

## REVIVING CRIMINAL CODE REFORM

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*This Article presents a history of how the District of Columbia (D.C.) recently rewrote its criminal code—legislatively adopting the first Model Penal Code (MPC)-based comprehensive criminal code reform in the U.S. in decades—and how Congress blocked the bill in 2023, its only criminal legislation of the year. The development and fate of the legislation has national implications. Like D.C., about fifteen states have never undergone MPC-based reform and dozens of other MPC-based codes have degraded over time and need comprehensive revision. After decades of reform failures, D.C. created an independent agency solely dedicated to criminal code revision. Emphasizing public transparency and taking an integrated, data-driven approach to set liability and punishments, the agency worked closely with prosecutors, defense attorneys, and others for five years. The resulting bill, the Revised Criminal Code Act of 2022, adopted the principal features of the Model Penal Code and is the first and only comprehensive revision of the District’s substantive criminal laws since Congress enacted the D.C. Code in 1901. Legislative debate on the bill centered on a couple dozen penalty changes, misdemeanor jury trial rights, and a “second look” review of lengthy sentences while core Model Penal Code features and hundreds of other liability and penalty changes were uniformly accepted. The amended bill passed unanimously. However, District legislation is subject to Congressional disapproval, and the bill was blocked when pandemic-driven crime rates spiked, a new House Republican majority targeted the bill as part of a national tough-on-crime messaging campaign, and President Biden withdrew administration support. For now, the District’s outdated criminal code remains*

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*in place. The District's mixed legislative success presents a singular case study for other jurisdictions on the modern possibilities and perils of comprehensive criminal code reform.*

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## INTRODUCTION

In his Pulitzer-Prize-winning history of the District of Columbia’s criminal justice system, Yale Law School Professor James Forman Jr. documented how mass incarceration was “assembled piecemeal”<sup>1</sup> as “the result of a series of small decisions, made over time, by a disparate group of actors.”<sup>2</sup> He described the resulting justice system (or “nonsystem”) as “almost absurdly disaggregated and uncoordinated,” and noted that the diffuse nature of the system means “nobody has to take responsibility for the outcome, because nobody *is* responsible—at least not fully.”<sup>3</sup>

Yet, just when Professor Forman’s history stopped—in the mid-2010s—the District was forming a new independent agency with an ambitious mandate to develop recommendations to reform the entirety of the District’s criminal code.<sup>4</sup> The purpose of the Criminal Code Reform Commission (“CCRC”) was to review and re-draft criminal laws that had not been comprehensively updated since Congress first adopted the District’s criminal code in 1901.<sup>5</sup> It was a bold attempt by District lawmakers to take greater responsibility and look beyond immediate crises and patches to construct a modern system of crimes and punishments.<sup>6</sup>

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1. JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 13 (2017).

2. *Id.* at 229.

3. *Id.* at 13–14 (citing Daniel J. Freed, *The Nonsystem of Criminal Justice*, in *LAW AND ORDER RECONSIDERED* 265 (Nat’l Comm’n on the Causes and Prevention of Violence ed., 1969)).

4. See RICHARD SCHMECHEL, D.C. CRIM. CODE REFORM COMM’N, TRANSMITTAL MEMORANDUM TO THE MAYOR AND COUNCIL 1 (2021) [hereinafter CCRC REPORT TRANSMITTAL MEMORANDUM], <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC-Executive-Director-Transmittal-Letter-to-the-Mayor-and-Council-March-31-2021.pdf> (noting that the CCRC was created in 2016 and summarizing the essence of the CCRC’s statutory mandate as “submit[ting] to the Mayor and the Council comprehensive criminal code reform recommendations that revise the language of the District’s criminal statutes” within specified parameters).

5. An Act to Establish a Code of Law for the District of Columbia, ch. 854, 31 Stat. 1189 (1901).

6. As described throughout this Article, the District’s criminal code revision was primarily a legislative effort. Judicial branch officials were contacted but declined to provide comment during the drafting phase. *Infra* notes 208–09. Representatives of the District’s locally elected prosecutor, the U.S. Attorney for the District of Columbia, and the D.C. Public Defender Service provided extensive advice on the draft revisions, but the representative of the Executive almost entirely absented themselves from the drafting process. See *infra* text accompanying note 205. The reform legislation chiefly concerned substantive criminal law and addressed only a few procedural aspects of policing, adjudication, sentencing, and incarceration.

This Article describes the District’s development of its criminal code reform legislation, the Revised Criminal Code Act of 2022<sup>7</sup> (RCCA), including the bill’s passage through the D.C. legislature and the Congressional disapproval resolution that ultimately struck the reform.

A state-level success in criminal justice reform with few parallels in scale, the RCCA was the first Model Penal Code (MPC)-based comprehensive criminal code reform<sup>8</sup> to successfully pass through a state-level legislature in over thirty years.<sup>9</sup> The reform legislation did not specifically aim to reduce mass incarceration or the sharp racial disparity in District arrests, nor was it specifically designed to improve public safety or the efficiency of the system—although the legislation likely would have advanced these and other criminal justice goals.<sup>10</sup>

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7. Council of D.C. A24-789, 23rd Council Period (D.C. 2023) (disapproved by joint resolution of Congress and signature of the President in Public Law 118-1).

8. Unless context indicates otherwise, throughout this Article “MPC-based reform” refers to the *initial adoption of the principal features the Model Penal Code* (e.g., division into a general and special part; definition of culpability terms). Updates to a criminal code that is already MPC-based, even when the updates are comprehensive in scope, are not considered to be “MPC-based reform” but are included within the broader term “criminal code reform” in this Article. This Article focuses on jurisdictions that, like the District, have yet to undergo MPC-based reform. But this should not detract from the fact that dozens of the jurisdictions that underwent MPC-based reform four or five decades ago have since been layered over with overlapping statutes and conflicting amendments and are now in need of comprehensive revision. See Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 634 (2004) (stating that criminal codes over the past generation have undermined, as opposed to strengthened, previously implemented reforms). Comprehensive criminal code reform in states that already underwent MPC-based reform is significantly less onerous than is required in the District and other jurisdictions lacking MPC features. This is due in part to not having to codify criminal defenses for the first time and not having to define and apply to all elements culpable mental state definitions. Nonetheless, comprehensive criminal code reform in the dozens of MPC-based jurisdictions remains a multi-year undertaking, which may draw lessons from the District’s example.

9. See Suzanne Monyak, *Senate Votes to Overturn DC Criminal Code Changes*, ROLL CALL (Mar. 8, 2023, 8:05 PM), <https://rollcall.com/2023/03/08/senate-votes-to-overturn-dc-criminal-code-changes>.

10. See COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REP. ON B24-0416, “REVISED CRIMINAL CODE ACT OF 2022,” attach. L: Racial Equity Impact Assessment, 24th Council Period, at 34–35 (2022), [https://lims.dccouncil.gov/downloads/LIMS/47954/Committee\\_Report/B24-0416-Committee\\_Report1.pdf?Id=148331](https://lims.dccouncil.gov/downloads/LIMS/47954/Committee_Report/B24-0416-Committee_Report1.pdf?Id=148331) (concluding that the bill’s decriminalization of certain offenses would likely have positive effects on racial equity, but noting that the bill was not drafted *with the intent* of addressing racial inequity); see also Paul H. Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law’s Moral Credibility*, 31 S. CAL. INTERDISC. L.J. 277, 284–92 (2022) (regarding the public safety compliance benefits of aligning criminal codes with contemporary moral intuitions).

Rather, the bill was a restructuring of the extant criminal code in accordance with the features of the MPC already adopted in most states, a restructuring that overwhelmingly preserved existing District law and the penalties actually being imposed in D.C. courts.<sup>11</sup>

Years of conversations with District prosecutors, defense attorneys, and others in public meetings underlay the bill's development, and a deep legislative record was created that included thousands of pages of published legal commentary, all draft revisions that were considered, and days of legislative hearings.<sup>12</sup> As detailed in that record, the focus of the bill was on improving the clarity and consistency of the law and realigning statutory penalties with contemporary practice. With few exceptions, the RCCA would not have shifted the boundaries of what is and is not criminal in the District, nor required changes in the imprisonment time actually being meted in D.C. courtrooms.<sup>13</sup> In this sense, however sweeping in scope and transformative in asserting (for the first time) legislative control over the front end of the District's justice system, the bill was exceptionally moderate in its expected effects on criminal justice outcomes.

The reform bill was fundamentally a rule of law initiative. The RCCA bill sought to instantiate in the District the legality principle, "the first principle of American criminal law jurisprudence."<sup>14</sup> The legality principle is a summation of two longstanding principles: "*nullum crimen sine lege*" (no crime without law) and "*nulla poena sine lege*" (no punishment without law).<sup>15</sup> In contemporary language, the legality principle provides that "criminal liability and punishment can be based only upon a prior legislative enactment of a prohibition that is

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11. See Damon King, *Congress, Hands Off Our Revised Criminal Code*, ACLUDC (Feb. 17, 2023), <https://www.acludc.org/en/news/congress-hands-our-revised-criminal-code>.

12. See D.C. CRIM. CODE REFORM COMM'N, RECOMMENDATIONS FOR THE COUNCIL AND MAYOR (2021) [hereinafter MARCH 2021 RECOMMENDATIONS FOR THE COUNCIL & MAYOR], <https://lms.dccouncil.gov/downloads/LIMS/46845/Introduction/RC24-0035-Introduction.pdf?Id=119617> (compiling the voluminous background materials used in generating the report, including written comments, changes instituted to draft documents based on feedback, public opinion data, and research).

13. Cf. CCRC REPORT TRANSMITTAL MEMORANDUM, *supra* note 4, at 6 ("The starting point for the CCRC's drafting of reforms to District criminal statutes has been existing District law—statutory law and case law—as well as current court practice. Rather than starting with a blank slate or adopting large swathes of model legislation from another entity or jurisdiction, the CCRC has sought to preserve applicable law where doing so is consistent with agency's statutory duties.").

