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My Husband Just Trashed Our Home: What Do You Mean That's Not a Crime?

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**MY HUSBAND JUST TRASHED OUR HOME;
WHAT DO YOU MEAN THAT'S NOT A CRIME?**

*Victoria L. Lutz and Cara M. Bonomolo **

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I. INTRODUCTION

"It's a catharsis for me to curse and to be angry and to break up the place. All I did was break some [expletive deleted]. I broke . . . I just broke things. I turned the table over. I did this; I did that."¹

All states make it a crime to damage the property of another person without his or her consent.² The laws that criminalize the destruction of

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1. Recorded conversation, between a wife and her husband who broke over \$600 worth of household property (Nov. 1995) (on file with author). The prosecutor refused to charge him with criminal mischief even though the police had seen broken property and the husband later made this admissible confession. *See infra* Introduction, case study of Mr. X.

2. ALA. CODE § 13A-7-21 (1994); ALASKA STAT. § 11.46.480 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-1602 (West 1989 & Supp. 1996); ARK. CODE ANN. § 5-38-203 (Michie 1993 & Supp. 1995); CAL. PENAL CODE § 594 (West 1988 & Supp. 1997); COLO. REV. STAT. ANN. § 18-4-501 (West 1986 & Supp. 1996); CONN. GEN. STAT. ANN. § 53a-115 (West 1994); DEL. CODE ANN. tit. 11, § 811 (1995); FLA. STAT. ANN. § 806.13 (West 1992 & Supp. 1997); GA. CODE ANN. § 16-7-22 (1996); HAW. REV. STAT. § 708-821 (1993 & Supp. 1996); IDAHO CODE § 18-7001 (1987); 720 ILL. COMP. STAT. ANN. 5/21-1 (West 1993 & Supp. 1996); IND. CODE ANN. § 35-43-1-2 (West 1994 & Supp. 1996); IOWA CODE ANN. § 716.1 (West 1993); KAN. STAT. ANN. § 21-3720 (1995 & Supp. 1996); KY. REV. STAT. ANN. § 512.020 (Michie 1990); LA. REV. STAT. ANN. § 14:56 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 806 (West Supp. 1996); MD. ANN. CODE OF 1957 § 111 (1996); MASS. GEN. LAWS ANN. ch. 266, § 127 (West 1990 & Supp. 1996); MICH. COMP. LAWS ANN. § 750.377a (West 1991); MINN. STAT. ANN. § 609.595 (West 1987 & Supp. 1997); MISS. CODE ANN. § 97-17-67 (1994); MO. ANN. STAT. § 569.100 (West 1979 & Supp. 1997); MONT. CODE ANN. § 45-6-101 (1995); NEB. REV. STAT. § 28-519 (1995); NEV. REV. STAT. ANN. § 206.310 (Michie 1992); N.H. REV. STAT. ANN. § 634:2 (Supp. 1996); N.J. STAT. ANN. § 2C:17-3 (West 1995 & Supp. 1996); N.M. STAT. ANN. § 30-15-1 (Michie 1994); N.Y. PENAL LAW §§ 145.00-145.12 (McKinney 1988); N.C.

property are most commonly labeled criminal mischief;³ however, in some states the crime is called criminal damage,⁴ vandalism,⁵ malicious injury,⁶ malicious mischief,⁷ intentional damage,⁸ property destruction and defacement,⁹ or unlawful mischief.¹⁰ The purpose of these statutes is to create and assign penal law sanctions and responsibility for the reckless, knowing, or intentional damaging of another's property without a legal right to do so.¹¹

Despite the ubiquity of criminal mischief¹² statutes, in a majority of jurisdictions, criminal mischief law is not routinely applied in domestic violence situations. That is, prosecutors do not commonly charge individuals for destroying the property of a spouse or partner or property that they jointly owned.¹³ This is so even though "[b]atterers often damage property to terrorize, threaten, and exert control over a victim of domestic violence."¹⁴

GEN. STAT. § 14-160 (1993); N.D. CENT. CODE § 12.1-21-05 (1985); OHIO REV. CODE ANN. § 2909.05 (Anderson 1996); OKLA. STAT. ANN. tit. 21, § 1760 (West 1983 & Supp. 1997); OR. REV. STAT. § 164.365 (Supp. pt. 3 1996); 18 PA. CONS. STAT. ANN. § 3304 (West 1983 & Supp. 1996); R.I. GEN. LAWS § 11-44-1 (1994 & Supp. 1995); S.C. CODE ANN. § 16-11-510 (Law Co-op. Supp. 1996); S.D. CODIFIED LAWS § 22-34-1 (Michie 1988 & Supp. 1996); TENN. CODE ANN. § 39-14-408 (1991); TEX. PENAL CODE ANN. § 28.03 (West 1994 & Supp. 1997); UTAH CODE ANN. § 76-6-106 (Supp. 1996); VT. STAT. ANN. tit. 13, § 3701 (1974); VA. CODE ANN. § 18.2-137 (Michie 1996); WASH. REV. CODE ANN. § 9A.48.080 (West Supp. 1997); W. VA. CODE § 61-3-30 (1992); WIS. STAT. ANN. § 943.01 (West 1996); WYO. STAT. ANN. § 6-3-201 (Michie 1988).

3. See, e.g., ALA. CODE § 13A-7-21; COLO. REV. STAT. ANN. § 18-4-501; IND. CODE ANN. § 35-43-1-2; ME. REV. STAT. ANN. tit. 17-A, § 806; N.Y. PENAL LAW § 145.05; 18 PA. CONS. STAT. ANN. § 3304; UTAH CODE ANN. § 76-6-106.

4. See, e.g., ARIZ. REV. STAT. ANN. § 13-1602.

5. See, e.g., CAL. PENAL CODE § 594.

6. See, e.g., S.C. CODE ANN. § 16-11-510.

7. See, e.g., MISS. CODE ANN. § 97-17-67.

8. See, e.g., S.D. CODIFIED LAWS § 22-34-1.

9. See, e.g., WYO. STAT. ANN. § 6-3-201.

10. VT. STAT. ANN. tit. 13, § 3701.

11. 54 C.J.S. *Malicious or Criminal Mischief* § 2 (1987).

