-11-190; Vt. Stat. Ann. tit. 13, § 505; W. Va. Code Ann. § 61-3-4; Mass. Gen. Laws Ann. ch. 266, § 5A.
[330] Proposed Federal Criminal Code § 1701.
[331] MPC § 220.1(1).
[332] D.C. Code § 22-301.
[333] D.C. Code § 22-302.
[334] N.J. Stat. Ann. § 2C:17-1(a), (b); Or. Rev. Stat. Ann. §§ 164.325, 164.315; Wash. Rev. Code Ann. § 9A.48.020; Wis. Stat. Ann. §§ 943.02, 04; N.D. Cent. Code Ann. §§ 12.1-21-01, 02; Mo. Ann. Stat. §§ 569.040, .0505.
[335] Md. Code Ann., Crim. Law §§ 6-102, -103, 6-1-06; Va. Code Ann. §§ 18.2-77, -79, -80, -81; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Conn. Gen. Stat. Ann. §§ 53a-111,-112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; Iowa Code Ann. §§ 712.2, .3, .4; 720 Ill. Comp. Stat. Ann. 5/20-1; -1.1; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mont. Code Ann. §§ 45-6-102, -103; Minn. Stat. Ann. §§ 609.561, .562; N.H. Stat. Ann. § 634:1; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Ariz. Rev. Stat. Ann. §§ 13-

one arson grade,[336] but essentially two additional grades in the closely-related endangering by fire or explosion offense.[337] Similarly, the MPC[338] has a single arson offense, but the closely related offense of reckless burning essentially operates as a second grade of arson.

The substance of the revised arson gradations also reflects national trends. The higher grades of the revised arson offense, aggravated arson and first degree arson, are reserved for arson that endangers human life. The majority of jurisdictions, the MPC,[339] and the Proposed Federal Criminal Code[340] grade arson that protects human life more seriously than arson that protects property.[341] At least 35 states, like the revised second degree arson offense, have a grade of arson that prohibits damaging specific types of property like dwellings or buildings, without regard to whether they are occupied.[342] These states' definitions of "dwelling,"

1703, -1704, -1705; Kan. Stat. Ann. §§ 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, 030, 040, .060; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14.53; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, -102; Tex. Penal Code Ann. § 28.02; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253, -8254; Ind. Code Ann. § 35-43-1-1.

[336] Proposed Federal Criminal Code §§ 1701, 1702.

[337] Proposed Federal Criminal Code § 1702.

[338] MPC § 220.1.

[339] MPC § 220.1. Although the MPC has just one "arson" offense in subsection (1), the closely-related offense of reckless burning in subsection (2) essentially operates as a second grade of arson. The MPC commentary notes that the intent of the "arson" offense in subsection (1) is "to confine the arson offense to specially cherished property whose burning or endangering by explosion would typically endanger life." *Id.* cmt. at 18.

[340] The arson offense in the Proposed Federal Criminal Code is limited to "a building or inhabited structure of another or a vital public facility." Proposed Federal Criminal Code § 1701. Although the Proposed Federal Criminal Code has just one "arson" offense in § 1701, the closely-related offense of endangering by fire or explsion in § 1702 essentially operates as a second grade of arson. The commentary states that "human endangerment is the principle concern" in the arson offense, but notes that the arson offense does not distinguish based upon the awareness of, or consequences of actual human occupation, and some kinds of property are included at which humans may rarely be present. *Id.* cmt. at 194. "The policy thus expressed is that the difference between arson accompanied and arson unaccompanied by the awareness, or consequences, of actual human occupation of the property is insufficient to warrant requiring proof as to the awareness of consequences in order to distinguish between the availability of Class B and Class C felony penalties." *Id.*

[341] *See, e.g.*, Md. Code Ann., Crim. Law §§ 6-102, 6-103; 6-106; Va. Code Ann. § 18.2-77, -79, -80, -81; N.Y. Penal Law §§ 150.01, .05, .10, .15. 20; Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.01; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.2, .3, .4; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14:53; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77; Minn. Stat. Ann. §§ 609.561, .562; Mo. Stat. Ann. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504, -505; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025, .030; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Codified Laws §§ 12.1-21-01, -02; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403; Or. Rev. Stat. Ann. §§ 164.325, .315; 18 Pa. Stat. Ann. § 3301; S.C. Code Ann. §§ 16-11-110, -130; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4-, -6; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, 102; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504, 505, 506; Wash. Rev. Code Ann. §§ 9A.48.020, .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4, -5, -7; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104.

[342] Md. Code Ann., Crim. Law §§ 6-101 (defining "structure"), -103; N.Y. Penal Law §§ 150.00 (defining "building") .05, .10; Tex. Penal Code Ann. § 28.02(a)(2)(A), (C), (D), (E), (a-2); Alaska Stat. Ann. § 11.46.410; Ala. Code §§ 13A-7-40 (defining "building"), -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1701 (defining structure), -1703; Ark. Code Ann. §§ 5-38-101 (defining "occupiable structure"), (a)(1)(A); Cal Penal Code §§ 450 (defining "structure"), 451(c), (d); Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building"), -102; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building"), 53a-113; Del. Code Ann. tit. 11, §§ 222 (defining "building"), 801, -802; Fla. Stat. Ann. § 806.01(1)(a), (b), (2), (3) (definition of "structure"); Ga. Code Ann. § 16-7-61(a); Idaho Code Ann. §§ 18-

"building," and similar terms frequently include motor vehicles and watercraft and could include "business yard" as defined in RCC § 22A-2001. In addition, as discussed earlier in this section, half the states include vehicles in their grades of arson that protect property, without any explicit requirement that the arson endanger human life.[343]

There is limited support in the 50 states for including, with strict liability, that a person other than a participant was killed or suffered serious bodily injury as does the revised aggravated arson gradation. At least 15 states specifically include death, bodily injury, or both as a gradation of arson,[344] with most of these states reserving it for the most serious gradation.[345] It is uncommon in these states to explicitly exclude a participant in the crime.[346] However, excluding a participant in a crime is a more common requirement in other states' arson statutes that require the presence of a person in a building.[347] One state specifies strict liability for the fact that a person suffered death bodily injury.[348] Due to the varying rules of statutory interpretation or lack thereof in the states, it is unclear whether the other states apply a culpable mental state or strict liability. As stated in the earlier discussion of "Relation to Current District Law," the aggravated arson gradation is intended to bring within the scope of the revised offense

---

801 (defining "structure"), -802(1), (2), -803; Iowa Code Ann. § 712.3; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building"), .030(1)(a), .040; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2; Mich. Comp. Laws Ann. §§ 750.73, .74; Minn. Stat. Ann. §§ 609.556 (defining "building"), .561, .562; Miss. Code Ann. §§ 97-17-1, -5; Mo. Ann. Stat. § 569.010 (defining "inhabitable structure"), .050(1)(1); Mont. Code Ann. § 45-6-103(1)(a); Neb. Rev. Stat. Ann. §§ 28-501 (defining "building"), -503; Nev. Rev. Stat. Ann. §§ 205.010(1), .014 (defining "building"), .015; N.M. Stat. Ann. § 30-17-5(A)(1), (I) (defining "occupied structure"); Or. Rev. Stat. Ann. §§ 154.305 (defining "protected property"), .325(1)(a)(A), .315(1)(a)(A); 18 Pa. Stat. Ann. § 3301(c)(1), (2); 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3; S.D. Codified Laws § 22-33-9.2(1); Tenn. Code Ann. §39-14-301(a)(1); Utah Code Ann. §§ 76-6-101 (defining "habitable structure"), -103(1)(a); Vt. Stat. Ann. tit. 13, §§ 502, 503; Wash. Rev. Code Ann. § 9A.48.010 (defining "building"), .030; W. Va. Code Ann. §§ 61-3-1, -2; Wis. Stat. Ann. § 943.020(1)(a); Wyo. Stat. Ann. §§ 6-3-104 (defining "occupied structure"), -101.

[343] Md. Code Ann., Crim. Law §§ 6-101 (defining "structure" to include "a vehicle"), 6-103; N.Y. Penal Law §§ 150.10, .05, .01; Tex. Penal Code Ann. § 28.02(a-1); Haw. Rev. Stat. Ann. §§ 708-8251(1)(B), -8252(1)(b), -8253(1)(B), -8254; Colo. Rev. Stat. Ann. §§ 18-4-103; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building" to include "vehicle"), -113; Del. Code Ann. tit. 11, §§ 222 (defining "building" to include "vehicle"), -801, -802; Fla. Stat. Ann. § 806.01(2), (4) (through the definition of "structure"); Ga. Code Ann. § 16-7-61; Idaho Code Ann. §§ 18-801 (defining "structure" to include "vehicle"), -803; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building" to include "vehicle"), .030, .040; La. Stat. Ann. §§ 14:52(A)(1); Mo. Ann. Stat. §§ 569.055;
Mont. Code Ann. § 45-6-103(1)(a); N.J. Stat. Ann. § 2C:17-1(a)(2), (b)(2), (f) (through definition of "structure"); N.M. Stat. Ann. § 30-17-5; Ohio Rev. Code Ann. § 2909.03(A)(1); 18 Pa. Stat. Ann. § 3301(d); Tenn. Code Ann. § 39-14-303; Utah Code Ann. § 76-6-102(1)(b);Wash. Rev. Code Ann. § 9A.48.030; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); Mont. Code Ann. §§ 45-6-103(1)(a), -103; Neb. Rev. Stat. Ann. § 28-504; Kan. Stat. Ann. § 21-5812(a)(1)(C).

[344] N.Y. Penal Law § 150.20; Tex. Penal Code § 28.02(d); Conn. Gen. Stat. Ann. § 53a-111(a)(2); 720 Ill. Comp. Stat. Ann. 5/20-1.1(a)(2); Ky. Rev. Stat. Ann. § 513.020(1)(b); Mich. Comp. Laws Ann. § 750.72(1)(b); Okla. Stat. Ann. tit. 21, § 1401(A); 18 Pa. Stat. Ann. § 3301(a.1); Tenn. Code Ann. § 39-14-302(a)(2); Wyo. Stat. Ann. § 6-3-101(c); Cal. Penal Code §§ 451(a); Fla. Stat. Ann. § 806.031(1); N.M. Stat. Ann. §§ 30-17-5, -6; S.C. Code Ann. § 16-11-110; Utah Code Ann. § 76-6-102(3).

[345] N.Y. Penal Law § 150.20; Tex. Penal Code § 28.02(d); Conn. Gen. Stat. Ann. § 53a-111(a)(2); 720 Ill. Comp. Stat. Ann. 5/20-1.1(a)(2); Ky. Rev. Stat. Ann. § 513.020(1)(b); Mich. Comp. Laws Ann. § 750.72(1)(b); Okla. Stat. Ann. tit. 21, § 1401(A); 18 Pa. Stat. Ann. § 3301(a.1); Tenn. Code Ann. § 39-14-302(a)(2); Wyo. Stat. Ann. § 6-3-101(c).

[346] N.Y. Penal Law § 150.20; Utah Code Ann. § 76-6-102(3).

[347] Md. Code Ann., Crim. Law § 6-102; N.Y. Penal Law §§ 150.15, .20; Del. Code Ann. tit. 11, § 803; Minn. Stat. Ann. § 609.5632(2); Utah Code Ann. § 76-6-103; Wash. Rev. Code Ann. § 9A.48.020.

[348] Fla. Stat. Ann. § 806.031.

firefighters and first responders who may be injured or killed in responding to the fire or explosion. At least fourteen states specifically include injury or risk to firefighters or other first responders in their arson statutes.[349]

The eighth substantive change to current District law is that the RCC deletes two statutes that are closely related to the current arson statute, burning one's own property with intent to injure or defraud another person[350] and placing explosives with intent to destroy or injure property.[351] It is difficult to assess national trends for this change because there is significant variation in the 50 states as to what conduct constitutes "arson," and some states do not name their offenses. However, in the 50 states' arson statutes, placing explosives near property with a certain intent is specifically an attempt to commit arson, and it is not a separate offense.[352] There is no equivalent offense in the MPC or the Proposed Federal Criminal Code.

Similarly, for burning one's own property with intent to injure or defraud another person, very few states' arson statutes use "intent to injure any other person,"[353] nor does the MPC or the Proposed Federal Criminal Code. As already noted, a majority of states,[354] the MPC,[355] and the Proposed Federal Criminal Code[356] grade arson more seriously where there is danger to human life, but the language used varies. Another change to current District law is deleting "with intent to defraud . . . any other person" that is in the current statute for burning one's own property with intent to injure or defraud another person. Although at least ten states, mostly jurisdictions with reformed criminal codes, do not include intent to defraud in their arson statutes,[357] a majority of states do.