14. See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 39 (3d ed. 2001).

15. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336 (2005) [hereinafter *Fair Notice*].

expressed with adequate precision and clarity.”<sup>16</sup> The legality principle provided the theoretical underpinning of the MPC, designed by leading jurists to take a comprehensive, orderly, and principled approach to codification<sup>17</sup> and the American gold-standard for criminal codes that most states have followed for decades.<sup>18</sup>

Yet, despite the reform bill’s uncontroverted aims and transparent, research-driven methodology, the RCCA did not survive the extraordinary turn in national criminal justice policy and politics driven by the COVID-19 pandemic spike in crime.<sup>19</sup> The code drafting began in the relative calm of 2016 to 2020, with the final phase of the rewrite occurring in the heated context of mass D.C. protests of the 2020 murder of George Floyd and the January 2021 Capitol insurrection.<sup>20</sup> Yet, by the time lawmakers voted on the RCCA in late 2022 and early 2023, the pandemic-related rise in violence that struck U.S. cities was leading headlines, including a tragic spike in District homicides and carjackings.<sup>21</sup> Federal review of the RCCA, moreover, coincided with the election of new Republican House leadership eager to seize a tough-on-crime mantle and posed the first significant veto decision for a first-term democratic president eyeing midterm results and his own next election.<sup>22</sup>

The bill’s spectacular rejection by the Congress and President was a defining moment in the country’s changing conversation on criminal justice, with lasting implications for both the nation and District residents. The disapproval resolution that ultimately blocked the

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16. *Id.*

17. *See id.* at 337.

18. *See infra* Part I.

19. A series of reports by the Council on Criminal Justice provides an overview of the rise and fall of the national crime wave that struck with the COVID-19 pandemic. *See, e.g.*, ERNESTO LOPEZ & BOBBY BOXERMAN, COUNCIL ON CRIM. JUST., CRIME TRENDS IN U.S. CITIES: MID-YEAR 2024 UPDATE (July 2024), <https://counciloncj.org/crime-trends-in-u-s-cities-mid-year-2024-update>.

20. *See infra* text accompanying note 324.

21. *See, e.g.*, Jorge L. Ortiz, *Homicides Down but Violent Crime Increased in Major US Cities, Midyear Survey Says*, USA TODAY (Sept. 11, 2022, 9:11 PM), <https://www.usatoday.com/story/news/nation/2022/09/11/united-states-major-cities-violent-crime-homicides-survey/8060734001>; Josiah Bates, *U.S. Crime Is Still Dramatically Higher Than Before the Pandemic*, TIME (Jul. 28, 2022, 5:15 PM), <https://time.com/6201797/crime-murder-rate-us-high-2022>.

22. *See infra* Part IV; Sara Dorn, *Biden Sides with Republicans on a Bill to Reverse D.C. Criminal Justice Reforms-Here’s Why*, FORBES (Mar. 3, 2023, 12:10 PM), <https://www.forbes.com/sites/saradorn/2023/03/03/biden-sides-with-republicans-on-a-bill-to-reverse-dc-criminal-justice-reforms-heres-why> (“61% . . . [of] U.S. adults . . . said violent crime was a top concern for them in making their midterm voting decisions.”).

RCCA was the only criminal justice legislation passed by a historically unproductive and partisan Congress in 2023.<sup>23</sup> President Biden's surprise Twitter announcement supporting the Republican resolution signaled his affirmative desire to distinguish himself from the majority of House Democrats on criminal justice.<sup>24</sup> The resolution also was the first time in over thirty years that Congress exercised its special powers to override the District's elected representatives.<sup>25</sup> In D.C., the failure of the RCCA not only froze efforts to shore up D.C.'s failing patchwork of criminal laws, but set back any prospect of greater District legislative autonomy or statehood by years or possibly decades.

A new criminal code for the District now appears to be contingent on a shift in national politics around crime and local D.C. crime rates. The District, meanwhile, continues its struggle to respond to crime with a criminal code designed in the nineteenth century.<sup>26</sup> D.C. is not alone in this struggle, however.

The federal government and approximately fifteen states have criminal codes that, like the District's, have never been comprehensively revised to reflect the core features of the MPC.<sup>27</sup> Many more state criminal codes have degraded over time and stand in need of comprehensive revision. A panoply of real-world problems, from failed prosecutions to overly punitive sentences, stem from the lack of a coherent criminal code in non-MPC jurisdictions.<sup>28</sup> Yet, large-scale

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23. Annie Karni, *The 27 Bills That Became Law in 2023*, N.Y. TIMES (Dec. 19, 2023), <https://www.nytimes.com/2023/12/19/us/politics/bills-laws-2023-house-congress.html>.

24. The Office of Management and Budget issued a Statement of Administration Policy on February 6, 2023, opposing the House disapproval resolution, was based on respect for the District's legislative autonomy—a deep and seemingly well-established democratic party position. As described below, a veto on that basis could have side-stepped questions about criminal justice policy. Instead, President Biden chose the RCCA bill to take a new stand in the criminal justice messaging battle. *See infra* Part IV.

25. *See* Monyak, *supra* note 9.

26. *See* CCRC REPORT TRANSMITTAL MEMORANDUM, *supra* note 4, at 2 (noting that D.C.'s substantive criminal statutes have not been reformed since their inception in 1901, and subsequently use outdated language and fail to address changing norms).

27. *See* Robinson & Cahill, *supra* note 8, at 634 (observing that over two-thirds of states adopted the MPC after its issuance). For a summary of scholarly analyses of the number of U.S. jurisdictions that currently have MPC-based criminal codes, see sources cited *infra* note 70.

28. *See e.g.*, COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REP. ON B24-0416, "REVISED CRIMINAL CODE ACT OF 2022," 24th Council Period, at 110–11 (2022), [https://lms.dccouncil.gov/downloads/LIMS/47954/Committee\\_Report/B24-0416-Committee\\_Report1.pdf?Id=148331](https://lms.dccouncil.gov/downloads/LIMS/47954/Committee_Report/B24-0416-Committee_Report1.pdf?Id=148331) (noting that while most states restructured their criminal codes following the issuance of the MPC, D.C. did not, causing D.C.'s criminal code to be ranked forty-fifth out of fifty-two jurisdictions).

criminal code reform efforts like that which generated the RCCA have been rarely attempted in recent decades.<sup>29</sup>

For the many American jurisdictions that similarly lack modern criminal codes, the history of the RCCA provides a unique case study on the possibilities and perils of MPC-based comprehensive criminal code reform. For future lawmakers, policymakers, and advocates seeking to understand how the District's criminal code reform effort proceeded, this Article seeks to give a broad account of the bill drafting process, its reception, and some insights for how similar reform might best be structured in other jurisdictions. The Article proceeds in five parts.

Part I surveys the desolate modern history of MPC-based criminal code reform across the nation. While most states underwent MPC-based reform in a wave of reforms in the 1960s and 1970s, approximately fifteen states (in addition to D.C. and the federal government) continue to utilize criminal codes with pre-MPC designs dating back to the early twentieth century.<sup>30</sup> These outdated codes give rise to an array of real-world problems, from dropped prosecutions to outlier sentences.<sup>31</sup> Yet, there have been few attempts at reviving MPC-based revision and the last such reform was in 1989.<sup>32</sup> Moreover, comprehensive criminal code reform in states that already underwent MPC-based reform in the mid-late twentieth century have often lost coherence in subsequent decades.<sup>33</sup> Yet, even attempts to update these MPC-based criminal codes—a much less-demanding type of revision—also have failed in recent decades.<sup>34</sup> Until the District's effort, momentum for MPC-based comprehensive code revision had all but disappeared.<sup>35</sup>

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29. See CCRC REPORT TRANSMITTAL MEMORANDUM, *supra* note 4, at 2 (“[T]he District’s piecemeal legislative amendments have been unable to fix pervasive, structural problems with the D.C. Code.”).

30. See Robinson & Cahill, *supra* note 8, at 634 (noting that over two-thirds of states adopted the MPC after its issuance).

31. See REP. ON B24-0416, at 110–11 (summarizing testimony about the outdated laws and its subsequent criminal justice issues).

32. See CCRC REPORT TRANSMITTAL MEMORANDUM, *supra* note 4, at 2 (noting that the D.C. criminal structures have never undergone a comprehensive reform or revision following the issuance of the MPC).

33. See Robinson & Cahill, *supra* note 8, at 634 (discussing the “serious and growing degradation” of most criminal codes, including those that adopted MPC revisions, over the last thirty years).

34. See *id.* (explaining that constituencies and influences driving political decision-making operate to impede criminal justice reform).

35. *Cf. id.* at 634 (stating that “there has been little momentum for further development or refinement of American criminal codes,” since the wave of criminal law reform that occurred in “the 1960s and early 1970s”).



Part II of the Article examines the modern revival of criminal code reform in the District, beginning with the failed efforts by the D.C. Sentencing and Criminal Code Revision Commission (“SCCRC”) from 2007 to 2016. Lawmakers tasked a pre-existing sentencing guidelines commission with the responsibility of drafting criminal code reform recommendations.<sup>36</sup> Initial problems of insufficient funding and unqualified staff eventually were addressed, but deeper process and conflict of interest problems persisted.<sup>37</sup> Even attempts to avoid substantive change and work by consensus for the lowest common denominator failed.<sup>38</sup> Nearly a decade of the SCCRC’s efforts yielded nothing.<sup>39</sup> Remarkably, District lawmakers persisted, learned from the Agency’s mistakes, and designed a new structure and processes to sidestep the deadlock among existing criminal justice stakeholders.<sup>40</sup> In October 2016, code revision responsibilities and staff were spun off to a new agency, the District’s Criminal Code Reform Commission (CCRC).<sup>41</sup>

Part III of the Article describes the CCRC’s successful development of MPC-based criminal code reform legislation from 2016 to 2021 and several of its key provisions. A new drafting process was implemented that relied principally on iterative written exchanges with an agency Advisory Group and prioritized transparency, making all drafts and meetings open to the public.<sup>42</sup> Topics were sequenced to maximize efficiency, with general doctrinal issues addressed first and penalty classifications last.<sup>43</sup> To develop penalty recommendations, the CCRC took a data-driven approach, analyzing existing court sentencing practices and conducting novel public opinion research on the relative severity of criminal conduct.<sup>44</sup> An extensive legal commentary explaining all the changes was developed in parallel with a revised statutory text, subjecting the Agency’s recommendations to detailed

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36. COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REP. ON BILL 16-172, “ADVISORY COMMISSION ON SENTENCING AMENDMENT ACT OF 2006,” 16th Council Period, at 4–5 (2006), [https://lms.dccouncil.gov/downloads/LIMS/15500/Committee\\_Report/B16-0172-COMMITTEEREPORT.pdf?Id=58773](https://lms.dccouncil.gov/downloads/LIMS/15500/Committee_Report/B16-0172-COMMITTEEREPORT.pdf?Id=58773).