12. Unless otherwise noted in the text, this article will use "criminal mischief" as a generic term for property damage crimes enumerated in footnotes 2-11.

13. Throughout this article, the defendants in domestic violence cases will be referred to as male.

Of all adult domestic violence cases reported to the National Crime Victimization Survey (NCVS) from 1987-91, 93% were victimizations of women by their male partners. Also, compared to males, females experienced over 10 times as many incidents of violence by an intimate. On average each year, women experienced over 572,000 violent victimizations committed by an intimate, compared to approximately 49,000 incidents committed against men.

NEW YORK STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, DATA SHEET (1996) (citing U.S. DEP'T OF JUSTICE, *VIOLENCE BETWEEN INTIMATES* (1994)).

14. Catherine F. Klein & Leslye G. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 873 (1993).

Documented examples of property damage inflicted by batterers have included: pulling telephone cords from walls, destroying furniture, breaking a window and skylights, chopping holes in a roof with an axe, driving a truck through a garage wall, damaging the spouse's car, injuring or killing a family pet, damaging the spouse's clothing, and breaking other items of sentimental value to the spouse.¹⁵ Although in most states a batterer can destroy property in the marital residence without criminal consequence,¹⁶ some states have held defendants criminally liable under similar statutes for damaging community or marital property.¹⁷

To illustrate the nature of the subject abuse and the context in which criminal mischief could be used as a weapon against domestic violence, the following actual case is offered as a backdrop for the discussion that follows.

On November 2, 1995, Mr. X broke many items in the marital residence—including a dining room chair, a cookie jar, other bric-a-brac, and a five hundred dollar table that Mrs. X had won two months earlier at a church benefit. Interestingly, Mr. X did not break any of his dental equipment, his model airplanes, or other items of his own personal property. The unusual table clearly belonged to his wife and, thus, became the object of his anger. (Mr. X later admitted on tape that when he gets angry he breaks things.) The District Attorney's Office refused to charge criminal mischief as a felony (or misdemeanor). Mrs. X pondered, "If he's not charged with criminal mischief, what will prevent him from trashing every item in our home?" This article will analyze the construction of criminal mischief statutes around the country and discuss how they can be and have been used in domestic violence situations such as the one just described.

II. THE MINIMAL HISTORY OF CRIMINAL MISCHIEF

The offense known today as criminal mischief developed historically as "malicious mischief."¹⁸ To a large extent, however, history has successfully shrouded the exact origin of malicious mischief. Common law characterized malicious mischief as a trespass, so some courts labeled it as a "mere civil wrong."¹⁹ Yet, other writers have described malicious mischief as a misde-

15. *Id.* at 873-74.

16. In New York, for example, often the batterer who has broken a window in the home or otherwise destroyed furniture or household goods in the course of a violent domestic incident will not be charged with criminal mischief. He may be charged with a "violation" called "harassment." See N.Y. PENAL LAW § 240.25 (McKinney 1989). Such a non-criminal nomenclature belittles the damage that has been perpetrated and fails to adequately describe the nature of the wrongdoing.

17. See discussion *infra* Section IV.

18. CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 485 (14th ed. 1981).

19. 52 AM. JUR. 2D *Malicious Mischief* § 1 (1970).

meanor at common law.²⁰ The offense, nonetheless, did become the subject of legislation at an earlier time in both England and the United States.²¹ In fact, the earliest English statute on this subject, Westminster I, 13 Edw. 1, ch. 46, may have been enacted in 1285.²² In *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*,²³ Martin R. Gardner writes that the origins of malicious mischief legislation spring from the Black Act of 1722, which required “the death penalty, without benefit of clergy, for anyone ‘unlawfully and maliciously’ killing, wounding, or maiming cattle.”²⁴ As criminal mischief statutes developed, they consisted of numerous specifically prohibited types of harm to particular types of property.²⁵ The Model Penal Code consolidated all forms of criminal mischief into a single generic offense, and many states followed its example, concentrating former malicious mischief provisions into a single comprehensive offense or an integrated series of related offenses.²⁶

III. THE AMERICAN STATUTES

Today, criminal mischief offenses are characterized as either misdemeanors or felonies. Exactly which characterization will prevail depends on the jurisdiction, the value of the property destroyed, and the mental state of the actor. The basic elements of criminal mischief statutes are the same in all states: (1) destruction of property (2) belonging to another (3) of a particular minimum value plus (4) some level of a culpable mental state.²⁷ The *mens rea* required by each statute, however, frequently differs. Most statutes require a simple *intent* to damage property.²⁸ Other statutes sanction damage to property

20. *Id.*; TORCIA, *supra* note 18, § 485.

21. TORCIA, *supra* note 18, § 485.

22. *Id.*

23. Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635.

24. *Id.* at 713 (referring to ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 410 (3d ed. 1982)).

25. MODEL PENAL CODE § 220.3 cmt. 1 at 41 (1980). “In New York, for example there were more than 200 such statutes.” *Id.* at 41 n.1.

26. *Id.* § 220.3 cmt. 1 at 42.

27. One of several New York criminal mischief statutes, N.Y. PENAL LAW § 145.05 (McKinney 1988), is illustrative of criminal mischief statutes around the country:

A person is guilty of criminal mischief in the third degree when, with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such right, he damages property of another person in an amount exceeding two hundred fifty dollars.