---

[349] 720 Ill. Comp. Stat. Ann. 5/20-1.1(a)(2); 18 Pa. Stat. Ann. § 3301(a.1); Tenn. Code Ann. § 39-14-302(a)(2); Wyo. Stat. Ann. § 6-3-101(c); Cal. Penal Code §§ 451.1(a)(2); Fla. Stat. Ann. § 806.031; Conn. Gen. Stat. Ann. § 53a-111(4); 720 Ill. Comp. Stat. Ann. 5/20-1.1(3); Iowa code Ann. § 712.2; Kan. Stat. Ann. § 21-5812(b)(2); La. Stat. Ann. § 14:51.1; Or. Rev. Stat. Ann. § 164.325(1)(a)(C); Miss. Code Ann. § 97-17-14; N.C. Gen. Stat. Ann. § 14-69.3.

[350] D.C. Code § 22-302.

[351] D.C. Code § 22-3305.

[352] *See, e.g.*, Md. Code Ann., Crim. Law § 6-109; Cal. Penal Code §455(b); Miss. Code Ann. § 97-17-9(2); Nev. Rev. Stat. Ann. § 205.025(2); Okla. Stat. Ann. tit. 21, § 1404(B); Vt. Stat. Ann. tit. 13, § 509; W. Va. Code Ann. § 61-3-4(b); Wis. Stat. Ann. § 943.05.

[353] *See, e.g.*, Cal. Penal Code § 451.5.

[354] *See, e.g.*, Md. Code Ann., Crim. Law §§ 6-102, 6-103; 6-106; Va. Code Ann. § 18.2-77, -79, -80, -81; N.Y. Penal Law §§ 150.01, .05, .10, .15. 20; Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.01; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.2, .3, .4; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14:53; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77; Minn. Stat. Ann. §§ 609.561, .562; Mo. Stat. Ann. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504, -505; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025, .030; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Codified Laws §§ 12.1-21-01, -02; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403; Or. Rev. Stat. Ann. §§ 164.325, .315; 18 Pa. Stat. Ann. § 3301; S.C. Code Ann. §§ 16-11-110, -130; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4-, -6; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, 102; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504, 505, 506; Wash. Rev. Code Ann. §§ 9A.48.020, .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4, -5, -7; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104.

[355] MPC § 220.1(1), (2).

[356] Proposed Federal Criminal Code §§ 1701, 1702.

[357] N.Y. Penal Law §§ 150.01, .05, .10, .15, .20; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253, -8254; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code § 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§13-1703, -1704, -1705;

Ninth, regarding the bar on multiple convictions for the revised arson offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised arson offense and other overlapping property offenses. For example, where the offense most like the revised arson is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[358] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[359] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[360]

Specifically for arson, at least two states define their general property damage offenses to exclude damage caused by fire,[361] prohibiting convictions for both arson and property damage for the same act or course of conduct.

Tenth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[362] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[363] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[364]

Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.031; Iowa Code Ann. §§ 712.2, .3, .4; Minn. Stat. Ann. § § 609.561, .562; Mo. Ann. Stat. § § 569.040, .050.

[358] D.C. Code § 22-3203.

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

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

[361] Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823, -823.5 ("other than fire"); La. Stat. Ann. §§ 14:55 ("other than fire or explosion"), 14:56 ("other than fire or explosion.").

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

[363] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

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

RCC § 22A-2502. Reckless Burning

(a) *Offense.* A person commits the offense of reckless burning if that person:
  (1) Knowingly starts a fire or causes an explosion;
  (2) With recklessness as to the fact that the fire or explosion damages or destroys;
  (3) A dwelling, building, business yard, watercraft, or motor vehicle.

(b) *Definitions.* The terms "knowingly" and "recklessly," have the meanings specified in § 22A-206, and the terms "dwelling," "building," "business yard," and "motor vehicle," have the meanings specified in § 22A-2001.

(c) *Penalty.* Reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Affirmative Defense.* It is an affirmative defense to commission of reckless burning that the defendant must prove by a preponderance of the evidence, that he or she had a valid blasting permit issued by the District Of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit.

Commentary

Explanatory Note. *This section establishes the reckless burning offense and penalty for the Revised Criminal Code (RCC). The offense proscribes knowingly starting a fire or causing an explosion with recklessness as to the fact that the fire or explosion damages or destroys a dwelling, building, business yard, watercraft, or motor vehicle. Reckless burning is a lesser included offense of all the gradations of the revised arson offense (RCC § 22A-2401). It differs from the revised arson offense because it is limited to recklessly damaging or destroying the property at issue, whereas the revised arson statute requires knowingly damaging or destroying the property at issue. Along with the revised arson offense, the reckless burning offense replaces the current arson statute,*[365] *as well as the closely-related offense of placing explosives with intent to destroy or injure property.*[366]

Subsection (a)(1) states the prohibited conduct—starting a fire or causing an explosion. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be knowledge, a term defined at RCC § 22A-206 which here requires the accused must be aware to a practical certainty or consciously desire that his or her conduct is starting a fire or causing an explosion.

Subsection (a)(2) states that the conduct must damage or destroy an item. "Reckless" is a term defined at RCC § 22A-206 to mean the accused must disregard a substantial and unjustifiable risk that the fire or explosion damages or destroys or the item.

Subsection (a)(3) specifies that the item involved is a dwelling, building, business yard, watercraft, or motor vehicle, each of which is a defined term. Per the rule of construction in 22A-207, the "recklessly" mental state in subsection (a)(2) also applies to subsection (a)(3), requiring the defendant to disregard a substantial risk that the location is a "dwelling, building, business yard, watercraft, or motor vehicle" in subsection (a)(3).

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

Subsection (c) states the penalty for the reckless burning offense. Unlike the revised arson offense in RCC § 22A-2401, there is a single gradation for reckless burning.

[365] D.C. Code § 22-301.
[366] D.C. Code § 22-3305.

Relation to Current District Law. *The reckless burning statute changes District law in five main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including mental states.*

First, the RCC reckless burning statute specifies culpable mental states of knowledge and recklessness with respect to various elements. "Maliciously" is the only culpable mental state specified in the current arson statute,[367] and it is unclear whether all or just some of the current arson statute elements are modified by the term. The D.C. Court of Appeals (DCCA) has stated that the malice culpable mental state in the current arson statute requires the government to "prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy."[368] Beyond this, District case law holds that the meaning of malice in the current arson and current malicious destruction of property (MDP) offenses is the same.[369] And, in the context of MDP, has recently clarified that as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice either requires the defendant act "purposely" or with a blend of "knowingly" and "recklessly" culpable mental states.[370] In addition, the DCCA has held that use of the culpable mental state of malice requires "the absence of all elements of justification, excuse or recognized mitigation," which creates various defenses typically recognized in the context of murder.[371]

In contrast, the RCC reckless burning statute provides definitions for each culpable mental state and specifies the relevant culpable mental states for the offense, including knowledge as to subsection (a)(1) (starting a fire or causing an explosion) and recklessness as to subsections (a)(2)-(a)(3) (the fire or explosion damaging or destroying a building, etc.). The "knowingly" culpable mental state is consistent with, but somewhat narrower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[372] The "reckless" culpable mental state that applies to the fact that the fire or explosion damages or destroys and that the property is a building, etc., approximates, but is somewhat lower than, existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. A recklessness requirement still requires subjective

[367] D.C. Code § 22-301.

[368] *Phenis*, 909 A.2d at 164. (internal citations omitted). The DCCA has further stated that the culpable mental state of the current arson offense is one of "general intent." *Phenis v. United States*, 909 A.2d 138, 163-64 (D.C. 2006). "General intent" is not used in or defined in the current arson statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128,1132 (D.C. 1984).

[369] *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987).

[370] *Harris v. United States*, 125 A.2d 704, 708 n. 3 (D.C. 2015).

[371] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e., a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e., defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

[372] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

awareness of the critical facts that distinguish innocent from criminal conduct,[373] and provides liability for reckless behavior that may result in serious property damage. As a lesser included offense of arson, penalized at a lower level, the lower culpable mental state in the RCC reckless burning offense creates a wider range of conduct and punishments for arson-type behavior. These changes clearly specify the necessary culpable mental state elements and, in combination with the revised arson offense, improve the proportionality of the law.

Eliminating malice from the RCC reckless burning statute also eliminates the special mitigation defenses applicable to the current arson offense.[374]

Second, subsection (a)(1) of the RCC reckless burning statute requires, in part, that the defendant "cause an explosion." The current arson statute merely requires that the defendant "burn or attempt to burn,"[375] and there is no case law on whether this would include all explosions. At the common law, explosions were excluded from arson if they did not burn the property.[376] Because explosions can be as dangerous, if not more dangerous, than fire and raises similar concerns about occupancy of the location where the explosion takes place, the RCC reckless burning statute includes explosions to eliminate a possible gap in liability. [377]

Third, the RCC reckless burning statute applies to motor vehicles. The current arson statute specifies a lengthy list of property,[378] including watercraft and railroad cars, but motor vehicles are excluded—perhaps due to the fact that the current arson statute was enacted in 1901. The current arson statute clearly applies to "dwellings" and "houses,"[379] but there is no District case law discussing whether motor vehicles used as a place of habitation or sleeping can qualify as dwelling and houses. By contrast, the RCC reckless burning statute includes any motor vehicle, and the revised aggravated arson and first degree arson include any motor vehicles that satisfy the definition of "dwelling" in RCC § 22A-2001. The addition of motor vehicles clarifies and eliminates a gap in liability under current law.

Fourth, the RCC reckless burning statute eliminates the requirement that the dwelling, building, business yard, watercraft, or motor vehicle be another person's property. The current arson statute requires that the property is "in whole or in part, of another person."[380] The limited DCCA case law construing this phrase merely asserts that the element is satisfied if a person

---

[373] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

[374] *See* D.C. Crim. Jur. Instr. § 5.100 (requiring as an element of arson that the defendant "acted without mitigation" and defining mitigation, in part, as "Mitigating circumstances exist where a person acts in the heat of passion caused by adequate provocation.").

[375] D.C. Code § 22-301.

[376] John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 362 (1986) ("At common law, it was not arson to damage a dwelling house by means of an explosion unless it caused the house to burn rather than first being torn apart by the blast . . . Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb.").

[377] As described below, another offense in the current D.C. Code also addresses explosives. D.C. Code § 22-3305 prohibits placing, or causing to be placed, near certain property explosives "with intent to destroy, throw down, or injure the whole or any part thereof."

[378] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").

[379] *Id*.

[380] D.C. Code § 22-301.

other than the defendant legally owns the property.[381] The RCC reckless burning statute changes District law by removing the requirement that the property is "in whole, or in part, of another person." It is inconsistent to permit a defendant who otherwise satisfies the requirements of reckless burning to avoid liability because another person owned all or part of the property. Under the RCC reckless burning statute, ownership of the property is irrelevant, except as discussed below. The elimination of the property of another requirement clarifies and eliminates a gap in liability under current law.

Fifth, the RCC reckless burning statute provides a new affirmative defense in in subsection (d). The affirmative defense allows a person to recklessly damage or destroy with a fire or explosion a occupied dwelling, building, business yard, watercraft, or motor vehicle with proper government authorization. No comparable statute or case law exists in current District law. Under the revised reckless burning statute's affirmative defense the accused must prove by a preponderance of the evidence that he or she had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit. As there is less risk to human life in reckless burning, in these circumstances it is appropriate to permit a defendant to avoid liability when acting with property authority. This change improves the proportionality of the revised offense.

Sixth, the revised reckless burning statute treats attempted reckless burning the same as most other criminal attempts. The current arson statute refers to an "attempt to burn" the same as a successful burning,[382] and case law appears to construe this language to mean that attempted arson is punished the same as completed arson.[383] There is no clear rationale for such a special attempt provision in arson or reckless burning as compared to other offenses. Under the RCC reckless burning statute, the General Part's attempt provisions[384] will establish liability for attempted reckless burning consistent with other offenses. Differentiating conduct that does and does not result in starting a fire or causing an explosion improves the proportionality of the revised offense.