37. See *infra* notes 114, 134, 148, 151 and accompanying text.

38. See *infra* notes 148, 151 and accompanying text.

39. See *infra* note 167 (stating that after ten years of existence, the SCCRC failed to issue any specific legislative recommendations).

40. D.C. CODE § 3-151 (2016).

41. *Id.* § 3-155.

42. See MARCH 2021 RECOMMENDATIONS FOR THE COUNCIL & MAYOR, *supra* note 12.

43. CCRC REPORT TRANSMITTAL MEMORANDUM, *supra* note 4, at 3.

44. *Id.* at 6.

scrutiny.<sup>45</sup> The scope of reform was far-reaching but not universal, revising criminal statutes that constituted over 97% of criminal charges in recent years.<sup>46</sup> The CCRC's Advisory Group unanimously voted to send the Agency's revised statutory language and commentary to the legislative and executive branches on March 31, 2021.<sup>47</sup>

Part IV of the Article recounts how the RCCA bill was introduced in the District's legislature on October 1, 2021, to codify the CCRC's recommendations, the political and media reception of the legislation, and the alternating success and failure of the RCCA when approved by the D.C. Council and then blocked by Congress. Of the hundreds of changes in the RCCA, almost all of the legislative debate and media focused on: (1) penalty changes for certain violent crimes; (2) a judicial "second look" review of long-term sentences after a person had served fifteen to twenty years; and (3) a restoration and expansion of access to misdemeanor jury trials.<sup>48</sup> MPC-based changes, aside from the second look mechanism, were almost entirely non-controversial.<sup>49</sup> An amended RCCA bill passed out of committee on October 26, 2022, after a series of changes in the direction advocated by the federal prosecutor and D.C. Mayor who, unassuaged, continued to publicly oppose the bill with the above provisions.<sup>50</sup> On November 1 and November 15, 2022, the D.C. Council unanimously approved the Revised Criminal Code (RCC) recommendations.<sup>51</sup> A January 3, 2023 mayoral veto also was swiftly overridden, and the bill was sent to Congress for its special review of District legislation.<sup>52</sup>

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45. *Id.* at 3.

46. *Id.*

47. See MARCH 2021 RECOMMENDATIONS FOR THE COUNCIL & MAYOR, *supra* note 12.

48. See *infra* Part IV.

49. See *infra* Part IV.

50. Council of D.C. B24-0416, 25th Council Period (D.C. 2021), <https://lims.dccouncil.gov/Legislation/B24-0416>; see Martin Austermuhle, *The D.C. Council Is Set To Overhaul The Entire Criminal Code. Here's Everything You Need To Know*, DCIST.COM (Nov. 15, 2022, 8:08 AM), <https://dcist.com/story/22/11/15/dc-council-will-vote-overhaul-criminal-code> ("Mayor Muriel Bowser has been particularly critical of certain provisions and says she'll consider wielding her veto pen . . .").

51. Council of D.C. B24-0416, 25th Council Period (D.C. 2021), <https://lims.dccouncil.gov/Legislation/B24-0416>.

52. *Id.* See generally *How a Bill Becomes a Law*, COUNCIL OF D.C., <https://dccouncil.gov/how-a-bill-becomes-a-law> [<https://perma.cc/RDL5-YZL2>] (describing District-level and congressional review of legislation).

Portrayed as a “pro-criminal”<sup>53</sup> bill in a time of rising District crime, a Republican resolution to block the RCCA passed the House on February 9, 2023, on a largely party-line divide.<sup>54</sup> On March 2, 2023, President Biden upended congressional expectations and a prior administration policy statement by tweeting that he was prepared to sign the disapproval motion if approved by the Senate.<sup>55</sup> Senate Democratic support for the RCCA then collapsed, and the resolution passed overwhelmingly.<sup>56</sup> President Biden signed the disapproval resolution into law on March 20, 2023.<sup>57</sup> It would prove to be the only criminal legislation passed in 2023 by a historically unproductive Congress.<sup>58</sup> It was also the first time in over thirty years that a congressional resolution disapproving a D.C. law was passed.<sup>59</sup> Although still committed to passage, as of this writing, District lawmakers had called for an indefinite pause on comprehensive criminal code reform.<sup>60</sup>

Part V concludes with a few practical insights, based on the District’s experience, on how to set up MPC-based reform efforts in other jurisdictions. First, an independent administrative structure dedicated to developing evidence-based criminal code reform is recommended, one that will facilitate a direct and sustained working relationship with legislators. Second, funding, staff support, and reporting requirements should be designed with a long-term or permanent time horizon. Third, proactive education and outreach on the broad aims and methods of MPC-based reform are necessary to achieve legislative success with particular attention to rationales for actual or apparent

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53. See Meagan Flynn & Michael Brice-Saddler, *D.C. Braces for Barrage of Republican Intervention in Local Governance*, WASH. POST (Jan. 19, 2023, 2:45 PM), [https://www.washingtonpost.com/dc-md-va/2023/01/19/dc-republican-congress-intervention/?itid=ap\\_meaganflynn](https://www.washingtonpost.com/dc-md-va/2023/01/19/dc-republican-congress-intervention/?itid=ap_meaganflynn) (quoting Representative James Comer, Chair of the House Oversight and Accountability Committee).

54. See *infra* note 415 and accompanying text.

55. President Biden (@POTUS), X (Mar. 2, 2023, 3:33 PM), <https://twitter.com/POTUS/status/1631392285182009376>.

56. See *infra* note 434 and accompanying text.

57. *Bills Signed: H.J.Res. 26, S. 619*, THE WHITE HOUSE (Mar. 20, 2023), <https://www.whitehouse.gov/briefing-room/legislation/2023/03/20/bills-signed-h-j-res-26-s-619>.

58. Karni, *supra* note 23.

59. See D.C. CODE § 1-206.02 hist. nn. (2024) (listing the three other times Congress has passed a resolution disapproving a D.C. law); see also Monyak, *supra* note 9 (“According to Norton’s office, only three disapproval resolutions against D.C. bills have ever been enacted: in 1979, 1981 and 1991. The House passed a disapproval resolution to nix a D.C. law related to employment discrimination in 2015, but the effort died in the Senate and never took effect.”).

60. See *infra* Section IV.D.

penalty changes for serious crimes and changes that impose major costs on other agencies. Finally, while MPC-based reform can be achieved as a moderate, good governance initiative, the District's experience highlights how timing the legislative introduction of such legislation is critical. Because it does not narrowly target more urgent needs for crime reduction, any comprehensive criminal code reform is likely to be bypassed or rejected in years of increased crime rates.

The District's comprehensive criminal code reform legislation was not, and was not intended to be, a broadly applicable MPC 2.0<sup>61</sup> or a major reform that would significantly shift D.C.'s boundaries of what behavior is criminalized or extant court sentencing patterns.<sup>62</sup> A bespoke redesign and modernization of the District's criminal statutes, the bill was true to the rule-of-law objectives given to the administrative agency that drafted it: greater clarity and consistency, reduction of unnecessary overlap between offenses, filling gaps in liability, eliminating unconstitutional and outdated provisions, and reestablishing proportionality.<sup>63</sup> The bill's fiery demise in the turmoil of the 118th Congress, presidential politics, and the pandemic-related spike in local crime belie the unprecedented success of the RCCA. For the many jurisdictions that, like the District, stand in need of comprehensive criminal code reform, the process used to develop and pass the RCCA through the D.C. legislature stands as an almost singular exemplar of such reform in the modern era.

### I. LEFT BEHIND: NON-MODEL PENAL CODE JURISDICTIONS

To appreciate the significance of the District's recent MPC-based reform effort, the broader history of U.S. criminal code revision must be outlined. This Part describes how nearly a third of American jurisdictions (including the District) failed to adopt MPC-based reforms, the kinds of problems inherent in unrevised codes, and the lack of momentum for reform in recent decades.

#### *A. Problems of Unrevised Criminal Codes*

In 1962, the American Law Institute, a body of leading jurists from across the country, issued the MPC.<sup>64</sup> Compiled under the direction of Herbert Wechsler, the development of the MPC took eleven years and involved dozens of experts in law, psychiatry, criminology, and other

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61. See *infra* text accompanying note 458.

62. See *generally infra* Part III.

63. See *infra* Part III.

64. MODEL PENAL CODE (AM. L. INST., Proposed Official Draft 1962).

fields.<sup>65</sup> Beyond narrower interests in making criminal law more effective or changing penalties in some way, Wechsler's broader vision for the project was to rationalize the diverse, conflicting body of extant state laws in a manner that would improve not only the consistency of the law but its ability to serve justice.<sup>66</sup> The MPC's approach to statutory drafting in a comprehensive, orderly, and principled manner, as well as innovations like the creation of standardized, culpable, mental-state definitions, proved extraordinarily successful.<sup>67</sup> A wave of MPC-based reforms washed over thirty states in the 1960s and 1970s before slowing to a trickle in the 1980s. The MPC came to be the standard by which all state codes were judged and legal education and research was conducted.<sup>68</sup> Sixty years after its release, the MPC remains the closest thing to being "an American criminal code."<sup>69</sup>

Yet, the District and approximately fifteen states (and the federal government) entirely missed the national wave of MPC-based code reform—a fact often neglected in criminal code reform scholarship.<sup>70</sup>

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65. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 323 (2007).