28. See, e.g., ALA. CODE § 13A-7-21 (1994); ALASKA STAT. § 11.46.480 (Michie 1996); CONN. GEN. STAT. ANN. § 53a-115 (West 1994); DEL. CODE ANN. tit. 11, § 811 (1995); GA. CODE ANN. § 16-7-22 (1996); HAW. REV. STAT. § 708-821 (1994 & Supp. 1996); IND. CODE

when it is done *recklessly*,²⁹ *purposely*,³⁰ *maliciously*,³¹ *knowingly*,³² *wilfully*,³³ *wantonly*,³⁴ *mischievously*,³⁵ or *unlawfully*.³⁶ Only Pennsylvania makes it a crime to damage property *by negligence*.³⁷ Further, some criminal mischief statutes sanction destruction done with any of a variety of culpable mental states.³⁸ For example, in Indiana, the criminal mischief statute makes it a

ANN. § 35-43-1-2 (West 1994 & Supp. 1996); IOWA CODE ANN. § 716.1 (West 1993); KAN. STAT. ANN. § 21-3720 (1995 & Supp. 1996); KY. REV. STAT. ANN. § 512.020 (Michie 1990); LA. REV. STAT. ANN. § 14:56 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 806 (West Supp. 1996); MINN. STAT. ANN. § 609.595 (West 1987 & Supp. 1997); NEB. REV. STAT. § 28-519 (1995); N.M. STAT. ANN. § 30-15-1 (Michie 1994); N.Y. PENAL LAW §§ 145.00-145.12 (McKinney 1988); OR. REV. STAT. § 164.365 (1990 & Supp. 1996); 18 PA. CONS. STAT. ANN. § 3304 (West 1983 & Supp. 1996); S.D. CODIFIED LAWS § 22-34-1 (Michie 1988 & Supp. 1996); TEX. PENAL CODE ANN. § 28.03 (West 1994 & Supp. 1997); UTAH CODE ANN. § 76-6-106 (Supp. 1996); VT. STAT. ANN. tit. 13, § 3701 (1974); WIS. STAT. ANN. § 943.01 (West 1996).

29. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1602 (West 1989 & Supp. 1996); DEL. CODE ANN. tit. 11, § 811; IND. CODE ANN. § 35-43-1-2; ME. REV. STAT. ANN. tit. 17-A, § 806; NEB. REV. STAT. § 28-519; N.H. REV. STAT. ANN. § 634:2 (Supp. 1996); 18 PA. CONS. STAT. ANN. § 3304.

30. *See, e.g.*, MONT. CODE ANN. § 45-6-101 (1995); N.H. REV. STAT. ANN. § 634:2; N.J. STAT. ANN. § 2C:17-3 (West 1995 & Supp. 1996).

31. *See, e.g.*, CAL. PENAL CODE § 594 (West 1988 & Supp. 1997); FLA. STAT. ANN. § 806.13 (West 1992 & Supp. 1997); IDAHO CODE § 18-7001 (1987); MD. ANN. CODE OF 1957 § 111 (1996); MASS. GEN. LAWS ANN. ch. 266, § 127 (West 1990 & Supp. 1996); MISS. CODE ANN. § 97-17-67 (1994); NEV. REV. STAT. ANN. § 206.310 (Michie 1992); OKLA. STAT. ANN. tit. 21, § 1760 (West 1983 & Supp. 1997); R.I. GEN. LAWS § 11-44-1 (1994 & Supp. 1995); S.C. CODE ANN. § 16-11-510 (Law Co-op. Supp. 1996); WASH. REV. CODE ANN. § 9A.48.080 (West Supp. 1997).

32. *See, e.g.*, COLO. REV. STAT. ANN. § 18-4-501 (West 1986 & Supp. 1996); 720 ILL. COMP. STAT. ANN. 5/21-1 (West 1993 & Supp. 1996); IND. CODE ANN. § 35-43-1-2; ME. REV. STAT. ANN. tit. 17-A, § 806; MO. ANN. STAT. § 569.100 (West 1979 & Supp. 1997); MONT. CODE ANN. § 45-6-101; N.J. STAT. ANN. § 2C:17-3 (West 1995 & Supp. 1996); OHIO REV. CODE ANN. § 2909.05 (Anderson 1996); TENN. CODE ANN. § 39-14-408 (1991); TEX. PENAL CODE ANN. § 28.03; WASH. REV. CODE ANN. § 9A.48.080; WYO. STAT. ANN. § 6-3-201 (Michie 1988).

33. *See, e.g.*, FLA. STAT. ANN. § 806.13; MD. ANN. CODE OF 1957 § 111; MASS. GEN. LAWS ANN. ch. 266, § 127; MICH. COMP. LAWS ANN. § 750.377a (West 1991); NEV. REV. STAT. ANN. § 206.310; N.C. GEN. STAT. § 14-160 (1993); N.D. CENT. CODE § 12.1-21-05 (1985); R.I. GEN. LAWS § 11-44-1; S.C. CODE ANN. § 16-11-510.

34. *See, e.g.*, KY. REV. STAT. ANN. § 512.020 (Michie 1990); N.C. GEN. STAT. § 14-160.

35. *See, e.g.*, MISS. CODE ANN. § 97-17-67; R.I. GEN. LAWS § 11-44-1.

36. *See, e.g.*, VA. CODE ANN. § 18.2-137 (Michie 1996); W. VA. CODE § 61-3-30 (1992).

37. 18 PA. CONS. STAT. ANN. § 3304 (West 1983 & Supp. 1996) (limiting such negligence to "the employment of fire, explosives, or other dangerous means").