Seventh, in codifying a reckless burning offense, the RCC deletes a statute that is closely related to the current arson statute: placing explosives with intent to destroy or injure property.[385] The current offense of placing explosives with intent to destroy or injure property proscribes placing an explosive near buildings, cars, and a few other specified structures with intent to damage or destroy the property. In the RCC, such conduct is criminalized under multiple statutes, including arson and reckless burning which now explicitly include use of explosives to

---

[381] *Posey v. United States*, 26 App. D.C. 302, 304-05 (D.C. Cir. 1906) (affirming the attempted arson conviction of a defendant that tried to burn down a building he was renting and noting that "the appellant was occupying the building as a tenant does not take it out of the terms of this section."); *Chaconas v. United States*, 326 A.2d 792, 793, 797 (D.C. 1974) (upholding the appellant's conviction for burning a store that his corporation rented); *Byrd v. United States*, 705 A.2d 629, 631, 635 (affirming appellant's conviction for arson and finding that appellant's testimony that is parents owned the house was sufficient for the house to be "in whole or in part, of another person.").

[382] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling…").

[383] *Gilmore v. United States*, 742 A.2d 862, 870 (D.C. 1999).

[384] RCC § 22A-301.

[385] D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

cause damage.[386] Deleting this offense reduces unnecessary overlap with the revised arson offense, the RCC reckless burning offense, and other offenses.

Eighth, the provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the reckless burning offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[387] However, reckless burning is not among those offenses and, as described in the commentary to RCC § 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the reckless burning offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Beyond these eight main changes to current District law, two other aspects of the RCC reckless burning statute may constitute substantive changes of law.

First, subsection (a)(1) of the RCC reckless burning statute requires a defendant, in relevant part, to "start[]a fire." The current arson statute requires that the defendant "burn" the specified property.[388] Several DCCA arson cases refer to conduct to "set" the fire or "set fire to" as if this language were equivalent to "burn,"[389] but no decision is directly on point. The RCC reckless burning statute resolves this ambiguity in case law and clarifies the element.

Second, the RCC reckless burning statute specifically includes liability for reckless burning of a "business yard," in subsection (a)(3) and eliminates liability for a "railroad car" that is not part of a motorized train. The current arson statute contains some undefined terms like "stable" and "warehouse,"[390] but nothing directly corresponding to a "business yard." There is no District case law construing these terms. As defined in the RCC, a "business yard" is a "securely fenced or walled land where goods are stored or merchandise is traded,"[391] and as such is an enclosed location where there may be an increased danger to persons who may be present because of a fire. Inclusion of business yards in the RCC reckless burning offense may eliminate a gap in liability. Similarly, the current arson statute contains the undefined term "railroad car";[392] and there is no District case law interpreting the term. The possibility of harm to a person inside an unconnected railroad car seems quite remote and may reflect the current statute's origin in 1901. Inclusion of business yards in the RCC reckless burning offense may eliminate a gap in

[386] E.g., such conduct would be subject to the revised arson or RCC reckless burning statute if the property was one of the specific types covered by those offenses (dwelling, building, etc.) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in 22A-2001.

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

[388] D.C. Code § 22-301.

[389] *Lewis v. United States*, 10 A.3d 646, 657 (D.C. 2010) (holding "there is sufficient evidence to prove that Lewis acted maliciously when *he set the fire*") and noting that the issue was whether "Lewis acted with the required *mens rea* of malice when he *set fire to* the house.") (emphasis added); *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (concluding, in part, that the evidence was sufficient that the appellant "intentionally set fire to" his mother's apartment."); *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("the trial judge reasonably could find, as she did, that appellant intentionally set the fire . . .").

[390] D.C. Code § 22-301.

[391] RCC § 22A-2001(3).

[392] D.C. Code § 22-301.

liability. Eliminating liability for reckless burning of a "railroad car" not connected to a motorized vehicle clarifies the state of the law.

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

The revised reckless burning statute requires that the fire or explosion damage or destroy a dwelling, building, business yard, watercraft, or motor vehicle. The current arson statute requires only that the defendant "burn" (or attempt to burn) the property specified in the statute.[393] Insofar as burning constitutes some kind of damage or destruction to the property at issue, this change merely clarifies the revised offense.

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

The first substantive change to District law is that the RCC reckless burning offense no longer uses the "malice" mental state that is in the current arson statute. Only 15 of the 50 states use malice in one of their arson statutes.[394] Even where malice is used, the recognition of a mitigation defense to arson is rare and disapproved by experts.[395] At least 20 states have reckless burning offenses,[396] as well as the MPC[397] and the Proposed Federal Criminal Code.[398] None of the states, the MPC, or the Proposed Federal Criminal Code use "malice" in their reckless burning statutes.

---

[393] D.C. Code § 22-301.

[394] Md. Code Ann., Crim. Law §§ 6-102, -103, -104, -105; Va. Code Ann. § 18.2-77, -79, -80, -81; Cal. Penal Code §§ 451, 451.5, 454; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77, .78; Miss. Code Ann. §§ 97-17-1, -3, -5, -7, -9; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025; N.M. Stat. Ann. §§ 30-17-5 and 30-17-6; N.C. Stat. Ann. § 14-58.2; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; S.C. Code Ann. § 16-11-110; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504; Wash. Rev. Code Ann. §§ 9A.48.020 and .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4; Wyo. Stat. Ann. § 6-3-101.

[395] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 10.4 (2d ed.) ("Outside of homicide law, the concept of [mitigation] doesn't [really] exist."); John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 404 n. 573 (1986) (rejecting the argument of R. Perkins & R. Boyce that a mitigated burning should not be arson and stating that "why should the rule of provocation be applied outside the law of homicide? I find neither history nor policy which supports the application of the rule of provocation to arson."); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1041 (2011) (categorically stating that "[p]rovocation is available as a partial defense only to murder" and that it is not "a defense, partial or otherwise" to non-homicide offenses, which is incorrect in light of District law.

[396] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.
Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[397] MPC § 220.1(2).

[398] Proposed Federal Criminal Code § 1702.

Instead, 11 of the 20 states[399] with reckless burning statutes instead specify "knowingly," "purposely," or "intentionally" in some or all of their reckless burning statutes. The varying rules of construction amongst states make it difficult to generalize whether these culpable mental states apply to the prohibited conduct in these states, such as start a fire or cause an explosion. However, the MPC reckless burning offense requires that the defendant "purposely" start a fire or cause an explosion[400] and the Proposed Federal Criminal Code requires that the defendant "intentionally" start or maintain a fire or causes an explosion.[401] The vast majority of the states with reckless burning statutes require "recklessly" as to the damage or destruction of the property or endangering of the property,[402] as do the MPC[403] and the Proposed Federal Criminal Code.[404] The RCC reckless burning offense reflects national trends with its culpable mental states of "knowingly" starts a fire or causes an explosion and "recklessly damages or destroys."

The second substantive change is that subsection (a)(1) requires, in part, that the defendant "cause[] an explosion." There is a clear national trend towards including explosions in reckless burning statutes. All of the 20 states with reckless burning statutes,[405] except one,[406] include "causes an explosion" or damaging or destroying "by explosives" or similar language in the offenses, as do the MPC[407] and the Proposed Federal Criminal Code.[408]

A third substantive change to current District law is that the RCC reckless burning statute applies to motor vehicles. Of the 20 states that have reckless burning statutes,[409] nine include

---

[399] Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; 18 Pa. Stat. Ann. § 3301(d); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; Wash. Rev. Code Ann. §§ 9A.48.040, .050; S.D. Codified Laws § 22-33-9.3.

[400] MPC § 220.1(2).

[401] Proposed Federal Criminal Code § 1702.

[402] Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[403] MPC § 220.1(2).

[404] Proposed Federal Criminal Code § 1702.

[405] Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[406] Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b).

[407] MPC § 220.1(2).

[408] Proposed Federal Criminal Code § 1702.

[409] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.
Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat.

motor vehicles in their reckless burning statutes.[410] A few of these states have requirements for the motor vehicle, such as it must be used for or adapted for the lodging of persons,[411] but the majority do not, and an additional nine states include any property in their reckless burning statutes.[412] The MPC reckless burning offense is limited to a building or occupied structure, which includes vehicles that meet certain requirements.[413] The Proposed Federal Criminal Code endangering by fire or explosion offense is similarly limited to a building or inhabited structure, which includes vehicles that meet certain requirements, and also includes damage to property of another constituting pecuniary loss in excess of $5,000.[414]

The fourth substantive change to District law is that the RCC reckless burning statute does not require that the dwelling, building, business yard, watercraft, or motor vehicle be another person's property. This is a minority position. Of the 20 states with reckless burning statutes,[415] all but four require that the property be of another person when the reckless burning endangers or damages property.[416]

The fifth substantive change in the RCC reckless burning statute is the affirmative defense in subsection (d). The affirmative defense reflects a minority position amongst the

---

tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[410] Ark. Code Ann. §§ 5-38-101 (defining occupiable structure" to include vehicles that meet certain requirements), -302; Conn. Gen. Stat. Ann. §§ 53a-101 (defining "building" to include vehicles), -114; Mo. Ann. Stat. §§ 569.010 (defining "habitable structure" to include vehicles that meet certain requirements); 18 Pa. Stat. Ann. § 3301(d)(2); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; N.Y. Penal Law § 150.05; Ala. Code §§ 13A-7-40 (defining "building" to include vehicles that meet certain requirements); Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building" to include vehicles), -105; N.D. Cent. Code Ann. §§ 12.1-21-08 (defining "inhabited structure" to include vehicles that meet certain requirements).

[411] Ark. Code Ann. §§ 5-38-101 (defining occupiable structure" to include vehicles that meet certain requirements), -302; Conn. Gen. Stat. Ann. §§ 53a-101 (defining "building" to include vehicles), -114; Mo. Ann. Stat. §§ 569.010 (defining "habitable structure" to include vehicles that meet certain requirements); 18 Pa. Stat. Ann. § 3301(d)(2); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; N.Y. Penal Law § 150.05; Ala. Code §§ 13A-7-40 (defining "building" to include vehicles that meet certain requirements); Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building" to include vehicles), -105; N.D. Cent. Code Ann. §§ 12.1-21-08 (defining "inhabited structure" to include vehicles that meet certain requirements).

[412] Del. Code Ann. tit. 11, § 804; Or. Rev. Stat. Ann. § 164.335; Utah Code Ann. § 76-6-104(1)(c); Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2);

[413] MPC § 220.1(2), (4).

[414] Proposed Federal Criminal Code §§ 1702, 1709.

[415] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.
Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[416] Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; N.Y. Penal Law § 150.05; Ala. Code § 13A-7-43.

states. As already noted, of the 20 states with reckless burning statutes,[417] all but four require that the property be of another person when the reckless burning endangers or damages property.[418] Two of these four states have an affirmative defense or exception to liability that requires the defendant to establish that no one person other than the defendant had a possessory interest in the property.[419]

The sixth substantive change to District law is that the RCC reckless burning statute does not include "attempt to burn" that is in the current arson statute.[420] None of the states with reckless burning statutes include "attempt" or similar language in the offense, nor do the MPC[421] or the Proposed Federal Criminal Code.[422]

The seventh substantive change to current District law is that the RCC deletes a statute that is closely related to the current arson statute and RCC reckless burning statute: placing explosives with intent to destroy or injure property.[423] It is difficult to assess national trends for this change because there is significant variation in the 50 states as to what conduct constitutes "reckless burning," and some states do not name their offenses. However, in the 50 states' arson statutes, placing explosives near property with a certain intent is specifically an attempt to commit arson, and it is not a separate offense.[424] There is no equivalent offense in the MPC or the Proposed Federal Criminal Code.

Finally, regarding the bar on multiple convictions for the reckless burning offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the reckless burning offense and other overlapping property offenses. For example, where the offense most like the reckless burning is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses.

---

[417] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.
Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[418] Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; N.Y. Penal Law § 150.05; Ala. Code § 13A-7-43.

[419] N.Y. Penal Law § 150.05; Ala. Code § 13A-7-43.

[420] D.C. Code § 22-301.

[421] MPC § 220.1.

[422] Proposed Federal Criminal Code § 1702.

[423] D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

[424] *See, e.g.*, Md. Code Ann., Crim. Law § 6-109; Cal. Penal Code §455(b); Miss. Code Ann. § 97-17-9(2); Nev. Rev. Stat. Ann. § 205.025(2); Okla. Stat. Ann. tit. 21, § 1404(B); Vt. Stat. Ann. tit. 13, § 509; W. Va. Code Ann. § 61-3-4(b); Wis. Stat. Ann. § 943.05.

Research has not identified any equivalent statutory provision to either the current Consecutive sentences[425] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[426] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[427]

[425] D.C. Code § 22-3203.
[426] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[427] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

RCC § 22A-2503. Criminal Damage to Property

(a) *Offense.* A person commits the offense of criminal damage to property if that person:
  (1) Recklessly damages or destroys;
  (2) What the person knows to be property of another;
  (3) Without the effective consent of the owner.