66. See generally Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *HARV. L. REV.* 1097 (1952).

67. Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 *U. LOUISVILLE L. REV.* 173, 175–76 (2015); Danye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 *SW. U. L. REV.* 229, 229–30 n.3 (1997).

68. Robinson, *supra* note 67, at 173, 191.

69. Robinson & Dubber, *supra* note 65, at 319.

70. Counts of states that have undergone MPC-based reform vary depending on the precise criteria applied. The numbers used here reflect the addition of Tennessee to the thirty-four states previously identified by Herbert Wechsler as being based on the MPC. See Holley, *supra* note 67, at 229–30 n.2, 236 (noting Tennessee's MPC-based revision in 1989). By this reckoning, the thirty-five states that have undergone MPC-based reform are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Florida; Georgia; Hawaii; Illinois; Indiana; Iowa; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; Nebraska; New Hampshire; New Jersey; New Mexico; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Virginia; Washington; and Wyoming. *Id.* The fifteen states that have not undergone MPC-based code reform are: California; Idaho; Louisiana; Maryland; Massachusetts; Michigan; Mississippi; Nevada; North Carolina; Oklahoma; Rhode Island; South Carolina; Vermont; West Virginia; and Wisconsin. *Id.* More stringent analysis has identified just twenty-five states with MPC-type culpability provisions—perhaps the most critical and unique feature of the MPC. *Id.* at 236–53; Scott England, *Stated Culpability Requirements*, 74 *RUTGERS U. L. REV.* 1213, 1233 (2022); see also Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 *DUKE L.J.* 285, 289 n.8 (2012) (including the same states as Holley and England except for Montana, leading to a total of twenty-four states). Arguably, the criminal codes of

Several of these fifteen states attempted MPC-based reform and failed in the distant past.<sup>71</sup> Today, these fifteen jurisdictions' criminal codes continue to use an organization and approach characteristic of the nineteenth and early twentieth centuries.<sup>72</sup> Criminal code defects may be serious in states that once underwent MPC-based revision and have since degraded, but these defects are orders of magnitude less problematic than those faced by the District and the fifteen other states with unrevised criminal codes.<sup>73</sup>

The most salient feature of codes in these non-MPC jurisdictions is their incompleteness: the absence of legislative specificity on the details of how liability is to be assigned or penalties apportioned. At a macro level, such non-MPC criminal codes typically list crimes and their corresponding punishments with little attention to how the provisions function together. These codes may be better understood as compilations of criminal laws that organize criminal statutes but, because they originate in diverse legislation enacted at different times, fail to craft those statutes to function together in a consistent system of liability and punishment. At a micro level, crimes in these codes generally do not articulate all elements necessary for conviction, rarely define terms, lack penalty gradations, and are not part of a standardized penalty classification scheme.<sup>74</sup> Instead, these codes rely heavily on common law precedent and principles to identify what elements must be proven and provide little or no guidance on how to sentence within wide ranges of authorized penalties.

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approximately ten states that were recodified under the influence of the MPC (according to Wechsler) but have not adopted MPC-type culpability provisions (under other analyses) still lack clarity, completeness, consistency, and proportionality and should be evaluated more like the D.C. Code than not. These ten states not making the shorter lists of Holley and England are: Florida; Georgia; Iowa; Minnesota; Nebraska; New Mexico; South Dakota; Virginia; Washington; and Wyoming.

71. See Robinson & Dubber, *supra* note 65, at 326 (noting that MPC-based reform efforts led to draft criminal codes being produced, but not enacted into law, in California, Massachusetts, Michigan, Oklahoma, Rhode Island, Tennessee, Vermont, and West Virginia).

72. *Id.* at 326–27.

73. See Robinson & Cahill, *supra* note 8, at 634.

74. See, e.g., D.C. CODE § 22-404(a)(1) (2024) (providing a punishment but no statutory definition for assault). A more complete articulation of crimes in recent legislation typically continues alongside an older set of nominally codified common law crimes that are entirely silent as to what conduct is prohibited. See, e.g., Anti-Sexual Abuse Act of 1994, D.C. CODE §§ 22-4102 to -4116 (1995) (revising sex offenses using specified culpable mental state requirements and creating a mini-general part for the new offenses with defined terms).

The District's criminal code is littered with examples of these defects.<sup>75</sup> Assault,<sup>76</sup> manslaughter,<sup>77</sup> and other frequently-prosecuted and serious crimes have no elements codified in the D.C. Code and remain essentially common law offenses that undergo frequent litigation over the scope of the offense.<sup>78</sup> General defenses (e.g., self-defense) too are uncodified and a matter of common law in the District.<sup>79</sup> For these reasons, the District has been ranked forty-fifth out of fifty-two jurisdictions in a national ranking of criminal codes that used almost entirely content-neutral criteria.<sup>80</sup> These measures included a code's comprehensiveness in codifying rules, the clarity of rules, and internal consistency in liability and sentencing.<sup>81</sup> Codes in other non-MPC jurisdictions round out the bottom of the ranking, while MPC jurisdictions fare best.<sup>82</sup>

An array of problems flow from non-MPC criminal codes' structural defects, even if they are "subtle and diffuse."<sup>83</sup> These problems include: non-prosecution or failed prosecutions arising from gaps in liability and reliance on ad hoc court decisions to fill in missing elements and define terms; losses to deterrence and/or chilling of legal (but ambiguous) behavior due to lack of fair notice as to what conduct is criminal; bias or arbitrariness in unconstrained selection of charges among overlapping offenses; disproportionate penalties imposed due to a lack of offense gradations and multiple punishments for overlapping offenses; excessive litigation to resolve ambiguous and incomplete statutory language; and the delegitimization of the entire justice system when there is reliance on laws that are obviously

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75. David E. Aaronson & John P. Sweeney, *Criminal Law Reform in the District of Columbia: An Assessment of Needs and Directions*, 24 AM. U. L. REV. 207, 240 (1975); see also Michael Serota, *Second Looks & Criminal Legislation*, 17 OHIO ST. J. CRIM. L. 495, 506–07 (2020) (using D.C.'s robbery statute to illustrate defects caused by the persistence of common law principles in modern criminal codes).

76. D.C. CODE § 22-404(a)(1) (2023).

77. *Id.* § 22-2105.

78. See, e.g., *Perez Hernandez v. United States*, 286 A.3d 990, 1001 (D.C. 2022) (en banc) (determining whether a non-consensual, non-sexual touching constituted an assault and noting the *mens rea* of assault has always been a frequent matter of litigation in the District).

79. See Aaronson & Sweeney, *supra* note 75, at 249 n.153.

80. Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 61 (2000) (placing the District in the group of jurisdictions with the worst criminal codes and lowest scores on every question).

81. *Id.* at 5.

82. *Id.* at 60–61.

83. See Robinson & Cahill, *supra* note 8, at 644–45.

defective, outdated, or otherwise do not reflect current community values.<sup>84</sup>

The extent to which these criminal code defects manifest largely turns on how executive and judicial authorities exercise their discretion. By developing a system of criminal liability and punishment without carefully circumscribing the limits of that criminal law, the executive and judicial branches hold greater power to shape outcomes in non-MPC jurisdictions. Powerful informal practices and mechanisms help guide prosecutorial and judicial discretion in the absence of legislative constraints,<sup>85</sup> but these cannot prevent outlier prosecutions and sentences.

The absence of clear, specific, and coherent legislative articulation of criminal law creates an inescapable structural risk of the above injustices occurring, even among prosecutors and judges who do their utmost to avoid such errors. Moreover, even if outliers in a discretionary justice system could be contained, a lack of clear criminal

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84. Wechsler, *supra* note 66, at 1100–02 (lack of fair notice as to what conduct is criminal); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 704–05 (1983) (non-prosecution or failed prosecutions arising from gaps in liability and reliance on ad hoc court decisions to fill in missing elements and define terms); Paul H. Robinson, Thomas Gaeta, Matthew Majarian, Megan Schultz & Douglas M. Weck, *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 711–12 (2010) (redundant offenses and inconsistent treatment of offenders); Robinson, *supra* note 67, at 177–79 (overlapping and often conflicting offenses that result in the delegitimization of the justice system); Pamela R. Ferguson, *Constructing a Criminal Code*, 20 CRIM. L.F. 139, 150–51, 154 (2009) (ambiguous and incomplete statutory language). *But see* Brown, *supra* note 70, at 292–93 (noting that judicial resistance has undermined MPC-based code reform); Robinson & Cahill, *supra* note 8, at 635, 638–39, 641 (noting that even in MPC-based criminal codes that have deteriorated over time there are disproportionate penalties imposed due to a lack of offense gradations and multiple punishments stemming from overlapping offenses).

85. Two of the most powerful mitigators of the flaws in the District's criminal code are its pattern jury instructions and voluntary sentencing guidelines. Published by LexisNexis and developed with a local group of attorneys and judges, the pattern jury instructions list the extensive uncodified elements of District crimes that have been identified in case law in (relatively) plain English and have gone so far as to promulgate consistent culpable mental state definitions in the absence of any uniform legislative or court authority. Barbara Bergman, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 3.100 Defendant's State of Mind; D.C. SENT'G COMM'N VOLUNTARY SENT'G GUIDELINES MANUAL 1 (D.C. SENT'G COMM'N 2023) (citing D.C. CODE § 3-105(c) (2024)). Both resources have existed for decades and are deeply entrenched in criminal law practice in the District, fostering more consistent adjudication and sentencing *despite* the absence of legislative guidance.



laws that reflect local norms undermines the legitimacy of the law and thereby undermines public safety.<sup>86</sup>

*B. Lack of Modern Model Penal Code-based Reform Initiatives*

MPC-based reform has been dead for decades. The last instance of MPC-based reform being legislatively approved was in 1989.<sup>87</sup> Like the District, several of the fifteen states (and the federal government) that lack MPC-based criminal statutes have attempted such reform in the distant past.<sup>88</sup> Yet, notwithstanding the problems endemic to unrevised codes, there has been almost no success at any kind of comprehensive criminal code reform. Since 2000, there have been efforts in multiple jurisdictions at comprehensive reform of codes that were *already* MPC-based, including in Illinois,<sup>89</sup> Kentucky,<sup>90</sup> Delaware,<sup>91</sup> and Missouri<sup>92</sup>. Of these, only Missouri's comprehensive revision was passed into law.<sup>93</sup> In recent years only one of the fifteen non-MPC jurisdictions (not counting the District) has seriously attempted MPC-based reform: Mississippi, which has been working on its code revision recommendations since 1994 with no end in sight.<sup>94</sup>

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86. See, e.g., *infra* note 471 (regarding the public safety compliance benefits of aligning criminal codes with contemporary moral intuitions).