38. *See, e.g.*, DEL. CODE ANN. tit. 11, § 811 (1995); IND. CODE ANN. § 35-43-1-2 (West 1994 & Supp. 1996); KY. REV. STAT. ANN. § 512.020; ME. REV. STAT. ANN. tit. 17-A, § 806 (West Supp. 1996); MISS. CODE ANN. § 97-17-67; MONT. CODE ANN. § 45-6-101 (1995); NEB. REV. STAT. § 28-519 (1995); NEV. REV. STAT. ANN. § 206.310; N.H. REV. STAT. ANN.

crime to “recklessly, knowingly, or intentionally damage . . . or deface . . . [the] property of another person without the other person’s consent.”³⁹ Other statutes seem to require a combination of mental states.⁴⁰ In particular, the statute in South Carolina makes it a crime to “wilfully and maliciously . . . injure or destroy any . . . kind, class, article, or description of personal property, or the goods and chattels of another.”⁴¹ Finally, in some states, New York for example, the level of the offense depends partially on the culpable mental state of the actor.⁴² If the actor damages property *recklessly*, the crime may be no more than a misdemeanor.⁴³ On the other hand, if the actor damages property *intentionally*, the crime can be a misdemeanor or a felony, depending upon the value of the property.⁴⁴

In states where criminal mischief statutes require proof of *intentional* or *purposeful* damage to property, the defendant must have acted with a conscious object or purpose to engage in conduct of a particularized and destructive nature or to cause a particular destructive result.⁴⁵ This particularized intent requirement restricts a court’s inquiry to the actor’s mental disregard for property⁴⁶ and would seem to foreclose convicting an offender whose only purpose was to injure a person.⁴⁷ For example, in *People v. Roberts*,⁴⁸ a New York court reversed the defendant’s conviction for criminal mischief after finding that the defendant damaged a coffee table when he threw his wife upon it. The court concluded that, since the evidence revealed only an intent directed toward the victim’s person, the People had failed to prove that the defendant specifically intended to damage the coffee table.⁴⁹ By analogy, statutes that require destructive acts to be done intentionally or purposely

§ 634:2 (Supp. 1996); N.J. STAT. ANN. § 2C:17-3 (West 1995 & Supp. 1996); 18 PA. CONS. STAT. ANN. § 3304; TEX. PENAL CODE ANN. § 28.03 (West 1994 & Supp. 1997).

39. IND. CODE ANN. § 35-43-1-2.

40. See, e.g., FLA. STAT. ANN. § 806.13 (West 1992 & Supp. 1997); MD. ANN. CODE OF 1957 § 111 (1996); MICH. COMP. LAWS ANN. § 750.377a (West 1991); MISS. CODE ANN. § 97-17-67; N.C. GEN. STAT. § 14-160 (1993); S.C. CODE ANN. § 16-11-510 (Law Co-op. Supp. 1996); WASH. REV. CODE ANN. § 9A.48.080 (West Supp. 1997).

41. S.C. CODE ANN. § 16-11-510 (emphasis added).

42. N.Y. PENAL LAW §§ 145.00-145.12 (McKinney 1988).

43. *Id.* at § 145.00.

44. *Id.* at §§ 145.00-145.12.

45. See, e.g., ALA. CODE § 13A-2-2(1) (1994); ARK. CODE ANN. § 5-2-202 (Michie 1993); KY. REV. STAT. ANN. § 501.020 (Michie 1990); N.J. STAT. ANN. § 2C:2-2 (West 1995); TEX. PENAL CODE ANN. § 6.03 (West 1994).

46. See, e.g., *People v. Culp*, 310 N.W.2d 421 (Mich. Ct. App. 1981); *People v. Summer*, 407 N.Y.S.2d 53 (App. Div. 1978); *State v. Patch*, 488 A.2d 755 (Vt. 1985).

47. 54 C.J.S. *Malicious or Criminal Mischief* § 4 (1987) (citing *In re Daniel K.*, 453 N.Y.S.2d 96 (App. Div. 1982)); *People v. Roberts*, 529 N.Y.S.2d 636 (App. Div. 1988).

48. 529 N.Y.S.2d at 636.

49. *Id.*

would excuse a defendant who threw a paperweight at his wife but missed and smashed the television set instead. Such a defendant would not be guilty of criminal mischief because the *mens rea* of intending to damage property would be lacking.

In states where a person may be guilty of criminal mischief for *recklessly* damaging the property of another, the results seem more equitable.⁵⁰ In such jurisdictions, a husband may be charged with criminal mischief if, in his anger, he throws a chair around the room, smashing any objects in the chair's path. Although the husband may not have specifically intended to destroy the valuable antique vase bequeathed to his wife, he is acting with conscious disregard of the fact that throwing the chair around the room will result in the damage of property; it does not matter that his anger is directed primarily at a person rather than a thing.

The *mens rea* of knowledge is used in two contexts in criminal mischief statutes. The first describes the kind of mind-set that the defendant must have when he is damaging the property; he must *knowingly* destroy it. The second describes the mind-set the defendant must have regarding the ownership of the property that he is destroying; he must *know* that the property belongs to another. Many states require proof of the former knowledge element.⁵¹ Nine states require some proof of both.⁵² Finally, under criminal mischief statutes that require distinctive acts to be done knowingly, the knowledge that property belongs to another also generally includes the awareness of a substantial probability that this fact exists.⁵³

50. A person acts recklessly when he consciously disregards a risk that an element exists or will result from the conduct, and such disregard involves a gross deviation from the conduct that a reasonable person would observe in the same situation. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-105(9)(c) (West Supp. 1996); ME. REV. STAT. ANN. tit. 17-A, § 35 (West 1983); NEB. REV. STAT. § 28-109(19) (1995).

51. *See, e.g.,* 720 ILL. COMP. STAT. ANN. 5/21-1 (West 1993 & Supp. 1996).

52. ALA. CODE § 13A-7-21 (1994); ALASKA STAT. § 11.46.480 (Michie 1996); CONN. GEN. STAT. ANN. § 53a-115 (West 1994); KY. REV. STAT. ANN. § 512.020 (Michie 1990); ME. REV. STAT. ANN. tit. 17-A, § 806 (West 1983 & Supp. 1996); N.H. REV. STAT. ANN. § 634:2 (Supp. 1996); N.Y. PENAL LAW §§ 145.00-145.12 (McKinney 1988); OR. REV. STAT. § 164.365 (Supp. pt. 3 1996); VT. STAT. ANN. tit. 13, § 3701 (1974).