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

(c) *Gradations and Penalties*.
  (1) *Aggravated Criminal Damage to Property.* A person is guilty of aggravated criminal damage to property if the person commits criminal damage to property by knowingly damaging or destroying property and, in fact, the amount of damage is $250,000 or more. Aggravated criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *First Degree Criminal Damage to Property*. A person is guilty of first degree criminal damage to property if the person commits criminal damage to property by knowingly damaging or destroying property and, in fact, the amount of damage is $25,000 or more. First degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Second Degree Criminal Damage to Property.*
    (A) A person is guilty of second degree criminal damage to property if the person commits criminal damage to property and:
      (i) Knowingly damages or destroys property and, in fact, the amount of damage is $2,500 or more;
      (ii) Knowingly damages or destroys property that, in fact: is a cemetery, grave, or other place for the internment of human remains;
      (iii) Knowingly damages or destroys property that, in fact: is a place of worship or a public monument; or
      (iv) Recklessly damages or destroys property and, in fact, the amount of damage is $25,000 or more.
    (B) Second degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) *Third Degree Criminal Damage to Property*. A person is guilty of third degree criminal damage to property if the person commits criminal damage to property and, in fact, the amount of damage is $250 or more. Third degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (5) *Fourth Degree Criminal Damage to Property*. A person is guilty of fourth degree criminal damage to property if the person commits criminal damage to property and, in fact, the amount of damage is any amount. Fourth degree criminal

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

Commentary

Explanatory Note. *This section establishes the criminal damage to property (CDP) offense and penalty gradations for the Revised Criminal Code (RCC). The CDP offense proscribes damaging or destroying property without the effective consent of the owner. The penalty gradations are based on the amount of damage to the property, as well as the type of property and the defendant's culpable mental state in causing the damage or destruction. The CDP offense is closely related to the revised arson,[428] reckless burning,[429] and revised criminal graffiti offenses.[430] The CDP offense replaces the current malicious destruction of property (MPD) offense and multiple statutes[431] in the current D.C. Code that concern damage to particular types of property.*

Subsection (a)(1) specifies the prohibited conduct—damaging or destroying an item. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be recklessness, a defined term, that means being aware of a substantial risk that one's conduct is damaging or destroying.

Subsection (a)(2) states that what must be damaged or destroyed is over is "property," a defined term meaning an item of value which includes goods, services, and cash. Further, the property must be "property of another," a defined term which means that some other person has a legal interest in the property at issue that the defendant cannot interfere with. Subsection (a)(2) also specifies the culpable mental state for subsection (a)(2) to be knowledge, a defined term that means the accused must be aware to a practical certainty or consciously desire that the item involved is "property" and "property of another."

Subsection (a)(3) states that the proscribed conduct must be done "without the effective consent of the owner." The term "consent" requires some indication (by words or actions) of agreement, and may be given by a person authorized to do so. "Effective consent" means consent not obtained by means of coercion or deception. Lack of effective consent means there was no agreement, there was an agreement obtained by coercion, or there was an agreement obtained by deception. "Owner" is defined to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rule of construction in § 22A-207, the "knowingly" mental state in subsection (a)(2) also applies to subsection (a)(3), here requiring the accused to be aware to a practical certainty or consciously desire that he or she lacks effective consent of the owner.

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

Subsection (c) establishes five grades of CDP.

Subsection (c)(1), aggravated CDP, requires the defendant to commit CDP as defined in subsection (a), with two additional requirements. First, a person must "knowingly" damage or destroy the property, meaning the accused must be aware to a practical certainty or consciously desire that his or her conduct will result in damage or destruction. Second, the amount of damage to the property must be, in fact, $250,000 or more. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the amount of damage.

[428] RCC § 22A-2501.
[429] RCC § 22-2502.
[430] RCC § 22A-2404.
[431] D.C. Code §§ 22-3303, 22-3305, 22-3307, 22-3309, 22-3310, 22-3312.01, 22-3313, and 22-3314.

Subsection (c)(2), first degree CDP, has the same requirement as aggravated CDP except the amount of damage to the property must be in fact, $25,000 or more (instead of $250,000 or more for aggravated CDP). "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the amount of damage.

Subsection (c)(3), second degree CDP, requires committing CDP as defined in subsection (a) and, in addition, meeting one of four alternative sets of requirements. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the amount of damage or as to the type of property required in some of the alternative variations of second degree CDP. First, and most generally, a person is liable for second degree CDP if he or she knowingly damages or destroys the property and the amount of damage to the property, in fact, is $2,500 or more. Second, a person is liable for second degree CDP if he or she knowingly damages or destroys the property, and, in fact, the property is a cemetery, grave, or other place for the internment of human remains. Third, a person is liable for second degree CDP if he or she knowingly damages or destroys the property, and, in fact, the property is a place of worship or a public monument. Fourth, a person is liable for second degree CDP if he or she recklessly damages or destroys the property and the amount of damage to the property, in fact, is $25,000 or more. Notably, this last alternative set of requirements for second degree CDP requires only recklessness as to the damage or destruction, but has a higher amount of damage threshold as compared to the first alternative set of requirements (which involves knowingly damaging or destroying property that causes $2,500 or more in damage). Second degree CDP also lowers the value threshold for damage or destruction of graves, monuments, etc. as compared to the first alternative set of requirements to reflect the special importance of such property.

Subsection (c)(4), third degree CDP, requires the defendant to commit CDP as defined in subsection (a) with the additional requirement that the amount of damage to the property, in fact, is $250 or more. The defendant need only be reckless as to damaging or destroying, per subsection (a)(1). "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the amount of damage.

Subsection (c)(5), fourth degree CDP, requires the defendant to commit CDP as defined in subsection (a) with the additional requirement that the amount of damage to the property, in fact, is any amount. The defendant need only be reckless as to damaging or destroying, per subsection (a)(1). "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the amount of damage.

Relation to Current District Law. *The CDP statute changes existing District law in seven main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including mental states.*

First, the revised CDP statute specifies culpable mental states of knowledge, recklessness, and strict liability with respect to various elements. "Maliciously" is the only culpable mental state specified in the current MDP statute,[432] and it is unclear whether all or just some of the current MDP statute elements are modified by the term. The D.C. Court of Appeals (DCCA) has defined malice to mean: "(1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with

[432] D.C. Code § 22-303.

awareness of a plain and strong likelihood that such harm may result."[433] Per the first part of this holding, MDP is subject to various defenses more typically recognized in the context of murder.[434] Per the second part of this holding, the DCCA has further clarified that, as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice in MDP either requires the defendant act "purposely" (corresponding to an "actual intent to cause the particular harm") or with a blend of "knowingly" and "recklessly" culpable mental states (corresponding to a mental state of "wanton and willful…with awareness of a plain and strong likelihood").[435]

In contrast, the RCC provides definitions for each culpable mental state and specifies the relevant culpable mental states for the revised CDP offense: knowledge as to the elements in subsections (a)(2)-(a)(3) and the element of damages or destroys in subsections (c)(1)-(c)(3); and recklessness as to the element of damages or destroys in subsection (a)(1) and in some of the gradations, such as subsections (c)(4) and (c)(5) for second degree CDP. In addition, the RCC specifies strict liability as to the amount of damage in subsections (c)(1)-(c)(5), as well as to the type of property specified in some of the alternative requirements for second degree CDP in (c)(3). The "knowingly" culpable mental state is consistent with, but somewhat narrower than, existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[436] The "reckless" culpable mental state that the revised CDP statute applies to lower grades of the statute is somewhat lower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, the recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[437] and provides liability for reckless behavior that may result in serious property damage. The strict liability requirement as to the amount of damage reflects the fact that the accused has already engaged in serious criminal conduct, and no further mental state appears necessary for liability as to the consequences based on his or her recklessly (or knowingly) damaging property. Applying no culpable mental state requirement to statutory

[433] *Harris v. United States*, 125 A.3d 704, 708 (D.C. 2015) (quoting Guzman v. United States, 821 A.2d 895, 898 (D.C.2003)). The DCCA has further stated that the culpable mental state of the current MDP offense is one of "general intent." *Carter v. United States*, 531 A.2d 956, 962 (D.C. 1987). "General intent" is not used in or defined in the current MDP statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[434] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e., a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e., defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

[435] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[436] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[437] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[438] Finally, eliminating malice from the revised CDP statute also eliminates the special mitigation defenses applicable to MDP.[439] These changes clarify the culpable mental states required in the revised CDP offense and improve the proportionality of the statute by providing lesser punishments for conduct with less culpable mental states.

Second, the revised CDP statute grades the offense, in part, based upon the "amount of damage" done to the property. By contrast, the current MDP statute states that it is the "value" of the property that determines the gradation. DCCA case law has interpreted "value" for MDP to mean the fair market value of the object when the object is completely destroyed, or the "reasonable cost of the repairs necessitated" where an item is only partly damaged.[440] The DCCA further noted that where the cost of repair exceeds the fair market value of the item as a whole, the value would simply be the fair market value of the whole before the damage occurred.[441] The revised CDP statute is graded simply on the amount of damage—not the value of the property as in the current MDP statute—and is intended to be consistent with existing case law. When the property is completely destroyed, the amount of damage is the whole item's fair market value, a defined term in RCC § 22A-2001. However, when the item is only partially damaged, the revised CDP statute provides greater flexibility as to how the amount of damage may be proven—it may either provide proof of the "reasonable cost of the repairs" as recognized in prior DCCA case law or it may provide proof of the change in the fair market value of the damaged property.[442] This change improves the proportionality of the statute by grading on the amount of the damage rather than the value of the property involved, and provides greater flexibility in the administration of justice.

Third, the revised CDP statute treats attempted CDP the same as most other criminal attempts. The current statute refers to an "attempts to injure or break or destroy" the same as a successful injury or breaking,[443] and there is no District case law construing this language. There is no clear rationale for such a special attempt provision in CDP as compared to other offenses.

---

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

[439] *Brown v. United States*, 584 A.2d 537, 539 (D.C. 1990) ("Thus, provocation is a proper defense to the charge of malicious destruction of property, and we look to the doctrine of provocation as it has developed in the context of homicide, and elsewhere, to guide us in deciding this case."); *see also* D.C. Crim. Jur. Instr. § 5.400 (requiring as an element of MDP that the defendant "acted without mitigation" and defining mitigation, in part, as "when a person acts in the heat of passion caused by adequate provocation" and "when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable.").

[440] *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975).

[441] That is, in the instance that the value of the entire item or property is less than $200 (the then-current threshold for MDP) but the cost of repair is $200 or more, it would be "unjust to measure the value of the damaged portion by the cost of restoration." *Id.* at n.3.

[442] In rare cases, the method of calculating the amount of damage may lead to different conclusions. For example, a person who causes damage that is very inexpensive to repair but dramatically lowers the fair market value of the property would fare worse under the change in market value calculation as compared to a reasonable cost of repair calculation. However, a person who causes damage that is very expensive to repair but only slightly lowers the fair market value of the property would fare better under the change in market value calculation as compared to a reasonable cost of repair calculation.

[443] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy…").

Under the revised CDP statute, the General Part's attempt provisions[444] will establish liability for attempted CDP consistent with other offenses. Differentiating conduct that does and does not result in damage to property improves the proportionality of the revised offense.

Fourth, the criminal damage to property statute increases the number and type of gradations for the offense. The current MDP offense is limited to two gradations based solely on the value of the property.[445] First degree MDP is for property that has a "value" of $1,000 or more, and is punished as a serious felony. Second degree theft involves property valued at less than $1,000 and is a misdemeanor. By contrast, the revised CDP offense has a total of five gradations, which span a much greater range of loss in value to the property, including distinctions for destruction of property that is of special significance and distinctions based upon the defendant's mental state as to the damage or destruction. The dollar value cutoffs in the revised CDP are consistent with other revised offenses and the increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.

Fifth, the revised CDP offense consolidates most conduct involving damage or destruction of property, deleting multiple statutes that are closely related to the current MDP statute.[446] The revised CDP and revised criminal graffiti offense[447] will cover the vast majority of conduct these deleted statutes prohibit pertaining to damaging property.[448] The only clear exceptions are causing damage to boundary markers that one owns[449] and placing excrement or filth on property in a manner that does not damage it.[450] Also, mandatory judicial orders of restitution and requirements that parents assume fine and abatement costs are eliminated for certain behavior, to the extent that the revised criminal graffiti statute (RCC § 22A-2404) does

[444] RCC § 22A-301.