87. Tennessee is the last state to have undergone MPC-based reform, in 1989. See Holley, *supra* note 67, at 229–30 n.2.

88. See Robinson & Dubber, *supra* note 65, at 326; *infra* note 101 (describing the D.C. Law Revision Commission (LRC) (1974-1992)).

89. See generally PAUL H. ROBINSON, MICHAEL T. CAHILL & COMM'N STAFF, FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION (2003).

90. See generally PAUL H. ROBINSON & KY. CRIM. JUST. COUNCIL STAFF, FINAL REPORT OF THE KENTUCKY PENAL CODE REVISION PROJECT (2003).

91. See generally DEL. GEN. ASSEMBLY'S CRIM. JUST. IMPROVEMENT COMM., FINAL REPORT TO THE DELAWARE GENERAL ASSEMBLY'S CRIMINAL JUSTICE IMPROVEMENT COMMITTEE (2019), <https://courts.delaware.gov/Supreme/criminalcode.aspx>; PAUL H. ROBINSON, MATTHEW KUSSMAUL, ILYA RUDYAK & CRIM. L. RSCH. GRP., REPORT OF THE DELAWARE CRIMINAL LAW RECODIFICATION PROJECT (2017).

92. Michele L. Moyer, *Schoolyard Felons: Missouri's New Criminal Code and Its Impact on Schools*, 82 MO. L. REV. 1213, 1213 (2017).

93. *Id.*; Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 403, 405–06, 408 (2010) (noting that while comprehensive reform did not succeed in Illinois, smaller, spin-off legislative proposals did. For example, the two-year Illinois code revision effort of the Illinois Criminal Code Rewrite and Reform Commission led by Professor Paul Robinson ended without legislative action but spurred the creation of another Illinois commission, the Criminal Law Edit, Alignment and Reform (CLEAR), which succeeded in an array of minor code changes).

94. Judith J. Johnson, *Why Mississippi Should Reform its Penal Code*, 37 MISS. C. L. REV. 107 (2019).

No institutions are actively working to advance MPC-based reform. While the American Law Institute has issued new MPC recommendations regarding sexual offenses<sup>95</sup> and sentencing,<sup>96</sup> those piecemeal efforts to rectify outdated portions of the MPC have, if anything, further diminished the likelihood of the organization engaging in more comprehensive work. The organization has not risen to calls for a new model penal code, and some have questioned its ability (and that of the American bar more broadly) to do so.<sup>97</sup> A few states have standing law revision commissions with joint civil and criminal mandates, but they have taken a piecemeal approach to reforms.<sup>98</sup> Other American professional organizations provide information and training on discrete criminal law reforms,<sup>99</sup> but since the withdrawal of the ALI in the 1980s, comprehensive criminal code reform has had no institutional champion.

Ambivalence to the arduous task of modernizing American criminal codes is understandable even if such reform is essential. In practice, allocating finite legislative attention to multi-year comprehensive code reform projects may come at the practical cost of improving public safety, prison conditions, parole review, and police procedures, and the ordinary work of overseeing executive branch agencies that come before the legislative committees where any comprehensive criminal code reform must start.<sup>100</sup> Choosing legislative priorities in these real-world circumstances is difficult, and this article does not argue that

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95. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. L. INST., Tentative Draft No. 6, 2022).

96. MODEL PENAL CODE: SENTENCING (AM. L. INST., Proposed Final Draft 2017).

97. Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53, 80 (2000); Gerard E. Lynch, *Revising the Model Penal Code: Keeping it Real*, 1 OHIO ST. J. CRIM. L. 219, 237 (2003).

98. CALIFORNIA LAW REVISION COMMISSION, <http://www.clrc.ca.gov> [<https://perma.cc/SA2M-UQER>]; CONNECTICUT LAW REVISION COMMISSION, <http://www.cga.ct.gov/lrc> (last visited Oct. 5, 2024); MICHIGAN LAW REVISION COMMISSION, <https://council.legislature.mi.gov/Council/MLRC> [<https://perma.cc/NNY9-TYRZ>]; NEW JERSEY LAW REVISION COMMISSION, <https://www.njlrc.org> [<https://perma.cc/2YG3-J26V>]; NEW YORK LAW REVISION COMMISSION, <https://lawrevision.state.ny.us> [<https://perma.cc/Q8JH-SDYE>]; OREGON LAW COMMISSION, <https://law-olc.uoregon.edu> [<https://perma.cc/E6CV-ERR7>]. A number of international governmental bodies are similarly dedicated to law reform (including criminal law) in their jurisdiction. *See, e.g.*, LAW REFORM COMMISSION OF IRELAND <https://www.lawreform.ie/useful-links/international-law-reform-bodies.132.html> (last visited Oct. 5, 2024).

99. *See, e.g.*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, <https://www.uniformlaws.org/home> [<https://perma.cc/6UTY-S844>].

100. Each of these competing priorities was a live issue before the District's Committee on the Judiciary and Public Safety in the 2021 to 2022 legislative session as it completed its review of the RCCA legislation.

comprehensive legislation like the District's should necessarily surmount other priorities in other jurisdictions. However, the feasibility of comprehensive criminal code reform should be revisited in the dozens of states with unrevised and outdated codes, and for the first time in a generation, there is a modern example of state-level MPC-based code reform that lawmakers, policymakers, and advocates can study.

## II. EARLY REFORM FAILURE: THE D.C. SENTENCING AND CRIMINAL CODE REFORM COMMISSION

The decade-long inability of the D.C. Sentencing and Criminal Code Reform Commission to develop any significant recommendations for change is an object lesson in how flawed structures and processes can derail even a well-funded reform effort with solid legislative backing. This Part describes the defects of the District's early effort, and how the successor agency responsible for criminal code revision was designed to remedy those failings.

### A. Agency Origin and Early Work (2007 to 2012)

Modern interest in undertaking comprehensive reform of the District's criminal code began in the early 2000s with a single local lawmaker's exasperation at the depth and breadth of problems in the existing criminal code.<sup>101</sup> In 2003, D.C. Councilmember Kathleen Patterson, then-chair of the D.C. Council's Committee on the Judiciary, launched a whole-code, staff-level review of District criminal statutes.<sup>102</sup> The review identified archaic crimes (e.g., dueling), the absence of expected statutes (e.g., liability for solicitation of anything other than sex, including murder), and highly inconsistent penalties across crimes for no apparent reason.<sup>103</sup> Subsequently, Councilmember Patterson pushed bills to repeal dozens of outdated statutes (including the

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101. Earlier attempts at MPC-based comprehensive code revision were made by the D.C. Law Revision Commission (LRC) (1974-1992). The LRC developed and submitted to Congress a skeletal "Basic Criminal Code" on March 7, 1978. *See* H.R. REP. NO. 95-29, at 5 (1978). However, Congress ultimately declined to enact the Basic Criminal Code and handed responsibility for criminal code reform (and all other criminal legislation) to local District lawmakers in 1979 as part of the transition to D.C. home rule. Under D.C. control the LRC continued to work on piecemeal criminal code reforms in the early 1980s. *See generally* Catherine T. Clarke, *A Survey of the District of Columbia Law Revision Commission*, 34 CATH. U. L. REV. 1309 (1985).

102. Email from Kathleen Patterson, D.C. Auditor and former D.C. Councilmember, to Author (Aug. 26, 2024, 5:19 PM) (on file with author).

103. *Id.*

District's no longer enforced criminalization of abortion)<sup>104</sup> and fill some of the most glaring statutory gaps.<sup>105</sup> However, the Councilmember realized much more extensive revisions were needed. In March 2005, after passing on the Committee gavel, Councilmember Patterson introduced a bill, the "Criminal Code Reform Commission Establishment Act of 2005" to establish a seventeen-member, temporary, independent Commission to prepare more "comprehensive recommendations" for a new criminal code.<sup>106</sup>

The new Judiciary Committee Chairman, Phil Mendelson, advanced Councilmember Patterson's legislation but amended it in 2006 to locate the criminal code reform mandate in the pre-existing D.C. Advisory Commission on Sentencing ("ASC") rather than create a stand-alone, new agency.<sup>107</sup> Under Mendelson's amended bill, a hybrid Sentencing and Criminal Code Revision Commission ("SCCRC") was to continue the former ASC duties to monitor and amend as needed the newly developed sentencing guidelines, while also submitting code revision recommendations to the Council within three years.<sup>108</sup> The criminal code reform mandate for the new SCCRC was extremely broad, applying generally to "criminal statutes" and requiring the Agency to provide recommendations to make the statutes "clear and consistent," to revise felony penalties to be "proportionate," provide a "rational system for classifying misdemeanor[s]," and propose language for the codification of "crimes defined in common law."<sup>109</sup> In addition, the SCCRC was asked generally to "[p]ropose such other

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104. See, e.g., Elimination of Outdated Crimes Amendment Act of 2003, D.C. CODE ANN. § 15-154 (West 2004).

105. See, e.g., Council of D.C. B16-0130, 16th Council Period (D.C. 2005), <https://lims.dccouncil.gov/Legislation/B16-0130> (including for the first time a charge of "solicitation of murder" in the D.C. code whereas previously, lacking any general statute providing solicitation liability, such conduct was arguably legal unless it was deemed to constitute a conspiracy under the Code's vague standards). Councilmember Patterson's proposed solicitation of murder statute was eventually passed as part of omnibus legislation. Council of D.C. B21-0247, 16th Council Period (D.C. 2007), <https://lims.dccouncil.gov/Legislation/B16-0247>.