53. 54 C.J.S. *Malicious or Criminal Mischief* § 4 (1987). In *People v. Jones*, 495 N.E.2d 1371 (Ill. App. Ct. 1986), however, the court held that a defendant was guilty of criminal damage to property when he "knowingly" damaged an automobile belonging in part to his estranged wife. The court so held even though the defendant may not have "known" that the automobile was the "property of another" for purposes of the statute. The court found that "[l]egislative intent and the construction of the statute dictate that 'knowingly' modifies the next word, 'damages,' but not 'property of another.'" *Id.* at 1373 (agreeing with the reasoning of *People v. Ivy*, 479 N.E.2d 399 (Ill. App. Ct. 1985)). Because the defendant admitted that he intentionally damaged the car, "the State [had] met its burden of proving the requisite element of knowledge." *Id.*

In some states, malice is an essential element of criminal mischief. "Malice" generally is proven by showing the defendant committed an offense with "either of two mental states: (1) intent to commit the social harm; or (2) recklessness in committing the social harm."⁵⁴ Many criminal mischief statutes that require acting maliciously also require acting willfully⁵⁵ or knowingly.⁵⁶ According to some courts, the malice necessary to constitute the offense of criminal mischief must be directed toward the owner of the damaged or destroyed property.⁵⁷ Yet, other courts view malice in the traditional legal sense, malice at law, which merely denotes the state of mind leading to the intentional or reckless destruction of property without justification or excuse.⁵⁸ State statutes that define malice often combine both views by defining malice as "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."⁵⁹ Ironically, when a batterer damages the property of his wife, he does so to terrorize, threaten, and exert control over her.⁶⁰ As a result, his actions satisfy the requirements that he act with a "wish to vex, annoy, or injure another person" and that he intends to do a wrongful act. Therefore, irrespective of how "malice" is defined, a batterer may be guilty of criminal mischief for damaging the property of his wife.

In addition to the *mens rea* discussed above, New York and eight other states also require that the defendant damage the property "*having no right to do so nor any reasonable ground to believe that he has such right.*"⁶¹ If a statute contains this additional element, a defendant does not violate the statute, provided that he has a reasonable ground to believe that he had the right to destroy property, even if he, in fact, had no right to do so.⁶² However, the defendant who merely relies on an unreasonable belief that he

54. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.04[D] (1987).

55. *See, e.g.*, FLA. STAT. ANN. § 806.13 (West 1992 & Supp. 1997); MD. ANN. CODE OF 1957 § 111 (1996); MICH. COMP. LAWS ANN. § 750.377a (West 1991).

56. WASH. REV. CODE ANN. § 9A.48.080 (West Supp. 1997).

57. TORCIA, *supra* note 18, § 486 n.26; 52 AM. JUR. 2D *Malicious Mischief* § 8 & n.3 (1970).

58. TORCIA, *supra* note 18, § 486 nn.28-30; 52 AM. JUR. 2D *Malicious Mischief* § 8 (1970).

59. CAL. PENAL CODE § 7(4) (West 1988); *see also* IDAHO CODE § 18-101(4) (1987); NEV. REV. STAT. ANN. § 193.0175 (Michie 1992).

60. *See* Klein & Orloff, *supra* note 14, at 873.

61. N.Y. PENAL LAW § 145.05 (McKinney 1988) (emphasis added); *see also* ALA. CODE § 13A-7-21 (1994); ALASKA STAT. § 11.46.480 (Michie 1996); CONN. GEN. STAT. ANN. § 53a-115 (West 1994); KY. REV. STAT. ANN. § 512.020 (Michie 1990); ME. REV. STAT. ANN. tit. 17-A, § 806 (West Supp. 1996); N.H. REV. STAT. ANN. § 634:2 (Supp. 1996); OR. REV. STAT. § 164.365 (Supp. pt. 3 1996); VT. STAT. ANN. tit. 13, § 3701 (1974).

62. Conversely, where a statute does not contain this additional element, the defendant is guilty of criminal mischief for destroying the property of another, having no legal right to do so, even if he had a reasonable ground to believe that he had a right to destroy that property.

could destroy the property of another is guilty. Statutes that contain this additional language may pose a problem in domestic violence situations because the husband who destroys the television in the home he shares with his wife may believe that he has a right to do so. In such situations, the defendant will always have a potentially viable mistake of fact defense. He need simply state that he thought that he could destroy the property since he also owned it.⁶³ The difficulty with the wording of the statute is that it places on the People the burden to prove beyond a reasonable doubt that the defendant did not have a *reasonable* belief that he could destroy the property in question. The positive flip-side is that jurors can dismiss a defendant's protestations of lack of intent if they find his excuses to be unreasonable. Under many of the circumstances in which vandalism of community property takes place, as in the previously discussed case of Mr. and Mrs. X, the facts of the case can establish that the defendant's choice of destructive actions speak louder than his words of explanation.

Although many statutes refer to the destruction of property,⁶⁴ other statutes broaden the offense to include damaging,⁶⁵ defacing,⁶⁶ injuring,⁶⁷ altering,⁶⁸ mutilating,⁶⁹ disfiguring,⁷⁰ or causing physical harm⁷¹ to property. In most states, the level of the offense or the severity of the punishment is at least partially determined by the monetary amount of damage inflicted or by the value of the property destroyed.⁷²

63. A mistake of fact defense works in two ways: it may negate an actor's moral culpability for causing the social harm, and it may negate an express element of the offense. The defendant has the initial burden to produce evidence that he or she was mistaken. However, the prosecution has the burden of persuading the factfinder beyond a reasonable doubt that the defendant possessed the requisite *mens rea* of the offense. DRESSLER, *supra* note 54, § 12.02 & n.7.

64. See, e.g., CAL. PENAL CODE § 594 (West Supp. 1997); IDAHO CODE § 18-7001; IOWA CODE ANN. § 716.1 (West 1993); S.C. CODE ANN. § 16-11-510 (Law Co-op. Supp. 1996).

65. See, e.g., ALA. CODE § 13A-7-21; ARIZ. REV. STAT. ANN. § 13-1602 (West 1989 & Supp. 1996); CAL. PENAL CODE § 594; IOWA CODE ANN. § 716.1.

66. See, e.g., ARIZ. REV. STAT. ANN. § 13-1602 (West 1989 & Supp. 1996); IOWA CODE ANN. § 716.1; UTAH CODE ANN. § 76-6-106 (1995 & Supp. 1996).