[445] The DCCA has interpreted "value" in the MDP statute as meaning "fair market value." *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975).

[446] D.C. Code §§ 22-3303, 22-3305, 22-3307, 22-3309, 22-3310, 22-3312.01, 22-3313, and 22-3314.

[447] RCC § 22A-2404.

[448] D.C. Code §§ 22-3307 ("Whoever maliciously or with intent to injure or defraud any other person defaces, mutilates, destroys . . . the whole or any part of" specified public records or papers); 22-3309 ("Whoever maliciously cuts down, destroys . . . any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, either of his or her own lands or of the lands of any other person whatsoever . . . ."); 22-3310 ("It shall be unlawful for any person willfully to top, cut down . . . girdle, break, wound, destroy, or in any manner injure" trees, specified vegetation, or any boxes or protection thereof of another person); 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to disfigure, cut, chip . . . to write, mark, or print obscene or indecent figures representing obscene or objects upon; to write, mark, draw, or paint, without the consent of the owner or proprietor thereof, or, in the case of public property, of the person having charge, custody, or control thereof, any word, sign, or figure upon" property"); 22-3313 ("It shall not be lawful for any person or persons to destroy, break, cut, disfigure, deface, burn, or otherwise injure" any building materials, materials intended for the improvement of streets, avenues, highways, similar modes of passage, and inclosures, or "to cut, destroy, or injure any scaffolding, ladder, or other thing used in or about such building or improvement . . . ."; and 22-3314 ("If any person shall maliciously cut down, demolish, or otherwise injure any railing, fence, or inclosure around or upon any cemetery, or shall injure or deface any tomb or inscription thereon . . . .").

[449] D.C. Code § 22-3309 ("Whoever maliciously cuts down, destroys, or removes any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, either of his or her own lands or of the lands of any other person whatsoever, even though such boundary or bounded trees should stand within the person's own land so cutting down and destroying the same, shall be fined not more than the amount set forth in § 22-3571.01 and imprisoned not exceeding 180 days.").

[450] D.C. Code § 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to … cover, rub with, or otherwise place filth or excrement of any kind….") Other conduct in D.C. Code § 22-3312.01 appears to be covered by the revised CDP statute or revised criminal graffiti statute in 22A-2404.

not cover the behavior.[451] Notably, attempted CDP, the revised arson offense,[452] and the reckless burning offense[453] cover the conduct prohibited in the current District offense pertaining to placing explosive substances near property.[454] Several of the statutes pertaining to removing or concealing property[455] are also addressed by the revised theft,[456] unauthorized use of property,[457] and fraud[458] offenses. Deleting unnecessary overlap among criminal statutes reduces the penalty disparities in existing statutes and prevents a defendant from receiving multiple convictions and sentences for the same act or course of conduct.

Sixth, the provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the CDP offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[459] However, the current MDP offense is not among those offenses and, as described in the commentary to section RCC § 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the CDP offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Seventh, the provision in RCC § 22A-2002, "Aggregation of Property Value To Determine Property Offense Grades," allows aggregation of value for the revised CDP offense based on a single scheme or systematic course of conduct. The current MDP offense is not part of the current aggregation of value provision for property offenses.[460] The revised CDP statute

---

[451] The District's current defacing public or private property statute, D.C. Code § 22-3312.01, appears to mandate such judicial remedies. D.C Code § 22-3312.04(a), (f), (g). To the extent that the revised criminal graffiti statute, RCC § 22A-2404, does not include the conduct in current D.C. Code § 22-3312.01, that conduct would not be subject to mandatory restitution and parental assumption of fines and abatement. Restitution remains an option for revised CDP violations, however, pursuant to D.C. Code § 16-711.

[452] RCC § 22A-2401.

[453] RCC § 22A-2402.

[454] D.C. Code § 22-3305.

[455] D.C. Code § 22-3303 ("Whoever, without legal authority or without the consent of the nearest surviving relative, shall disturb or remove any dead body from a grave" for specified purposes); D.C. Code § 22-3307 ("Whoever maliciously or with intent to injure or defraud any other person . . . abstracts, or conceals the whole or any part of" specified public records or papers); D.C. Code § 22-3309 ("Whoever maliciously . . . removes any boundary tree, stone, or other mark or monument . . . either of his or her own lands or of the lands of any other person whatsoever . . . ."); D.C. Code § 22-3310 ("It shall be unlawful for any person willfully to . . . remove" trees, specified vegetation, or any boxes or protection thereof of another person); D.C. Code § 22-3313 ("It shall not be lawful for any person or persons to . . . remove" any building materials, materials intended for the improvement of streets, avenues, highways, similar modes of passage, and inclosures, or any scaffolding, ladder, or other similar object).

[456] RCC § 22A-2101.

[457] RCC § 22A-2102.

[458] RCC § 22A-2201.

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

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

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

Eighth, under the revised CDP statute the general culpability principles for self-induced intoxication in RCC § 22A-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication.[461] The current MDP statute is silent as to the effect of intoxication. However, the DCCA has held that the current MDP statute is a general intent crime,[462] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming any of the culpable mental state requirements for the offense.[463] This DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[464]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess any of the culpable mental state requirements for MDP. By contrast, per the revised CDP offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim of that self-induced intoxication prevented the defendant from forming the knowledge required for various elements of CDP. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in CDP.[465] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these seven main changes to current District law, three other aspects of the revised CDP statute may constitute substantive changes of law.

First, the revised CDP statute requires a result element of "damages or destroys." The current MDP statute refers to "injures or breaks,"[466] but does not define these terms. The DCCA has twice made rulings that depended on the definition of "injury," and in doing so referred to a dictionary definition of the term as meaning: "detriment to, or violation of, person, character, feelings, rights, property, or interests, or value of the thing."[467] In one of these rulings the

---

[461] With respect to those elements of CDP subject to a culpable mental state of recklessness, the Revised Criminal Code effectively precludes an intoxication defense where the intoxication is self-induced. *See* RCC § 209(c)("Imputation of Recklessness for Self-Induced Intoxication. When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if: (1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and (2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists.").

[462] *See Carter v. United States*, 531 A.2d 956, 962 (D.C. 1987).

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

[464] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

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

[466] D.C. Code § 22-303.

[467] *Baker v. United States*, 891 A.2d 208, 215 (D.C. 2006) ("Second, using black spray paint to inscribe obscenities on walls and on an automobile causes damage sufficient under the statute. "Injury" is defined as "detriment to, or violation of, person, character, feelings, rights, property, or interests, or value of the thing." WEBSTER'S NEW

DCCA suggested that temporary disassembly of an object which does not involve loss or destruction of a part of the object constitutes injury so long as the immediate, ordinary purpose of the object is substantially affected.[468] However, under the revised statute, damage does not include mere temporary disassembly of an object which does not involve loss or destruction of a part.[469] Instead, such a temporary disassembly would be a violation of the revised unauthorized use of property (UUP) offense in RCC § 22A-2102. The revised CDP statute clarifies the elements of the offense.

Second, the revised CDP statute requires the property be "property of another," generally defined to mean property "in which a person other than the accused has an interest in that the accused is not privileged to interfere with."[470] The current MDP statute refers to the affected property as being "not his or her own," and does not further define the meaning of this phrase. The DCCA has stated that the phrase "not his or her own" is "ambiguous" because "it could either refer to property that is fully owned by an individual or property that is at least partially owned."[471] However, the DCCA has found that a co-owner of property can be found liable under the current MDP for destroying jointly-owned property.[472] The revised CDP offense is consistent with case law holding that a person may be liable for destroying jointly-owned property without consent of the other where the joint owner has an interest the other joint owner is not privileged to infringe upon.[473] However, the revised CDP offense, by use of "property of another," excludes liability for damaging or destroying property in which the only sense in which the property belongs to another is that another has a security interest in the property. This is because the revised definition of "property of another" specifically excludes "property in the possession of the accused that the other person has only a security interest in."[474] No case law has interpreted whether the current MDP statute's reference to "not his or her own" would include property in the possession of, and owned by, the accused except for a security interest held by another. This change in the revised CDP statute clarifies the offense and applies a

---

INTERNATIONAL DICTIONARY (2d ed.1947). Applying this definition to the facts here demonstrates that the graffiti, although temporary, caused sufficient "injury." In order to repair Boggs' vehicle, the paint had to be removed and then replaced with a new layer of paint, otherwise, the vehicle would have been significantly devalued."); *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009).

[468] *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009) ("As with, for example, most broken human arms, the effect is temporary, but nevertheless substantial and sufficient to defeat the immediate purpose of its ordinary or intended use.").

[469] This meaning of "damage" may affect the rulings in *Baker v. United States*, 891 A.2d 208 (D.C. 2006) and *Thomas v. United States*, 985 A.2d 409 (D.C. 2009) which relied upon a dictionary definition of "injury" to decide the case.

[470] RCC 22A-2001(18).

[471] *Jackson v. United States*, 819 A.2d 963, 965 (D.C. 2003).

[472] *Id.* at 964. Since the court determined the statutory language was ambiguous, it first looked to the legislative history. *Id.* at 965. The legislative history "provid[ed] no assistance," so the court then looked at case law from other jurisdictions, academic commentators, and the link between destruction of property and domestic violence. *Id.* at 965-67.

[473] Note that, under the revised definition of "property of another," joint owners are not categorically liable under CDP for destroying property of another.

[474] RCC 22A-2001. As with theft and theft-related offenses, this exclusion is justified because civil remedies such as contract liability, rather than criminal liability, address the situation when a debtor damages property and the other party has only a security interest in that property. Note, however, that under the definition of "property of another," a third party still could be liable under the revised CDP statute for damaging property that is in the possession of the debtor.

consistent definition across theft and theft-related offenses in Chapter 20 of Subtitle III of the RCC through the definition of "property of another."

Third, the gradations in subsection (c), by use of the phrase "in fact," codify that no culpable mental state is required as to the amount of damage or as to the type of property required in some of the alternative variations of second degree CDP. The current MDP statute is silent as to what culpable mental state, if any, applies to the current MDP value gradations. There is no District case law on what mental state, if any, applies to the current MDP value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[475] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[476] Clarifying that the amount of the loss in value is a matter of strict liability in the revised CDP gradations clarifies and potentially fills a gap in District law.

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

For example, the revised CDP statute deletes "by fire or otherwise" and "any public or private property, whether real or personal" that are in the current MDP statute.[477] The language is surplusage and deleting it will not change the scope of the offense.

Relation to National Legal Trends. *The revised CDP offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends in equivalent property damage offenses.*[478]

First, the revised CDP offense replaces "malice" as the culpable mental state in the current MDP statute with requirements of knowledge, recklessness, and strict liability with respect to various elements. Deleting "malice" reflects national trends. Only 12 states, mostly with unreformed criminal codes, use "malice" in their damage to property statutes.[479] Neither the MPC[480] nor the Proposed Federal Criminal Code[481] criminal mischief statutes require "malice." Three states require "recklessly" in all grades of their damage to property offenses.[482] An additional 10 states differentiate gradations, at least in part, based on the defendant's culpable mental state and include "recklessly" in the lowest or lower grades of the offense.[483] The MPC's criminal mischief offense uses this grading scheme, requiring either "purposely" or "recklessly,"

[475] D.C. Crim. Jur. Instr. § 5.300.
[476] D.C. Crim. Jur. Instr. § 5.400.
[477] D.C. Code § 22-303.
[478] Unless otherwise specifically noted, this survey of national legal trends is limited to states' most general property damage or destruction statute. More specific statutes, such as those pertaining to the damage or destruction of specific types of property, tampering offenses, interfering with public utilities or services, especially dangerous means of damage or destruction, and graffiti were excluded.
[479] Md. Code Ann., Crim. Law § 6-301; Fla. Stat. Ann. § 806.13; Idaho Code Ann. § 18-7001; Mass. Gen. Laws Ann. ch. 266, § 127; Mich. Comp. Laws Ann. § 750.377a; Miss. Code Ann. § 97-17-67; Okla. Stat. Ann. tit. 21, § 1760; S.C. Code Ann. § 16-11-510; Wash. Rev. Code Ann. § 9A.48.090; Cal. Penal Code § 594; Nev. Rev. Stat. Ann. § 206.310; 11 R.I. Gen. Laws Ann. § 11-44-1.
[480] MPC § 220.3.
[481] Proposed Federal Criminal Code § 1705.
[482] Ariz. Rev. Stat. Ann. § 13-1602(A)(1)-(5); Ind. Code Ann. § 35-43-1-2(a), (a)(1), (a)(2)(A); Me. Rev. Stat. Ann. tit. 17-A, §§ 805, 806.
[483] N.Y. Penal Law §§ 145.00(1), (3), .05(2), .10; Tex. Penal Coe Ann. §§ 28.03(a)(1), (b), .04; Ark. Code Ann. §§ 5-38-203(a)(1), (b), -204(a)(1); Conn. Gen. Stat. Ann. §§ 53a-115(a)(1), -116(a)(1), -117(a)(1); Del. Code Ann. tit. 11, § 811(a)(1), (b); Neb. Rev. Stat. Ann. § 28-519(1)(a), (2)-(5); N.H. Rev. Stat. Ann. § 634:2; Or. Rev. Stat. Ann. §§ 164.365(1)(a)(A); 18 Pa. Stat. Ann. § 3304(a)(1), (a)(6), (b); N.D. Cent. Code Ann. § 12.1-21-05(1)(b), (2).