106. Council of D.C. B16-0172, 16th Council Period (D.C. 2005), <https://lims.dccouncil.gov/Legislation/B16-0172>.

107. See COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REP. ON BILL 16-172, "ADVISORY COMMISSION ON SENTENCING AMENDMENT ACT OF 2006," 16th Council Period, at 4-5 (2006), [https://lims.dccouncil.gov/downloads/LIMS/15500/Committee\\_Report/B16-0172-COMMITTEEREPORT.pdf?Id=58773](https://lims.dccouncil.gov/downloads/LIMS/15500/Committee_Report/B16-0172-COMMITTEEREPORT.pdf?Id=58773).

108. From the outset, it was understood that this three-year timeframe was dubious. *Id.* at 5 ("The Committee is mindful of this task's magnitude and the possibility that the Commission may, at a later point, request additional time to complete this project.").

109. Council of D.C. B16-0172.

amendments [to criminal statutes] as the Commission believes are necessary.”<sup>110</sup> Mendelson’s bill was silent as to sources or methods to use in developing the recommendations, and, similar to Councilmember Patterson’s original bill, the goals of the reform recommendations did not specifically identify the reformed code public safety, cost, racial equity, or other matters often at the forefront of criminal justice reforms.<sup>111</sup>

Mendelson’s revised bill was easily approved, and the new SCCRC, with a new dual purpose to develop code reform recommendations and maintain the sentencing guidelines, went into effect on January 1, 2007.<sup>112</sup> However, the criminal code reform mandate of the new SCCRC clashed not only with the staffing and plans of the prior ASC, which was focused solely on the sentencing guidelines, but threatened to undermine prior years of ASC work developing sentencing guidelines. The ASC’s guidelines assumed existing legal distinctions between offenses (including the typical lack of offense gradations and the existence of overlapping offenses), and existing statutory penalties were given deference when determining guidelines penalties.<sup>113</sup>

The SCCRC’s chairman and executive director chose not to fundamentally shift the independent agency’s existing personnel or workflow to reflect the new code revision mission. The legislative creation of the SCCRC, with its new hybrid mission, did not come with new funding (although it did continue prior funding)<sup>114</sup> and carried forward the prior ASC staff and Commissioners (the latter with a few additions). Consequently, the existing ASC leadership faced a choice to either retain current staff and the work plans that they had envisioned for further guidelines-related work or terminate staff and rehire attorneys with a different skill set to try to meet the 2010

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110. *Id.*

111. *See supra* note 107.

112. *Id.*

113. The one major exception to this deference was drug crimes, for which the guidelines created a whole separate schedule of sharply lower penalties than were authorized by statute. D.C. SENT’G COMM’N, *supra* note 85, at app. B. (distinguishing the “Drug Grid” in appendix B, which is used for all felony drug crimes, from the “Master Grid,” which is used for all other felony crimes).

114. Continuation of the prior ASC funding levels for the SCCRC apparently reflected Council belief that the new mandate would allow staff time and resources freed up by the completion of the sentencing guidelines to shift to criminal code reform. *See* COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REP. ON BILL 16-172, “ADVISORY COMMISSION ON SENTENCING AMENDMENT ACT OF 2006,” 16th Council Period, at 4-5 (2006), [https://lms.dccouncil.gov/downloads/LIMS/15500/Committee\\_Report/B16-0172-COMMITTEEREPORT.pdf?Id=58773](https://lms.dccouncil.gov/downloads/LIMS/15500/Committee_Report/B16-0172-COMMITTEEREPORT.pdf?Id=58773).

deadline for issuing code reform recommendations.<sup>115</sup> The status quo won. No personnel changes were made to the five-person micro-agency's staff (which included just one attorney) when the new code reform mandate became law. The SCCRC's criminal code reform work was branded both internally and externally as a temporary "project."<sup>116</sup>

For most of the first two and a half years, the SCCRC's criminal code reform work was merely exploratory in nature. SCCRC staff unearthed archives from the 1970s and 1980s of the former D.C. Law Revision Commission<sup>117</sup> and made contact with representatives of prior criminal code revision projects in Illinois and Arizona, learning those projects utilized three to five attorneys for four to five years.<sup>118</sup> Organizationally, the SCCRC set up a dedicated Committee on Criminal Code Reform ("Committee") with new Commission member Ronald Gainer, an expert in federal criminal code revision efforts, as its Chair.<sup>119</sup> However, commissioners' interest was low, and there was considerable skepticism about reform. Only four commissioners volunteered to join Mr. Gainer on the Committee.<sup>120</sup> It was not until the spring of 2009 that the Agency first hired a project director dedicated to criminal code reform.<sup>121</sup>

Despite the Agency's lack of early progress, the D.C. Council extended the SCCRC's criminal code reform mandate to September 2012,<sup>122</sup> and the Agency tried to develop recommendations to redress the disproportionality of fines and imprisonment penalties.<sup>123</sup> However, while analysis of penalties was work familiar to Commissioners and staff who had worked on sentencing guidelines and avoided arguments over interpretations of existing and proposed criminal elements, it proved a hard task to even catalog crimes dispersed through the D.C. Code. It took the SCCRC Committee nearly a year and a half to complete the

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115. *Id.* at 2–3.

116. 2009 D.C. SENT'G & CRIM. CODE REVISION COMM'N ANN. REP. at 49.

117. *See, e.g.*, 2008 D.C. SENT'G & CRIM. CODE REVISION COMM'N ANN. REP. at 21.

118. 2009 D.C. SENT'G & CRIM. CODE REVISION COMM'N ANN. REP., *supra* note 116, at 45–46.

119. COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REP. ON PR17-0647, "DISTRICT OF COLUMBIA SENT'G AND CRIM. CODE REVISION COMM'N RONALD L. GAINER APPOINTMENT RESOL. OF 2008," at 1, 11–13 (2008).

120. 2011 D.C. SENT'G & CRIM. CODE REVISION COMM'N ANN. REP. at 60 n. 44.

121. 2009 D.C. SENT'G & CRIM. CODE REVISION COMM'N ANN. REP., *supra* note 116, at 43.

122. *Id.*

123. *Id.* at 49. Fines in the D.C. criminal code often lacked any rationale. For example, there were no fines for crimes such as robbery and burglary while minor misdemeanors often did carry fines. COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REP. ON BILL 19-214, "CRIMINAL FINE PROPORTIONALITY AMENDMENT ACT OF 2012," 19th Council Period, at 6 (2012).

uncontroversial work of identifying crimes and proposing new fines to align with the severity of existing maximum imprisonment penalties.<sup>124</sup> Further work to reform imprisonment penalties was then abandoned. Sent to the Council in 2011 and approved in late 2012, the “Criminal Fine Proportionality Amendment Act of 2012”<sup>125</sup> would prove to be the *only* criminal code reform legislation passed as a result of the SCCRC’s ten years of work (2007 to 2016).<sup>126</sup> Yet, insofar as many District-authorized imprisonment terms remained disproportionate, linking criminal fines to imprisonment terms only partly redressed fine disproportionality.

Pivoting from criminal fines to the elements of crimes, in 2011, the SCCRC adopted some written goals and procedures (“2011 procedures”) to guide further criminal code reform work.<sup>127</sup> Replacing its prior ad hoc approach, the 2011 procedures required the SCCRC’s Committee and staff to engage primarily in a translation approach that would seek to redraft offenses only to be “clear, consistent, and free of . . . historical anachronisms” and use “a standardized language and organization scheme” without consideration of proportionality or offense overlap or gaps.<sup>128</sup> Recommendations for “substantive changes” to the law were authorized as an *option* “when necessary and appropriate to promote consistency and clarity or otherwise improve the code.”<sup>129</sup> Per the 2011 procedures, the Committee was directed to operate by consensus and, wherever consensus was lacking, bracket disputed language and alternatives for later consideration by the Commission.<sup>130</sup>

The new 2011 procedures for code reform set the stage for following years of SCCRC work but remained untested for nearly a year, as the director of the criminal code revision project resigned in late 2011 and a paralegal was transferred.<sup>131</sup> Because the Agency process was wholly reliant on staff research, rather than research by SCCRC Commissioners, the Committee and all code reform ceased operation for nearly a year.

The Council, meanwhile, doubled down on its commitment to comprehensive criminal code reform and, in the summer of 2012,

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124. REP. ON BILL 19-214.

125. Criminal Fine Proportionality Amendment Act of 2012, D.C. CODE § 22-3571.01 (2013).

126. See 2015 D.C. SENT’G & CRIM. CODE REVISION COMM’N ANN. REP. at 9394.

127. 2011 D.C. SENT’G & CRIM. CODE REVISION COMM’N ANN. REP., *supra* note 120, at 61.

128. *Id.* at 61–62.

129. *Id.* at 62.

130. *Id.*

131. *Id.*

extended the SCCRC's criminal code reform deadline a third time, to 2016, and appropriated significant new funds to support a total of five staff to work on criminal code reform—a project director, two senior attorneys, and two paralegals.<sup>132</sup> Rejecting options for more piecemeal reforms, this funding substantially met the Agency's stated staffing need to engage in MPC-based reform projected from other jurisdictions' efforts.<sup>133</sup>

*B. Expansion and Reboot (2012 to 2016)*

A new phase in the SCCRC's code reform work commenced in November 2012, with the hiring of a new project director and, within months, an additional four attorneys.<sup>134</sup>

The 2013 procedures also, for the first time, detailed how staff would work with stakeholders on the Committee, exchanging iterative drafts.<sup>135</sup> There were to be twice-a-month, in-person, two-hour meetings of the five criminal code revision staff with the code revision Committee.<sup>136</sup> Committee meetings were closed to the public and not recorded, although internal minutes were kept.<sup>137</sup> Staff proposals of draft statutory language were accompanied by memoranda describing relevant District law (both the current District statute and case law), relevant MPC provisions, and examples from other states' revised statutes.<sup>138</sup> Committee meetings discussed, amended, and preliminarily accepted or sent back for further changes to the staff draft language for each section.<sup>139</sup> From the outset, multiple rounds of edits and multiple meetings were expected to reach consensus agreement on each section of draft language, but over time it was expected that a new draft title would accumulate that had the Committee's consensus approval.<sup>140</sup> Oversight was to come through monthly progress updates to the full Commission and twice-a-year updates to the Council.<sup>141</sup> Near the end

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132. COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, COMMITTEE REPORT ON BILL 19-214, "CRIMINAL FINE PROPORTIONALITY AMENDMENT ACT OF 2012," 19th Council Period, at 3 n.11 (2012).