67. See, e.g., FLA. STAT. ANN. § 806.13 (West 1992 & Supp. 1997); MISS CODE ANN. § 97-17-67 (1994); S.C. CODE ANN. § 16-11-510.

68. See, e.g., IOWA CODE ANN. § 716.1.

69. See, e.g., KAN. STAT. ANN. § 21-3720 (1995).

70. See, e.g., MISS. CODE ANN. § 97-17-67.

71. See, e.g., OHIO REV. CODE ANN. § 2909.05 (Anderson 1996).

72. 52 AM. JUR. 2D *Malicious Mischief* § 3 (1970); 54 C.J.S *Malicious or Criminal Mischief* § 5 (1987).

IV. WHAT IS “PROPERTY OF ANOTHER?”

Property is deemed to be that of another person if anyone, other than the defendant, has a possessory or proprietary interest in the tangible property.⁷³ So, “[w]here two people have an ownership interest in the same property, [criminal mischief] statutes may prohibit one person from damaging the other’s interest.”⁷⁴ Therefore, an item’s status as marital property owned jointly by husband and wife would not preclude its destruction from being a violation of a criminal mischief statute.

“[I]n the modern common-law property system, property may belong either to the husband, to the wife or to both.”⁷⁵ Property that belongs to either the husband or the wife is “separate property,”⁷⁶ while property that belongs to both the husband and the wife is “community” or “marital property.”⁷⁷ “[S]tatutes define marital property as all property, however titled, acquired by the parties during marriage.”⁷⁸ “Separate property . . . is either property owned by a spouse before marriage or property acquired during marriage by gift, bequest, devise or descent.”⁷⁹

Clearly, a husband has no right to damage the separate property of his wife because it is property in which he has no ownership interest and is, therefore, deemed to be the “property of another.” A strong argument, based on a twenty-five-year-old Supreme Court case, can be made that a husband also has no right to damage marital property owned by both of them. In

73. See, e.g., ARK. CODE ANN. § 5-38-101(3) (Michie 1993); N.Y. PENAL LAW § 145.14 practice commentary (McKinney 1988). The Model Penal Code defines “property of another” as property “in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property” MODEL PENAL CODE § 220.3 cmt. 3 (1980). Several states, including Maine, New Hampshire, and South Dakota, have adopted the Model Penal Code definition. *Id.* § 220.3 & n.22. Others, such as North Dakota, Oregon, and Utah, define the phrase as “property in which someone other than the actor has a possessory or proprietary interest.” Montana defines “the phrase as property in which a person other than the offender has an interest which the offender has no authority to defeat or impair, even though the offender himself may have an interest in the property.” *Id.* § 220.3 cmt. 3 & nn.24-25.

74. 54 C.J.S. *Malicious or Criminal Mischief* § 3 (1987).

75. Emily Osborn, Comment, *The Treatment of Unearned Separate Property at Divorce in Common Law Property Jurisdictions*, 1990 WIS. L. REV. 903, 906.

76. See BLACK’S LAW DICTIONARY 1530 (rev. 4th ed. 1968) (defining “separate property” as “[p]roperty owned by married person in his or her own right during marriage”).

77. *Id.* at 351 (defining “community property” as “[p]roperty owned in common by a husband and wife as a kind of marital partnership”). Community property states use the term “community property,” whereas equitable distribution states use “marital property.” Robin P. Rosen, Note, *A Critical Analysis of Celebrity Careers As Property Upon Dissolution of Marriage*, 61 GEO. WASH. L. REV. 522, 525 n.12 (1993).

78. *Id.* at 528 & n.27.

79. Osborn, *supra* note 75, at 909.

Kirchberg v. Feenstra,⁸⁰ the Court invalidated a Louisiana community property statute that gave the husband, as the head and master, "the unilateral right to dispose of property jointly owned" with his wife without spousal consent. It follows that a husband does not have the right to *damage* property jointly owned with his wife.

When a husband and wife own property together, they are often deemed to have a joint tenancy in the property. "Joint tenancy is a tenancy of two or more persons whose interests are equal in every respect."⁸¹ Each concurrently owns all of the undivided whole and has a nonexclusive right to possess that undivided whole.⁸² Thus, when a husband destroys property that he owns jointly with his wife, not only does he destroy his property, which he may have a right to destroy, but he simultaneously destroys his wife's undivided one hundred percent interest in the property, which he does not have a right to destroy. Therefore, when a husband destroys marital property, he destroys the property of another and violates this element of criminal mischief statutes.

V. THE CASE LAW AND ITS APPLICATION IN THE DOMESTIC VIOLENCE CONTEXT

Because criminal mischief statutes have not routinely been used in domestic violence situations, most state courts have not answered the question of whether property owned jointly by a husband and wife, or property in the home that they share together, constitutes property of another. However, Wharton's Criminal Law,⁸³ and many state statutes as well, defines property of another as any property where "any person or government other than the actor has a possessory or proprietary interest"⁸⁴ therein. Furthermore, cases from appellate courts in California, Illinois, Iowa, and Washington demonstrate that a husband does not have a right to destroy the property of his wife just because he too may have an ownership interest in the property.⁸⁵ These uncontroverted appellate holdings support the conclusion that a husband can and should be charged with criminal mischief for destroying community property.

80. 450 U.S. 455, 455 (1981).

81. MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 212 (1992). Although the term joint tenancy originated in a real property context, "it has expanded into every sort of personalty, including popular joint tenancy bank accounts." *Id.*

82. *Id.*

83. TORCIA, *supra* note 18, § 490.

84. *See, e.g.*, ARK. CODE ANN. § 5-38-101(3) (Michie 1993); *see also* N.J. STAT. ANN. § 2C:17-1(f) (West 1995); N.D. CENT. CODE § 12.1-21-08(2) (1985).

85. *See infra* notes 92, 95, 98, 109.