with reckless damage limited to the lower grades of the offense.[484] Similarly, the Proposed Federal Criminal Code's criminal mischief offense requires "willfully," with reckless damage limited to the lower grades of the offense.[485] Most of the remaining states, at least 19, require "knowingly" or a higher mental state, such as intentionally or purposely, for all grades of their property damage statutes.[486]

Second, using the amount of damage to the property as the basis for measuring the damage or destruction reflects a clear national trend. The majority of the 50 states use the amount of damage or destruction as the gradation for the equivalent property damage offense.[487] Four states use the costs of repairs or replacement.[488] Six states grade based on the value of the property, and two of these states also partially grade based on the amount of damage.[489] The MPC criminal mischief offense grades, in part, based on the amount of "pecuniary loss" that results,[490] with the commentary suggesting that "pecuniary loss" is limited to the amount of physical harm or damage done.[491] The Proposed Federal Criminal Code criminal mischief offense also grades, in part, based on the amount of "pecuniary loss."[492]

Third, it appears that only one state treats attempts the same as the completed property damage offense.[493] The MPC[494] and the Proposed Federal Criminal Code[495] do not include attempt in their criminal mischief offenses.

---

[484] MPC § 220.3.

[485] Proposed Federal Criminal Code § 1705.

[486] Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ala. Code §§ 13A-7-21(a)(1), -22(a), -23; Colo. Rev. Stat. Ann. § 18-4-501; Ga. Code Ann. §§ 16-7-23(a)(1), -21(a); Ill. Comp. Stat. Ann. 5/21-1(a)(1), (d); Iowa Code Ann. §§ 716.1, .3(1)(a), .4, .5(1)(a), .6(1)(a)(1), (b), Kans. Stat. Ann. § 21-5813(a)(1), (c); Ky. Rev. Stat. Ann. §§ 512.020, .030, .040; La. Stat. ann. § 14:56; Minn. Stat. Ann. § 609.595(1)(3), (2)(a), (3); Mont. Code Ann. § 45-6-101(1)(a); N.J. Stat. Ann. § 2C:17-3(a)(1); N.M. Stat. Ann. § 30-15-1; Tenn. Code Ann. § 39-14-408(b)(1); Utah Code Ann. § 76-6-106(1)(c); Vt. Stat. Ann. tit. 13, § 3701; Wis. Stat. Ann. § 943.01(1), (2)(d); Wyo. Stat. Ann. § 6-3-201.

[487] Md. Code Ann., Crim. Law § 6-301; Alaska Code Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(1); N.Y. Penal Law §§ 145.00(1), (6), .05(2), .10; Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ala. Code § 13A-7-21(a)(1), -22(a), -23; Ariz. Rev. Stat. § 13-1602; Ark. Code Ann. Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823 ("without the other's consent."); Colo. Rev. Stat. Ann. § 18-4-501; Conn. Gen. Stat. Ann. §§ 53a-115, -116, -117; Fla. Stat. Ann. § 806.13; Ga. Code Ann. § 16-7-23(a)(1); Idaho Code Ann. § 18-7001; 720 Ill. Comp. Stat. Ann. 5-21-1; Me. Rev. Stat. tit. 17-A, §§ 806(1)(A), 805(A)(1); Mich. Comp. Laws Ann. § 750.377a; N.M. Stat. Ann. § 30-15-1; Or. Rev. Stat. Ann. §§ 164.365, .364; Tenn. Code Ann. § 39-14-408; Wash. Rev. Code Ann. §§ 9A.48.070(1)(A), .080(1)(A), .090(1)(A); Cal. Penal Code § 594; Mo. Ann. Stat. §§ 569.100, .120.

[488] Wis. Stat. Ann. § 943.01; Iowa Code Ann. §§ 716.3, .4, .5, .6; Minn. Stat. Ann. § 609.595; W. Va. Code Ann. § 61-3-30.

[489] Nev. Rev. Stat. Ann. § 206.310 ("value of the property affected or the loss resulting."); Va. Code Ann. § 18.2-137(B) ("value of or damage to the property."); Tenn. Code Ann. § 39-14-408(c)(1) ("value"); Vt. Stat. Ann. tit. 13, § 3701 ("valued at" or "valued."); Miss. Code Ann. § 97-17-67 ("value of the property."); Mass. Gen. Laws Ann. ch. 266, § 127 ("value of the property.").

[490] MPC § 220.3.

[491] MPC § 220.3 cmt. at 47, 53 (stating that "damages" in the MPC criminal mischief offense is meant to "refer to actual physical destruction or harm to the tangible property" and discussing the grading of the offense as based on "a mixture of culpability and amount of harm done."). The MPC commentary also characterizes states' property damage statutes that require "pecuniary loss" as requiring damage. *Id.* at 55-56.

[492] Proposed Federal Criminal Code § 1705.

[493] N.H. Rev. Stat. Ann. § 634:2.

[494] MPC § 220.3.

[495] Proposed Federal Criminal Code § 1705.

Fourth, regarding increasing the number and type of gradations, it appears that the District's current two gradations and $1,000 value cutoff in its MDP statute make it an outlier, with its 10 year penalty for the higher grade being one of the harshest, if not the harshest, in the country. One state appears to not have any gradations in its property damage offense, but the offense is a misdemeanor.[496] Of the remaining 49 states, only two permit 10 year maximum penalties for gradations that are equal to or less than D.C.'s $1,000 threshold.[497] However, one of these states requires a mental state of "knowingly,"[498] which is a higher mental state than the "malice" culpable mental state in the current District MDP statute. Other states generally have far higher dollar value requirements for gradations with 10 year maximum penalties.[499] The District's current MDP statute is similarly an outlier when compared to the criminal mischief offenses in the MPC and the Proposed Federal Criminal Code. The MPC punishes purposely causing pecuniary loss in excess of $5,000 with a maximum penalty of 5 years imprisonment.[500] The Proposed Federal Criminal Code punishes intentionally causing pecuniary loss in excess of $5,000 with a maximum penalty of 7 years imprisonment.[501]

A majority of the 50 states have more than two gradations, with three and four[502] being the most common number. The MPC[503] and the Proposed Federal Criminal Code[504] criminal mischief offense each have three gradations. As noted earlier, ten states, [505] the MPC,[506] and the Proposed Federal Criminal Code[507] grade their property damage offenses partially based on the defendant's mental state. While a minority approach, this appears to reflect the fact that damage done with a lower culpable mental state, such as malice in the current MDP statute, or reckless in the criminal damage to property statute, can still create significant harm.

There is significant support for treating the special types of property specified in second degree CDP differently amongst the 50 states. At least 17 states have special gradations in their damage to property offenses or separate offenses for damage to cemeteries and similar places for the internment of human remains.[508] At least nine states have gradations in their damage to

[496] 11 R.I. Gen. Laws Ann. § 11-44-1.
[497] Wyo. Stat. Ann. § 6-3-201; Mass. Gen. Laws. Ann. ch. 266, § 127.
[498] Wyo. Stat. Ann. § 6-3-201.
[499] *See, e.g.*, Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823; Ala. Code §§ 13A-7-22, -23; La. Stat. Ann. § 14:56; S.C. Code Ann. § 16-11-510; S.D. Codified Laws § 22-34-1; Wash. Rev. Code Ann. §§ 9A.48.070, .080, .090; Iowa Code Ann. §§ 716.4, .5, .6; Ark. Code Ann. §§ 5-3-203, -204.
[500] MPC §§ 220.3, 6.06.
[501] Proposed Federal Criminal Code §§ 1705, 3201.
[502] Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); Ala. Code §§ 13A-7-21, -22, -23; Fla. Stat. Ann. § 806.13; La. Stat. Ann. § 14:55; Me. Rev. Stat. tit. 17-A, §§ 805, 807; S.C. Code Ann. § 16-11-510; Wash. Rev. Code Ann. §§ 9A.48.070, .080, .090; Cal. Penal Code § 594; Ind. Code Ann. § 35-43-1-2; Ky. Rev. Stat. Ann. §§ 512.020, .030, .040; N.J. Stat. Ann. § 2C:17-3; Minn. Stat. Ann. § 609.595; Conn. Gen. Stat. Ann. §§ 53a-115, -116, -117; Del. Code Ann. tit. 11, § 811; Or. Rev. Stat. Ann. §§ 164.365, .354; N.H. Rev. Stat. Ann. § 634:2; Va. Code Ann. § 18.2-137; Vt. Stat. Ann. tit. 13, § 3701; Mass. Gen. Laws Ann. ch. 266, § 127; Ohio Rev. Code § 2909.07; Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823; 720 Ill. Comp. Stat. Ann. 5/21-1; Mich. Comp. Laws Ann. § 750.377a; Nev. Rev. Stat. Ann. § 206.310; Kan. Stat. Ann. § 28-5813; 18 Pa. Stat. Ann. § 3304; N.D. Cent. Code Ann. § 12.1-21-05; N.Y. Penal Law §§ 145.00, .05, .10; Neb. Rev. Stat. Ann. § 28-519; Miss. Code Ann. § 97-17-67.
[503] MPC § 220.3.
[504] Proposed Federal Criminal Code § 1705.
[505] Proposed Federal Criminal Code § 1705.
[506] MPC § 220.3.
[507] Proposed Federal Criminal Code § 1705.
[508] Wis. Stat. Ann. § 943.012(2); Mont Code Ann. § 45-6-104(2); Ind. Code Ann. § 35-43-1-2.1; Ala. Code § 13A-7-23.1; N.Y. Penal Law §§145.22, .23; Ark. Code Ann. § 5-38-207; N.H. Rev. Stat. Ann. § 635:6(I)(a); Ohio Rev.

property statutes or separate offenses that are specific to damage places of worship.[509] A small number of states, possibly as few as four,[510] have separate gradations for damaging public monuments. However, neither the MPC nor the Proposed Federal Criminal Code select places such as cemeteries, places of worship, and public monuments for different grading.

Fifth, regarding the deletion of several statutes that are closely related to the current MDP statute, the 50 states take different approaches to reducing overlap between the main criminal damage to property offense and separate offenses for damaging certain kinds of property. Some states have a main criminal damage to property offense with separate offenses that pertain to specific property, although the number of separate offenses varies greatly.[511] Other states, however, appear to have only one property damage statute.[512] The RCC has one main property damage property statute with gradations for specific types of property to prevent defendants from receiving multiple convictions for the same act or course of conduct. In doing so, the RCC follows several states and the MPC[513] and the Proposed Federal Criminal Code[514] which have criminal mischief offenses that were meant to consolidate the numerous specific property damage offenses that existed at the time the model legislation was proposed. Neither the MPC nor the Proposed Federal Criminal Code has property damage statutes for specific types of property.

Sixth, regarding the bar on multiple convictions for the CDP offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the CDP offense and other overlapping property offenses. For example, where the offense most like the CDP offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[515] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or

---

Code Ann. § 2909.05(C); 18 Pa. Stat. Ann. § 3307(a)(2); Alaska Stat. Ann. § 11.46.482(a)(3)(A); N.J. Stat. Ann. § 2C:17-4(b)(6); Ariz. Rev. Stat. Ann. § 13-1604(A)(3); Tex. Penal Code Ann. § 28.03(f); Kan. Stat. Ann. § 21-5813(b)(4); Idaho Code Ann. § 18-7027; Nev. Rev. Stat. Ann. § 206.125(1)(b); N.C. Gen. Stat. Ann. § 14-148.

[509] Wis. Stat. Ann. § 943.012(1); Mont Code Ann. § 45-6-104(2); 18 Pa. Stat. Ann. § 3307(a)(1); Kan. Stat. Ann. § 21-5813(b)(1); Ariz. Rev. Stat. Ann. § 13-1604(A)(1); 720 Ill. Comp. Stat. Ann. 5/21-1(d); N.M. Stat. Ann. § 30-15-1.1; Nev. Rev. Stat. Ann. § 206.125 (1)(a); S.C. Code Ann. § 16-11-535.