133. *Id.*; see also CCRC REPORT TRANSMITTAL MEMORANDUM, *supra* note 4, at 2 (stating "the District's piecemeal legislative amendments have been unable to fix pervasive, structural problems with the D.C. Code").

134. 2013 D.C. SENT'G & CRIM. CODE REVISION COMM'N ANN. REP. at 74.

135. *Id.* at 77.

136. *Id.*

137. *Id.* at 6.

138. *Id.* at 77.

139. *Id.*

140. *Id.*

141. *Id.* at 5–6.



of the three-and-a-half-year span, the plan was for the Committee's preliminary draft text to be delivered to the full Commission for a final vote and then recommended to the Council.<sup>142</sup> However, no draft language was to be deemed final until the final Commission vote, with scheduled opportunities late in the process for global review and changes at the Committee and Commission level.<sup>143</sup>

In their first year of implementation, the 2013 procedures appeared to work. By the close of 2013, the staff had drafted and received the Committee's preliminary approval on definitions and other general provisions, as well as a reorganization of criminal offenses in Title 22 of the D.C. Code.<sup>144</sup> Discussion of how to codify culpable mental states akin to those in the MPC consumed many Committee meetings as the District had no such standard mental state definitions by statute or case law, and the government agency representatives in the Committee all were unfamiliar with these or other MPC features.<sup>145</sup> Yet, drafting new general provisions (including culpable mental state definitions) based on the MPC proved relatively uncontroversial, and there were no major objections to staff draft language. While iterative drafts continued to tweak the draft general provisions in minor ways, by the end of their first year, the new staff had begun revising specific property offenses, such as theft. The Committee held twenty-one in-person meetings with staff and reviewed over 800 pages of legal research.<sup>146</sup>

However, when the SCCRC Committee turned from drafting new provisions to revising existing crimes in 2014, it could not reach a consensus on recommendations. Disagreements arose not only about the optimal new language to reflect existing law, but what existing law was (especially when crime elements were articulated only in case law) and whether draft language was sufficiently distinct to constitute a substantive change in law.<sup>147</sup> With each new disagreement, the Committee inserted another set of bracketed alternatives in its accumulating draft text, putting the matters aside for later resolution by the Committee and Commission.<sup>148</sup> Soon, however, the numerous variants made it difficult to follow the draft statutory text, and the statutory mandate to improve consistency across multiple offenses,

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142. *Id.* at 78.

143. *Id.* at 78.

144. *Id.* at 81.

145. *Id.*

146. *Id.* at 6.

147. *Id.* at 81.

148. 2014 D.C. SENT'G & CRIM. CODE REVISION COMM'N ANN. REP. at 89–92.

each with multiple variants, became impossible. This lack of consensus occurred even under the seemingly uncontroversial translation and elementizing approaches required by the SCCRC Committee's procedures. "Optional," clearly substantive changes did not stand a chance.

In the latter half of 2014, about a year and a half into the SCCRC's fully staffed code reform work, the Committee's three institutional representatives (from the Public Defender Service and the federal and local prosecutor offices) called for a halt in meetings to conduct more extensive in-house reviews in their respective agencies of the accumulated Committee work to-date.<sup>149</sup> Although staff continued to work ahead to research and to draft new language per existing procedures, all Committee meetings ceased. The results of the Committee members' in-house reviews, completed in December 2014, showed unresolvable differences about the legitimate scope and manner of SCCRC code revision.<sup>150</sup> In early 2015, the full Commission declined to directly resolve these differences and, instead, Agency staff and the Committee were re-tasked with research and technical drafting to enact the existing D.C. Code Title 22 and other minor matters.<sup>151</sup>

For most of 2015 the D.C. Council did not take direct action to break the SCCRC's impasse. The Committee did develop and, in September 2015, the full Commission approved and submitted to the Council, a set of technical enactment and other miscellaneous revision recommendations that were promptly ignored.<sup>152</sup> Having no other work that could be addressed by consensus, the SCCRC Committee temporarily resumed the consideration of reforms to specific offenses and the drafting of new general provisions, and its practice of recommending substantive changes only when there was unanimity.<sup>153</sup>

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149. *Id.* at 92.

150. *Id.* at 92–93.

151. See 2015 D.C. SENT'G & CRIM. CODE REVISION COMM'N ANN. REP., *supra* note 126, at 97.

152. D.C. SENT'G & CRIM. CODE REVISION COMM'N, REPORT ON ENACTMENT OF D.C. CODE TITLE 22 AND OTHER CRIMINAL CODE REVISIONS (2015), <https://lims.dccouncil.gov/downloads/LIMS/34873/Introduction/RC21-0049-Introduction.pdf?Id=24474>. The "plus" reflected recommendations for a reorganization of criminal statutes, identification of statutes held to be unconstitutional, and identification of clearly archaic offenses that could be repealed with unanimous support.

153. 2015 D.C. SENT'G & CRIM. CODE REVISION COMM'N ANN. REP., *supra* note 126, at 100–02.

*C. Paralysis and Spin-off of the Reform Mandate (2016)*

The legislative response to the SCCRC's paralysis came on December 1, 2015, with the introduction of the Criminal Code Reform Commission Amendment Act of 2015<sup>154</sup> ("CCRC bill"), a bill to spin off the SCCRC's criminal code reform mandate and associated staff to a new, independent agency—the CCRC. The bill not only created a separate entity for code reform, but it also made critical changes to the organization, mandate, and process to be used in developing code reform recommendations.

Administratively, the CCRC bill inverted the prior structure in a manner more typical of an executive branch agency than a commission. The new CCRC executive director and four staff attorneys, transferees from the SCCRC, were directly and primarily responsible for meeting the new entity's statutory responsibilities.<sup>155</sup> There were no commissioners. Instead, a statutorily-specified seven-member "Advisory Group" was to provide ongoing consultation to staff, and, by majority vote, the five voting members of the advisory group had to approve transmission of the Agency's final recommendations.<sup>156</sup> The seven-member Advisory Group was comprised of the same four government stakeholders and three professionals "devoted to the research and analysis of criminal justice issues, appointed by the Council."<sup>157</sup> As an independent agency controlled by a District government employee and reporting its recommendations directly to the Council and Mayor with stakeholder input, the new administrative structure of the CCRC was designed to act more quickly and be more directly accountable to District elected officials.

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154. D.C. CODE § 3-151 (2016).

155. *Id.*; see also § 3-155 (shifting all funding from the old SCCRC to the new CCRC).

156. *Id.* § 3-153.

157. *Id.* The government stakeholders were representatives of the Office of the D.C. Attorney General (OAG), the Office of the U.S. Attorney for the District of Columbia (USAO-DC), the D.C. Public Defender Service (PDS), and the D.C. Council Committee on the Judiciary and Public Safety ("JPS"). Uniquely, USAO-DC is the largest U.S. Attorney office in the country and has primary authority to prosecute adult felonies and most misdemeanors in the D.C. Code *in addition to* violations of the federal criminal code. *About Us*, U.S. ATT'Y OFF. D.C., <https://www.justice.gov/usao-dc/about-us> [<https://perma.cc/Z828-8WLV>]. The District's Attorney General, in contrast, is locally elected and primarily has authority to bring charges in cases involving young people and assorted misdemeanors regardless of age. *About the Public Safety Division*, OFF. OF ATT'Y GEN. FOR D.C., <https://oag.dc.gov/about-oag/our-structure-divisions/about-public-safety-division> [<https://perma.cc/Y47F-7VXL>]. PDS is a federally funded agency representing indigent defendants accused of felony crimes. *Mission & Purpose*, PUB. DEF. SERV. FOR D.C., <https://www.pdsdc.org/about/mission-purpose> [<https://perma.cc/8YTV-YCQC>].

The CCRC bill also clarified that the new agency was to proceed with MPC-based reform that was data-driven. The bill required the new reform recommendations to be “comprehensive,” “[d]escribe all elements, including mental states, that must be proven,” “[r]educe unnecessary overlap and gaps between criminal offenses,” and “[a]djust penalties, fines, and the gradation of offenses to provide for proportionate penalties.”<sup>158</sup> The Agency was required to not only consult with the Advisory Group but also to review other jurisdictions’ criminal codes, the MPC, and “best practices recommended by criminal law experts.”<sup>159</sup> It also was required to submit with its recommendations “charging, sentencing, and other relevant statistics regarding the offenses affected by the recommendations.”<sup>160</sup>

Perhaps most importantly, however, the CCRC bill required a transparent, writing-based process for development of reform recommendations with majority approval of the Advisory Group. To ensure the new staff-driven administrative structure did not unduly burden or exclude Advisory Group member input, the members were required to be given at least one month to provide written comments on any draft revision language from staff.<sup>161</sup> Further, the statute said that the CCRC must “consider all written comments that are timely received” and was required to “propose all final recommendations to the Council based on the comments received.”<sup>162</sup> A majority vote of the five Advisory Committee voting members was required before transmitting recommendations to the Council and Mayor.<sup>163</sup> Finally, the CCRC was directed to make publicly available all the written comments received from Advisory Group members throughout the reform process.<sup>164</sup>

The CCRC bill was included in the District’s annual budget, which went into effect October 1, 2016.<sup>165</sup> However, the time from the

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158. D.C. CODE § 3-152 (2016).

159. *Id.*

160. *Id.* § 3-152(b)(2).

161. *Id.* § 3-152(c).

162. *Id.* § 3-153(d).

163. *Id.* § 3-153(e) (containing an explicit majority vote requirement).

164. *Id.* § 3-153(f).