As noted in *People v. Kahanic*,⁸⁶ where a wife was convicted of vandalizing the car that she and her husband owned:

The essence of the crime is in the physical acts against the ownership interest of another, even though that ownership is less than exclusive. . . . Each community property owner has an equal ownership interest and, although undivided, one which the criminal law protects from unilateral nonconsensual damage or destruction by the other marital partner.⁸⁷

The court also noted, “Property is deemed to be that of another if ‘any person or government other than the actor has a possessory or proprietary interest’ therein.”⁸⁸ Based on this reasoning, it is logical to construe the language the property of another in criminal mischief statutes to include property where ownership is shared between husband and wife.

In *People v. Schneider*,⁸⁹ an Illinois court analyzed the language of its arson statute to determine the scope of the words property of another. The court held that the “defendant could be convicted for damag[ing an] . . . automobile in [his] wife’s possession, even though [the] defendant assertedly had [a] partial ownership interest in the automobile.”⁹⁰ The court noted that the arson statute defined property of another as “property . . . in which a person other than the offender has an interest which the offender has no authority to defeat or impair, even though the offender may also have an interest in the . . . property.”⁹¹ After quoting the arson statute, the court concluded that the malicious mischief statute for damage to property “must be read to impose criminal responsibility on a person who damages another’s interest in property, regardless of whether ownership of the property in question is shared.”⁹²

Similarly, in *State v. Webb*,⁹³ the court upheld a defendant’s conviction for damaging property in an apartment he formerly shared with his estranged wife. The court looked to the application of the Washington theft statute to interpret that the property of another language in the malicious mischief statute includes “property co-owned by the defendant.”⁹⁴ The court cited *State v.*

86. 241 Cal. Rptr. 722 (Ct. App. 1987).

87. *Id.* at 725 (citation omitted).

88. *Id.* at 724 (quoting CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 490 (14th ed. 1981)).

89. 487 N.E.2d 379 (Ill. App. Ct. 1985).

90. *Id.*

91. *Id.* at 380 (alterations in original).

92. *Id.*

93. 824 P.2d 1257 (Wash. Ct. App. 1992).

94. *Id.* at 1263.

Pike,⁹⁵ which held that the property of another element of theft “consists of property in which another person has an interest and over which the ‘defendant may not lawfully exert control . . . absent the permission of that other person.’”⁹⁶ The court found importance in the physical distinction between theft and destruction. Essentially, the court felt that because destruction forecloses any possibility of redeeming one’s ownership rights sound policy reasons demanded different interpretations for property of another in the malicious mischief context and the theft context.⁹⁷

In *State v. Zeien*,⁹⁸ the defendant was convicted of malicious mischief “for damaging contents in the home of his estranged wife.” The court used the principles of general property law to hold that the malicious mischief statute applied to marital property damaged by one’s spouse.⁹⁹ The court noted that “[u]nder general property law, when married persons own property together each has ‘a separate, distinct and undivided interest in all of the property so held.’”¹⁰⁰ Applying these principles to the facts, the court stated that the wording of the malicious mischief statute, “as well as public policies of preventing domestic violence and damage to property generally, suggests . . . that the statute should apply to marital property as well as any other.”¹⁰¹

In an analogous criminal context, men have been charged with burglary for entering the home or car of their wives.¹⁰² For example, in *State v. Peck*, the Iowa Supreme Court upheld a defendant’s conviction for burglary because he entered a home that he had previously shared with his wife and the wife had obtained a court order restraining the defendant “from coming upon any premises occupied by the petitioner and minor children”¹⁰³ Despite the fact that the house had been the marital home of the parties, the court found, pursuant to the court order, that the defendant had no “right, license or privilege” to enter the premises.¹⁰⁴ Referring to the public policies underlying its decision in *Zeien*, the court noted that “[a]pplication of our burglary

95. 826 P.2d 152 (Wash. 1992) (en banc).

96. *Webb*, 824 P.2d at 1262-63 (alterations in original).

97. *Id.* at 1263.

98. 505 N.W.2d 498 (Iowa 1993).

99. *Id.*

100. *Id.* at 498 (quoting *In re Estate of Rogers*, 473 N.W.2d 36, 40 (Iowa 1991)).

101. *Id.* at 499. Note that criminal mischief statutes apply unequivocally where the batterer destroys his girlfriend’s or ex-wife’s individually owned property. Questions arise only where mutual ownership interests appear.

102. *State v. Peck*, 539 N.W.2d 170 (Iowa 1995); *People v. Buckner*, 561 N.E.2d 335 (Ill. App. Ct. 1990).

103. *Peck*, 539 N.W.2d at 172 (quoting court order).

104. *Id.* at 172-73.

law in these circumstances will tend to discourage domestic violence and promote security in the home.”¹⁰⁵

In *People v. Buckner*,¹⁰⁶ an Illinois appellate court found a husband could be convicted of burglarizing his wife’s car. The defendant argued that his conviction for burglary should have been reversed “because the evidence showed he had driven his wife’s car on prior occasions with her permission.”¹⁰⁷ The court, however, held that, although the car may have been marital property, the defendant could nevertheless be convicted of burglarizing the car because the defendant only was permitted to drive the car when he had his wife’s permission.¹⁰⁸

It should be noted that in some states, criminal mischief may also be grounds for a criminal or family court order of protection. Currently nine states issue civil protection orders based on malicious property damage: Delaware, Georgia, Hawaii, Indiana, New Hampshire, New Jersey, New Mexico, Tennessee, and Washington.¹⁰⁹ When a husband destroys a television, breaks dishes, or kills the family cat, a woman may fear that she will be the next target of his destruction. Other states would be prudent to consider issuing orders of protection on these grounds as well.