[510] Mont Code Ann. § 45-6-104(2); Tex. Penal Code Ann. § 28.03(f); 720 Ill. Comp. Stat. Ann. 5/21-1(d); Idaho Code Ann. § 18-7021.

[511] *See, e.g.*, Ala. Code §§ 13A-21, -22, -23, -23.1; Va. Code Ann. §§ 18.2-137, -138, -139.1, -140; 18 Pa. Stat. Ann. §§ 3304, 3305, 3307, 3309, 3310, 3312; Ky. Rev. Stat. Ann. §§ 512.020, .030, .040, .090; Conn. Gen. Stat. Ann. §§ 53a-115 through -117m; S.C. Code Ann. §§ 16-11-510, -520, -535, -560, -570, -580, -590.

[512] Me. Rev. Stat. tit. 17-A, §§ 805, 806 (two degrees of criminal mischief); Alaska Stat. Ann. §§ 11.46.475, .480, .482, .484, .486 (five degrees of criminal mischief); Md. Code Ann., Crim. Law § 6-301; Neb. Rev. Stat. Ann. § 28-519.

[513] MPC § 220.3 cmt. at 41 ("Typical legislation at the time the Model Penal Code was drafted consisted of numerous specifically prohibited types of harm to particular property, often supplemented by a catch-all offense dealing with injury or destruction to real or personal property in cases not specifically covered by other provisions. . . . Section 220.3 consolidates all forms of malicious mischief into a single generic offense.").

[514] Proposed Federal Criminal Code § 1705 cmt. at 197 ("This section is intended to provide a rational grading structure for the numerous property-damage and property-tampering provisions in existing law which are consolidated in it.").

[515] D.C. Code § 22-3203.

course of conduct for most or all (not just property) crimes,[516] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[517]

Specifically for CDP, at least two states define their general property damage offenses to exclude damage caused by fire,[518] prohibiting convictions for both arson and property damage for the same act or course of conduct.

Seventh, regarding the aggregation of amounts of damage in a single scheme or systematic course of conduct, the revised CDP offense follows many jurisdictions[519] which have statutes that closely follow the Model Penal Code (MPC)[520] 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.[521] However, these other jurisdictions' aggregation statutes are silent as to damage to property offenses, nor does the MPC's Criminal Mischief[522] offense explicitly provide for aggregation.

Eighth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[523] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[524] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with

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

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

[518] Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823, -823.5 ("other than fire"); La. Stat. Ann. §§ 14:55 ("other than fire or explosion"), 14:56 ("other than fire or explosion.").

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

[520] 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.")

[521] 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.

[522] Model Penal Code § 220.3

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

[524] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[525]

National legal trends also support other changes to the revised CDP offense.

For example, regarding the replacement of "injures or breaks" in the current MDP statute with "damages," a majority of the 50 states use "damage" or similar language in the equivalent property damage offenses,[526] as do the MPC[527] and the Proposed Federal Criminal Code.[528] Fifteen states include "injures,"[529] at least three of which also include "damage."[530] None of the 50 states appear to use "breaks" in their equivalent property damage offenses.

Also, regarding the replacement of "not his or her own" in the current MDP statute with "property of another," the majority of the 50 states' criminal damage to property statutes require that the property be "of another" or use similar language.[531] Both the MPC[532] and the Proposed Federal Criminal Code[533] require that the property at issue be "property of another." Only four states use "not his own" or "not his or her own" in their damage to property statutes.[534] However, it is difficult to generalize about whether other jurisdictions' language is directly comparable to the definition of "property of another" used in the revised CDP statute because not

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

[526] Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); N.Y. Penal Law §§ 145.00(1), (3), .05(2), .10; Tex. Penal Code Ann. §§ 28.03(a)(1), .04; Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ala. Code §§ 13A-7-21, -22, -23; Ark. Code Ann. §§ 5-38-203(a)(1), -204(a)(1); Colo. Rev. Stat. Ann. § 18-4-501; Conn. Gen. Stat. Ann. §§ 53a-115(1), -116(1), -117(1); Del. Code Ann. tit. 11, § 811(a)(1); Ga. Code Ann. § 16-7-23(a)(1); 720 Ill. Comp. Stat. Ann. 5/21-1(a)(1); La. Stat. Ann. §§ 14:55, 14:56; Me. Rev. Stat. tit. 17-A, §§ 805(1)(A), 806(1)(A); Minn. Stat. Ann. § 609.595; Neb. Rev. Stat. Ann. § 28-519(1)(a); N.H. Rev. Stat. Ann. § 634:2; N.J. Stat. Ann. § 2C:17-3(a)(1); N.M. Stat. Ann. § 30-15-1; N.D. Cent. Code Ann. § 12.1-21-05(1)(b); Or. Rev. Stat. Ann. §§ 164.365, .354; 18 Pa. Stat. Ann. § 3304(a)(1), (6); Tenn. Code Ann. § 39-14-408(b)(1); Vt. Stat. Ann. tit. 13, § 3701; Wash. Rev. Code Ann. § 9A.48.070(1)(a), .080(1)(a), .090(1)(a); Wis. Stat. Ann. § 943.01(1); Cal. Penal Code § 594(a)(2), (3); Mo. Ann. Stat. §§ 569.100(1)(1), .120(1)(2).

[527] MPC § 220.3.

[528] Proposed Federal Criminal Code § 1705.

[529] Md. Code Ann., Crim Law. § 6-301; Fla. Stat. Ann. § 806.13; Idaho Code Ann. § 18-7001; Mass. Gen. Laws ch. 266, § 127; Mich. Comp. Laws Ann. § 750.377a; Miss. Code Ann. § 97-17-67; Mont. Code Ann. § 45-6-101; N.C. Gen. Stat. Ann. §§ 14-127, -160; Okla. Stat. Ann. tit. 21, § 1760; S.C. Code § 16-11-510; S.D. Codified Laws § 22-34-1; W. Va. Code Ann. § 61-3-30; Wyo. Stat. Ann. § 6-3-201; Nev. Rev. Stat. Ann. § 206.310; 11 R.I. Gen. Laws Ann. § 11-44-1.

[530] Fla. Stat. Ann. § 806.13; Mont. Code Ann. § 45-6-101; S.D. Codified Laws § 22-34-1.

[531] *See, e.g.*, Md. Code Ann., Crim Law. § 6-301; Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); N.Y. Penal Law §§ 145.00(1), (3), .05(2), .10; Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ariz. Rev. Stat. Ann. § 13-1602(A)(1); Ark. Code Ann. §§ 5-38-203(a)(1), -204(a)(1); Colo. Rev. Stat. Ann. § 18-4-501; Conn. Gen. Stat. Ann. §§ 53a-115(1), -116(1), -117(1); Del. Code Ann. tit. 11, § 811(a)(1); Fla. Stat. Ann. § 806.13; Ga. Code Ann. § 16-7-23(a)(1); 720 Ill. Comp. Stat. Ann. 5/21-1(a)(1); Ind. Code Ann. § 35-43-1-2(a); Kan. Stat. Ann. § 21-5813(a)(1); Me. Rev. Stat. tit. 17-A, §§ 805(1)(A), 806(1)(A); Mich. Comp. Laws Ann. § 750.377a; Me. Rev. Stat. tit. 17-A, §§ 805(1)(A), 806(1)(A); Minn. Stat. Ann. § 609.595; Mont. Code Ann. § 45-6-101(1)(a); Neb. Rev. Stat. Ann. § 28-519(1)(a); N.H. Rev. Stat. Ann. § 634:2; N.J. Stat. Ann. § 2C:17-3(a)(1); N.M. Sat. Ann. § 30-15-1; N.D. Cent. Code Ann. § 12.1-21-05(1)(b); Or. Rev. Stat. Ann. §§ 164.365, .354; 18 Pa. Stat. Ann. § 3304(a)(1), (6); Tenn. Code Ann. § 39-14-408(b)(1); Utah Code Ann. § 76-6-106(2)(c); Wash. Rev. Code Ann. § 9A.48.070(1)(a), .080(1)(a), .090(1)(a); Wis. Stat. Ann. § 943.01(1); Wyo. Stat. Ann. § 6-3-201; Mo. Ann. Stat. §§ 569.100(1)(1), .120(1)(2); Ohio Rev. Code Ann. § 2909.07(A)(1).

[532] MPC § 220.3.

[533] Proposed Federal Criminal Code § 1705.

[534] Va. Code Ann. § 18.2-137; Idaho Code Ann. § 18-7001; Okla. Stat. Ann. tit. 21, § 1760; Cal. Penal Code § 594.

all jurisdictions define that term or adopt an MPC-based definition of that term. At least some states specifically exclude security interests from their property damage statutes through the definition of "property of another."[535] However, the majority of states and the Proposed Federal Criminal Code appear to include such property with security interests in their equivalent property damage statutes, even though many of these states and the Proposed Federal Criminal Code adopt the MPC definition of "property of another" and exclude these interests from theft and related offenses. The MPC applies the same definition of "property of another," and the exclusion of certain security interests to both the criminal mischief offense and theft offenses.[536]

[535] Haw. Rev. Stat. Ann. § 708-800; N.H. Rev. Stat. Ann. §§ 637:2, 634:2.

[536] MPC § 220.3 cmt. at 45 ("With respect to the element 'of another' in the Model Code, there would seem to be no reason not to apply the term 'property of another' as defined in Section 223.0(7)."). The MPC has a separate offense that prohibits destroying or "otherwise deal[ing] with" property subject to a security interest with purpose to hinder enforcement of that interest. MPC § 224.10 ("A person commits a misdemeanor if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with purpose to hinder enforcement of that interest.").

RCC § 22A-2504. Criminal Graffiti

(a) *Offense.* A person commits the offense of criminal graffiti if that person:
  (1) Knowingly places;
  (2) Any inscription, writing, drawing, marking, or design;
  (3) On property of another;
  (4) That is visible from a public right-of-way;
  (5) Without the effective consent of the owner.

(b) *Definitions.* In this section, "minor" means a person under 18 years of age. The term "knowingly" has the meaning specified in § 22A-206, and the terms "consent," "effective consent," "property," "property of another," and "owner," have the meanings specified in § 22A-2001.

(c) *Penalty.* Criminal graffiti is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both. However,

(d) *Mandatory Restitution*. The court shall order the person convicted to make restitution to the owner of the property for the damage or loss caused, directly or indirectly, by the graffiti, in a reasonable amount and manner as determined by the court.

(e) *Parental Liability.* The District of Columbia courts shall find parents or guardians civilly liable for all fines imposed or payments for abatement required if the minor cannot pay within a reasonable period of time established by the court.

Commentary

Explanatory Note. *This section establishes the revised criminal graffiti offense and penalty for the Revised Criminal Code (RCC). The revised criminal graffiti offense prohibits placing any inscription, writing, drawing, marking, or design on the property of another without the effective consent of the owner. There is a single penalty gradation for the offense. The revised criminal graffiti offense is closely related to the criminal damage to property offense (CDP).*[537] *The two offenses share several elements, but the revised criminal graffiti offense addresses a specific type of damage to property. The revised criminal graffiti offense replaces the current graffiti offense,*[538] *the current possessing graffiti material offense,*[539] *and the current defacing public or private property offense.*[540]

Subsection (a)(1) states the offense's first required element, "placing" an item. Subsection (a)(1) also specifies the culpable mental state for subsection (a)(1) to be knowledge, a term defined at RCC § 22A-206 to mean the accused must be aware to a practical certainty or consciously desire that his or her conduct is "placing."

Subsection (a)(2) states that what is placed is "any inscription, writing, drawing, marking, or design." Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (a)(1) also applies to subsection (a)(2) requiring the person to be aware to a practical certainty or consciously desire that what he or she is placing is "any inscription writing, drawing, marking, or design."

Subsection (a)(3) states that the "inscription writing, drawing, marking, or design" must be placed on "property," a defined term meaning something "of value," that is "property of another," a defined term which means property that some other person has a legal interest in the

[537] RCC § 22A-2403.
[538] D.C. Code § 22-3312.04(d).
[539] D.C. Code § 22-3312.04(e).
[540] D.C. Code § 22-3312.01. See commentary to criminal damage to property, RCC § 22A-2503.

property at issue that the accused cannot interfere with. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (a)(1) also applies to subsection (a)(3), requiring the person to be aware to a practical certainty or consciously desire that where he or she is placing is placing the graffiti is "property" and "property of another."

Subsection (a)(4) states that the inscription, writing, drawing, marking, or design be visible from a public right of way. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (a)(1) also applies to subsection (a)(4) requiring the person to be aware to a practical certainty or consciously desire that what he or she is placing is visible from a public right of way.

Subsection (a)(5) states that the proscribed conduct must be done "without the effective consent of the owner." The term "consent" requires some indication (by words or actions) of agreement, and may be given by a person authorized to do so. "Effective consent" means consent not obtained by means of coercion or deception. Lack of effective consent means there was no agreement, there was an agreement obtained by coercion, or there was an agreement obtained by deception. "Owner" is defined to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rule of construction in RCC § 22A-207, the "knowingly" mental state in subsection (a)(1) also applies to subsection (a)(5), here requiring the accused to be aware to a practical certainty or consciously desire that he or she lacks effective consent of the owner.

Subsection (b) defines the term "minor" for the revised criminal graffiti offense and cross-references applicable definitions located elsewhere in the RCC.

Subsection (c) states the penalty for the revised criminal graffiti offense. Unlike the criminal damage to property offense, there is a single gradation for revised criminal graffiti.

Subsection (d) requires mandatory restitution to the owner of the property for the damage or loss caused, directly or indirectly, by the graffiti.

Subsection (e) provides for parental and guardian liability for all fines imposed or payments for abatement if the minor cannot pay within a reasonable period of time established by the court.

Relation to Current District Law. *The revised criminal graffiti statute changes existing District law in three main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including mental states.*

First, the revised criminal graffiti treats attempted criminal graffiti the same as most other criminal attempts. District law currently codifies a separate, attempt-type offense for graffiti that prohibits, in part, possessing graffiti material with the intent to place graffiti,[541] in addition to providing liability under the current general attempt statute.[542] The revised criminal graffiti statute, however, relies solely on the General Part's attempt provisions[543] to establish liability for attempts to place graffiti, consistent with other offenses. The General Part's attempt provisions differ from the current attempt-type offense for graffiti chiefly by requiring the person to be "dangerously close" to committing the offense for there to be liability. Such a requirement

[541] D.C. Code §§ 22-3312.05(5) (defining "graffiti material"), 22-3312.04(e) ("Any person who willfully possesses graffiti material with the intent to place graffiti on property without the consent of the owner shall be fined not less than $100 or more than $1,000.").
[542] D.C. Code §§ 22-1803.
[543] RCC § 22A-301.

reflects longstanding District case law regarding criminal attempts generally.[544] There is no clear rationale for such a special attempt-type offense for graffiti as compared to other offenses. Appropriately differentiating conduct that does and does not constitute an attempt to commit graffiti improves the proportionality of the revised offense.

Second, the revised criminal graffiti offense specifies a culpable mental state of "knowingly" for all elements of the offense. The current graffiti offense[545] specifies a culpable mental state of "willfully." The current graffiti offense does not define the term "willfully" and there is no generally applicable definition in the District's current criminal code. No case law exists interpreting the culpable mental state of the graffiti statute. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[546] Requiring a knowing culpable mental state also makes the revised criminal graffiti offense consistent with the elements of higher gradations of the revised CDP statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[547]

Third, the provision in section RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the criminal graffiti offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct.[548] However, graffiti is not among those offenses and, as described in the commentary to RCC § 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised criminal graffiti offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

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

First, the revised criminal damage to property statute requires that the "inscription, writing, drawing, marking, or design" be placed on "property of another" and applies the definition of "property of another" in RCC § 22A-2001. The current graffiti offense does not specify any ownership requirements for the property, although it does require the defendant to act "without consent of the owner." The definition of "property of another" in RCC § 22A-2001 specifies that "property of another" is "any property that a person has an interest in that the accused is not privileged to interfere with." The definition of "property of another" also

[544] See commentary to RCC § 22A-301.
[545] D.C. Code § 22-3312.04(e).
[546] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[547] See, e.g., RCC § 22A-2503.
[548] D.C. Code § 22-3203 (requiring concurrent sentences "for any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct."). Note, however, that the Council specified in legislative history that the District's current offense of TPWR offense 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. If the DCCA were to hold that the current TPWR offense were a lesser included offense of theft, then multiple convictions for theft and TPWR for the same act or course of conduct would be prohibited.

excludes from the revised criminal graffiti offense property that is in the possession of the accused in which the other person has only a security interest. This narrow exclusion for security interests is the same exclusion that applies to the CDP offense and other property offenses in Chapter 20 of Subtitle III of the RCC. As with the other offenses, the exclusion is justified because civil remedies such as contract liability, rather than criminal liability, address the situation when a debtor damages property and the other party has only a security interest in that property. However, under the definition of "property of another," a third party could be criminally liable for damaging property that is in the possession of the debtor because the debtor has a possessory interest in that property. Given the nature of the revised criminal graffiti offense, it is unlikely that the security interest exclusion will often apply. However, the consistency of the RCC improves if the criminal damage to property and the revised criminal graffiti offenses cover the same range of property interests.

Second, the revised criminal graffiti statute requires a person to act "without the effective consent of the owner." "Consent," "effective consent," and "owner" are defined terms that together generally require a person to lack some affirmative indication of the owner's preference about the placement of graffiti from a person holding an interest in the property or his or her designee. The current graffiti offense requires that the defendant act "without the consent of the owner," but there is no statutory definition of these terms, and no District case law addresses the meaning of "without the consent" or "owner" in the graffiti statute. Requiring a person to act "without the effective consent of the owner" and using the definitions in RCC § 22A-2001 that apply to other property offenses in Chapter 20 of Subtitle III of the RCC improves the clarity of the offense.

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

First, the revised criminal graffiti statute eliminates the "on public or private property" requirement that is in the current definition of "graffiti."[549] Similarly, the revised criminal graffiti offense deletes "on structures, buildings, dwellings, statues, monuments, fences, vehicles, or other similar materials" that is in the current definition of "graffiti."[550] Such language is surpulsage and deletion will not change District law.

Second, the revised criminal graffiti statute deletes the language in the current definition of "graffiti"[551] that refers to a "manager, or agent in charge of the property" because these entities are covered by the definition of "consent" in RCC § 22A-2001. Deleting the language will not change District law.

Finally, the revised criminal graffiti offense deletes the methods of making graffiti that are in the current definition of "graffiti,"[552] "is painted, sprayed, etched, scratched, or otherwise placed." Instead, the revised criminal graffiti statute requires the defendant to "place[]" "any inscription, writing, drawing, marking, or design." "Any inscription, writing, drawing, marking, or design" is taken from the current definition of "graffiti" without change. "Places" and the types of graffiti specified in the revised statute render "is painted, sprayed, etched, scratched, or otherwise placed" surplusage and deletion will not change District law.

[549] D.C. Code § 22-3312.05(4).
[550] D.C. Code § 22-3312.05(4).
[551] D.C. Code § 22-3312.05(4).
[552] D.C. Code § 22-3312.05(4).

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

First, the revised criminal graffiti offense replaces the current possessing graffiti materials offense. At least 17 states have separate offenses for placing graffiti on property, or have a specific gradation to that effect in their broader property damage statutes.[553] Neither the Model Penal Code (MPC) nor the Proposed Federal Criminal Code has graffiti offenses or provisions in their criminal mischief statutes. It appears only four[554] of the 17 states with graffiti offenses have similar offenses that prohibit possessing graffiti materials.

Second, the revised criminal graffiti offense replaces the "willfully" mental state in the current graffiti offense[555] with a "knowingly" culpable mental state and applies the "knowingly" culpable mental state to each element of the offense. Of the 17 states with graffiti offenses,[556] six states require an "intentionally"[557] culpable mental state, two require "knowingly,"[558] and two require "recklessly."[559] Several states do not specify a mental state in the statute[560] or use old, common law mental states.[561] Varying rules of construction amongst the states or lack thereof make it difficult to determine whether the states apply the culpable mental states to each element as the revised criminal graffiti offense does.

Third, regarding the bar on multiple convictions for the revised criminal graffiti offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the criminal graffiti offense and other overlapping property offenses. For example, where the offense most like the revised criminal graffiti offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of

---

[553] For the purposes of this survey, states with statutes that described the penalties for damage to property when caused by graffiti, without specifying elements of a graffiti offense, were excluded. States with statutes that did not use the term "graffiti," but had elements that substantively established a graffiti offense were included. Or. Rev. Stat. Ann. §§ 164.381, .383, .388; Wis. Stat. Ann. § 943.017; Idaho Code Ann. § 18-7036; Neb. Rev. Stat. Ann. § 28-524; N.M. Stat. Ann. § 30-15-1.1; La. Rev. Stat. Ann. § 14:56.4; 11 R.I. Gen. Laws Ann. § 11-44-21.1; N.Y. Penal Law §§ 145.60, .65; Tex. Penal Code § 28.08; Ariz. Rev. Stat. Ann. § 13-1602(A)(5); Utah Code Ann. §§ 76-6-107, -107.1; 18 Pa. Stat. Ann. § 3304; Del. Code Ann. tit. 11, § 812; Md. Code, Crim. Law § 6-301; Nev. Rev. Stat. Ann. §§ 206.335, .330; S.C. Code Ann. § 16-11-770; N.C. Gen. Stat. Ann. § 14-127.1.

[554] Or. Rev. Stat. Ann. § 164.388; N.Y. Penal Law §§ 145.65; Del. Code Ann. tit. 11, § 812; Nev. Rev. Stat. Ann. § 206.335.

[555] D.C. Code § 22-3312.04(e).

[556] For the purposes of this survey, states with statutes that described the penalties for damage to property when caused by graffiti, without specifying elements of a graffiti offense, were excluded. States with statutes that did not use the term "graffiti," but had elements that substantively established a graffiti offense were included. Or. Rev. Stat. Ann. §§ 164.381, .383, .388; Wis. Stat. Ann. § 943.017; Idaho Code Ann. § 18-7036; Neb. Rev. Stat. Ann. § 28-524; N.M. Stat. Ann. § 30-15-1.1; La. Rev. Stat. Ann. § 14:56.4; 11 R.I. Gen. Laws Ann. § 11-44-21.1; N.Y. Penal Law §§ 145.60, .65; Tex. Penal Code § 28.08; Ariz. Rev. Stat. Ann. § 13-1602(A)(5); Utah Code Ann. §§ 76-6-107, -107.1; 18 Pa. Stat. Ann. § 3304; Del. Code Ann. tit. 11, § 812; Md. Code, Crim. Law § 6-301; Nev. Rev. Stat. Ann. §§ 206.335, .330; S.C. Code Ann. § 16-11-770; N.C. Gen. Stat. Ann. § 14-127.1.

[557] Or. Rev. Stat. Ann. §§ 164.383, .388; Wis. Stat. Ann. § 943.017; Neb. Rev. Stat. Ann. § 28-524; N.M. Stat. Ann. § 30-15-1.1; La. Rev. Stat. Ann. § 14:56.4; 18 Pa. Stat. Ann. § 3304.

[558] Idaho Code Ann. § 18-7036; Tex. Penal Coded Ann. § 28.08.

[559] Ariz. Rev. Stat. Ann. § 13-1602(A)(5); Del. Code Ann. tit. 11, § 812

[560] N.Y. Penal Law §§ 145.60, .65; Utah Code Ann. §§ 76-6-107, -107.1; Md. Code, Crim. Law § 6-301; Nev. Rev. Stat. Ann. §§ 206.335, .330; S.C. Code Ann. § 16-11-770; N.C. Gen. Stat. Ann. § 14-127.1.

[561] 11 R.I. Gen. Laws Ann. § 11-44-21.1.

overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[562] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[563] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[564]

Specifically, for graffiti, one state avoids overlap with the broader property damage statute by making graffiti a gradation of the broader property damage offense[565] and another state applies the graffiti statute "unless a greater penalty is provided by a specific statute."[566] At least four states avoid overlap between graffiti and the broader property damage statute by codifying a special penalty when damage to property is done by graffiti.[567] These states do not have graffiti offenses and were not otherwise analyzed in this commentary, but they prevent overlap between graffiti and the broader property damage offense.

[562] D.C. Code § 22-3203.
[563] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[564] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[565] Ariz. Rev. Stat. Ann. § 13-1602(A)(5).
[566] Nev. Rev. Stat. Ann. § 206.330(1).
[567] Haw. Rev. Stat. Ann. § 708-823.6; N.J. Stat. Ann. § 2C:17-3(c), (d); Fla. Stat. Ann. § 806.13; Ind. Code Ann. § 35-43-1-2(c).