VI. CONCLUSION

There are many advantages to using criminal mischief statutes in domestic violence situations. Lieutenant Ray Sigwalt, the Domestic Violence Unit Chief for the San Diego Police Department, has stated that the single biggest advance in domestic violence intervention in his jurisdiction occurred when California’s vandalism laws were interpreted to apply to a batterer’s destruction of community property.¹¹⁰ Application of a criminal mischief statute in domestic violence situations makes criminal liability more probable by lessening problems that typically arise when charging a batterer with assault. For example, the only evidence available to support an assault charge frequently may be a battered woman’s statement, since bruising may not appear immediately, and often there are no witnesses other than the perpetrator and the victim. The circumstances are not dramatically improved when bruises appear days later because such evidence often goes unrecorded and has healed by the time of trial. However, criminal mischief cases sometimes arise in the context of wider ranging property destruction by the batterer. In

105. *Id.* at 173.

106. 561 N.E.2d at 341.

107. *Id.*

108. *Id.* at 343.

109. Klein & Orloff, *supra* note 14, at 873 & n.439.

110. Interview Lieutenant Ray Sigwalt, San Diego, Cal. (Feb. 26, 1996).

contrast to the assault charge, a valid criminal mischief claim inherently presents tangible details of destroyed property for police to witness, voucher, and preserve. Evidence such as ripped phone lines, shards from a broken mirror, and other markings along a path of material destruction, unlike the in-court testimonial evidence of battered women, does not become unavailable at trial because of threats of retaliation.¹¹¹ Interestingly, batterers who would never admit to striking a spouse readily admit to intentional property damage, which admissions are a bonus piece of the domestic violence proof-puzzle.

Additionally, it is much easier to establish felonious damage to property than felonious damage to the person. The crux of the dichotomy is that the threshold injury required in establishing even misdemeanor assault in many states is rather high, and that required for felony assault is often *quite* high.¹¹² On the other hand, to establish felony status for criminal mischief

111. In jurisdictions, such as San Diego, California and Quincy, Massachusetts, that are dramatically reducing their domestic violence homicide statistics, the approach is to prepare the case to go forward without the victim. The first step is to presume the victim will not testify. *See, e.g.,* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1850 (1996); Alison Frankel, *Domestic Disaster*, AM. LAW., June 1996, at 55, 56, 60; Stephanie B. Goldberg, *Nobody's Victim*, A.B.A. J., July 1996, at 48, 50. This presumption is based on studies that show 50% of battered women continue to live with their abuser. Gwen DeVasto, Quincy, Mass. A.D.A., Address at the Quincy Coordinated Community Response Team Training Program (Nov. 7, 1996). Battered women know how dangerous leaving can be. The reality is that divorced and separated women who have left their mates report being battered 14 times as often as women still living with their partners. NCADV Voice (Newsletter of the Nat'l Coalition Against Domestic Violence), Spring 1992. A criminal justice system with goals of victim safety, batterer accountability, and zero tolerance for domestic violence, should work with its police, its advocates, and its domestic violence task force to create cases that make victim testimony unnecessary and should avoid "second-guessing" the victim's choice not to leave.

112. For example, in New York to be guilty of assault in the third degree, which is a misdemeanor, the defendant must cause "physical injury to another person." N.Y. PENAL LAW § 120.00(1) (McKinney 1987). For a defendant to be guilty of a felony level assault in the second degree, the defendant must "cause serious physical injury to another person." N.Y. PENAL LAW § 120.05(1). The New York Penal Law defines "physical injury" as "impairment of physical condition or substantial pain," while it defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." N.Y. PENAL LAW § 10.00(9)-(10). It is unlikely that a defendant would be charged with a felony level assault for battering his wife, where the wife receives bruises and minor cuts, because such injuries do not rise to the level of serious physical injuries as defined by New York law. In fact, New York case law suggests that such injuries may not even rise to the level required for a misdemeanor level assault. In *In re Philip A.*, 400 N.E.2d 358 (N.Y. 1980), the New York Court of Appeals asked the question, "When is pain 'substantial' within the meaning of subdivision 9 of section 10.00 of the Penal Law?" *Id.* at 359. The court found that "evidence that complainant was hit, that it caused him pain, the degree of which was not spelled out, caused him to cry and caused a red mark . . . was insufficient to establish 'substantial pain' beyond a reasonable doubt." *Id.* at 359.

in states like New York, a batterer would only have to break a good-sized television. In sum, gathering sufficient evidence for a domestic violence prosecution based on a criminal mischief theory can be much easier than collecting and using evidence of battering behavior based on assault or some other more common legal theory.

A tangential benefit to interpreting criminal mischief as applicable to the destruction of community property, particularly in the many states that now have mandatory arrest for batterers, is that it will be one additional tool that police officers can use to determine who is the primary aggressor during a domestic violence altercation. If a television has been hurled at a door and the wife is 5 feet 2 inches and the husband is 6 feet tall, police discretion and investigation would likely lead to the conclusion that the husband was the aggressor, even if both parties exhibit minor injuries. The decision of whom to arrest and in what context to avoid mutual arrest is clearer when the criminal mischief misdemeanor and felony statutes are available as charging options. Moreover, if domestic violence is truly criminal in nature as federal and state governments now emphasize,¹¹³ and if destruction of a spouse's property is understood in a given context as a form of control, bullying, and fear induction—a form of domestic violence—consistency mandates the ability to charge batterers with the crime of criminal mischief.

Few state appellate courts have interpreted the language of their respective statutes to determine whether a husband can be charged with criminal mischief for destroying jointly owned or marital property. Only appellate courts in California, Illinois, Iowa, and Washington have held that such charges are viable and based on sound public policy. To their credit, no appellate court in any reported decision from any state has held otherwise. We are left with the conclusion that it is merely a matter of training and leadership momentum to acquaint law enforcement and prosecutors with the availability of criminal mischief as a valid law enforcement weapon in the war against domestic violence.

113. Findings preceding the N.Y. Family Protection and Domestic Violence Intervention Act of 1994, 1994 N.Y. Laws ch. 222 (uncodified). President Bill Clinton stated, "Violence against women within our families will not go away unless we all take responsibility for ending it." John F. Harris, *Clinton Makes a Personal Appeal for Men to End Violence Against Women*, WASH. POST, Oct. 15, 1995, at A5.