165. Fiscal Year 2017 Budget Support Act of 2016, 63 D.C. Reg. 12932 (Oct. 8, 2016), <https://lirms.dccouncil.gov/Legislation/B21-0669> (Title III, Subtitle M. Establishment of Criminal Code Reform Commission). The enacted statute made some minor changes as compared to the introduced bill, including the addition of the Deputy Mayor for Public Safety to the Advisory Group (replacing one of the slots for an appointed legal expert) to represent views of the Executive. *Compare* D.C. CODE § 3-

December 2015 introduction of the CCRC bill to the start of the CCRC's operation was lost. In the interim, the SCCRC made no changes to its existing procedures, calling for a narrow translation and elementizing of crimes in accordance with existing law.<sup>166</sup> Almost ten years since the SCCRC was renamed and mandated to produce criminal code reform recommendations, and about four years since the project received the funding it requested for staffing, the SCCRC submitted a final report to the D.C. Council in late September 2016 without any recommendations for revising any crimes.<sup>167</sup>

### III. NEW STRUCTURE AND APPROACH: THE CRIMINAL CODE REFORM COMMISSION

Designed and run to avoid the paralysis of earlier efforts, the District's Criminal Code Reform Commission took an independent, transparent, data-driven approach to developing recommendations. This Part describes the details of *how* the District's revised criminal code was developed, particularly the way ideas were exchanged and the data sources used. While not attempting to summarize the agency's proposal and rationale, the last Section of this Part highlights the few recommendations that became the focus of subsequent legislative and media attention.

#### *A. Legislative Drafting and Legal Analysis*

The CCRC, which to-date remains in charge of developing District criminal code revisions, began at a frenetic pace. It was initially given just two years (to October 1, 2018) to issue its recommendations.<sup>168</sup> The deadline subsequently was pushed back, bit-by-bit as Charles Allen, a

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153(a)(2)(B) (specifying the Deputy Mayor for Public Safety and Justice as a non-voting member), *with* CRIMINAL CODE REFORM COMMISSION AMENDMENT ACT OF 2015 § 202(a)(5) (D.C. 2015) (initially calling for three professionals devoted to the research and analysis of criminal justice issues). The two Council appointees to the Advisory Group were George Washington University Law School Professor Don Braman and Georgetown University Law Center Professor Paul Butler. *See* 2016 D.C. CRIM. CODE REFORM COMM'N ANN. REP. at 1 n.4, <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/2-9-17%20CCRC-2016-Annual-Report.pdf> (listing all the initial members of the Advisory Group).

166. D.C. SENT'G & CRIM. CODE REVISION COMM'N, MINUTES OF FULL COMM'N MEETING JANUARY 19 (2016) at 2–3 <https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/Minutesfinal011916.pdf>.

167. 2016 D.C. SENT'G COMM'N ANN. REP. at 6.

168. Fiscal Year 2017 Budget Support Act of 2016, 63 D.C. Reg. 12932 § 3127 (Oct. 8, 2016), <https://lims.dccouncil.gov/Legislation/B21-0669>.

non-lawyer,<sup>169</sup> became the new Chairman of the Council's Committee on the Judiciary and Public Safety ("JPS") and grew familiar with the CCRC's work. But the extensions were year-by-year, perpetuated staff uncertainty, and restricted agency planning to a short-term basis. A final six-month extension for issuing recommendations was granted after the slowdown of the COVID-19 public health emergency.<sup>170</sup>

Virtually *none* of the draft statutory language developed under the former sentencing commission could be carried forward into the CCRC's new recommendations.<sup>171</sup> The CCRC's statute affirmed the prior agency's decision to ensure that each element of every crime, including culpable mental states, was codified.<sup>172</sup> However, the CCRC's statute's new language about gradation of offenses and reducing overlap between offenses more clearly required going beyond a translation and elementizing of existing law into modern parlance as the prior agency had attempted. The CCRC's statutorily specified goals of clarity, consistency, completeness, and proportionality were understood to trump repetition of prior law.<sup>173</sup> Moreover, the fact that the CCRC sought to revise a much more comprehensive scope of crimes and criminal statutes meant that all manner of definitions, terms, and elements had to be redrafted to be consistent throughout all their applications in the CCRC recommendations.<sup>174</sup>

Draft language aside, prior work by the sentencing commission provided an irreplaceable training experience for staff and

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169. *Meet Charles*, OFF. OF COUNCILMEMBER CHARLES ALLEN, <https://www.charlesallenward6.com/about> (last visited Oct. 5, 2024).

170. Fiscal Year 2021 Budget Support Act of 2020, 67 D.C. Reg. 10493 (Sept. 4, 2020), <https://lms.dccouncil.gov/Legislation/B23-0760> (Title III, Subtitle A. Criminal Code Reform Commission).

171. The exception was the SCCRC's technical enactment recommendations. D.C. SENT'G & CRIM. CODE REVISION COMM'N, REPORT ON ENACTMENT OF D.C. CODE TITLE 22 AND OTHER CRIMINAL CODE REVISIONS (2015), <https://lms.dccouncil.gov/downloads/LIMS/34873/Introduction/RC21-0049-Introduction.pdf?Id=24474>. As responsibility for such recommendations was repeated in the CCRC statute, the prior SCCRC recommendations were updated slightly and submitted as a 179-page bill to the Council and Mayor on May 5, 2017. CRIM. CODE REFORM COMM'N, REPORT #1: RECOMMENDATIONS FOR ENACTMENT OF D.C. CODE TITLE 22 AND OTHER CHANGES TO CRIM. STATUTES (2017), <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC-Recommendations-for-Mayor-and-Council-May-5-2017.pdf>. Council's failure to act on the technical bill caused subsequent delays for the major code reform bill in the critical 2021-2022 time period.

172. D.C. CODE § 3-152(a)(3) (2016).

173. *Id.* § 3-152(a).

174. For example, when the CCRC drafted general defenses for the first time, various crimes' offense elements had to be altered in various ways to ensure liability was appropriately either preserved or made subject to the newly codified defense.

stakeholders. The transferred SCCRC staff began with a strong knowledge base on substantive District law, experience researching model reforms, and prior drafting experience. Also, the CCRC's Advisory Group, comprised mostly of individuals who had served on the former sentencing commission's Criminal Code Revision Committee, began with the substantive and functional knowledge to immediately engage in the revision process.

To guide the development of CCRC recommendations, a comprehensive management plan was created by the Executive Director that laid out a sequenced schedule of revision topics.<sup>175</sup> The plan covered general provisions, specific crimes, penalties, penalty enhancements, and a few procedural matters inextricably linked to substantive crimes and punishments—roughly in that order.<sup>176</sup> Because of the Agency's initial two-year deadline, at first the plan targeted only an extremely limited set of general provisions and the most serious felonies and related misdemeanors. The list of statutes to revise and draft anew expanded when the Agency's due dates for final recommendations were extended.<sup>177</sup> In 2018, the management plan added drafting of defenses (e.g., self-defense, defense of others, and consent), dozens of offenses against government operations, and weapons offenses.<sup>178</sup>

For each topic in the management plan, the CCRC director assigned one of the agency's attorneys to be the lead with primary responsibility, and for the duration of the CCRC's work, that person remained the go-to expert on that topic.<sup>179</sup> An internal checklist of research and drafting steps guided that attorney's development of statutory language.<sup>180</sup> Initial research included analysis of the following: the statutory language and the text of closely related statutes; major District case law on the statute; legislative history; any relevant District pattern jury instructions, MPC or substantive criminal law treatise entries; law review articles directly on topic; and relevant District court

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175. 2016 D.C. CRIM. CODE REFORM COMM'N ANN. REP., *supra* note 165, at 9–13.

176. *Id.*

177. 2020 D.C. CRIM. CODE REFORM COMM'N ANN. REP. at 3–7.

178. CRIM. CODE REFORM COMM'N 2019 PERFORMANCE OVERSIGHT HEARING QUESTIONS & RESPONSES (2019) at 18–19, <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC%20Responses%20to%20Judiciary%20Oversight%20Pre-Hearing%20Questions%20%281-28-19%29.docx.pdf>.

179. Email from Patrice Sulton, Executive Director of the D.C. Justice Lab and former Senior Attorney Advisor with the D.C. Criminal Code Reform Commission from 2018 to 2020 (Aug. 26, 2024, 6:21 PM) (on file with author).

180. *Id.*

data on charging and conviction frequency and sentencing length.<sup>181</sup> Based on these materials, staff would draft a first, plain language translation of existing District law.<sup>182</sup> Staff also would make a list of gaps, ambiguities, overlap with other offenses, potential grading issues, and sketch possible ways to restructure the revised statute—merging with other crimes or penalty enhancements, breaking a crime up into multiple offenses, and grading divisions.<sup>183</sup>

Having completed their initial research and drafting, the lead attorney would meet with the agency director or a senior attorney to initially decide whether or how to restructure the offense and substantive changes to current law.<sup>184</sup> After this, to identify specific language options and national norms, a narrow, secondary round of research would be conducted to gauge how other jurisdictions with MPC-based criminal codes stood with respect to any changes in District law being considered.<sup>185</sup> The lead attorney would complete updated drafts of the statute and meet with the supervisor until all drafting issues were resolved and one version was selected for distribution to the agency Advisory Group.<sup>186</sup>

The lead CCRC attorney would then write a legal commentary to accompany the proposed statutory text, relying on their prior research.<sup>187</sup> The commentary would begin with a summary of the meaning of the new language (not its impact on existing law).<sup>188</sup> It then would proceed in sections distinguishing clear changes in law (statutory or case law), possible changes in law (where the underlying statute or case law was itself ambiguous and so not easy to compare), and non-substantive clarificatory changes of language for the sake of clarity and consistency.<sup>189</sup> A separate commentary entry would be made for each substantive change in District law, citing or quoting the current law and the basis for the change in the CCRC's own statutory mandate (e.g., clarification or reducing unnecessary overlap).<sup>190</sup>

In practice, the staff's criminal code revision work did not exactly follow the linear process as described here. Agency staff were

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181. *Id.*; see also CCRC REPORT TRANSMITTAL MEMORANDUM, *supra* note 4, at 1 (notifying the Executive of the basis of the recommendations).

182. Email from Patrice Sulton, *supra* note 179.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*



constantly re-revising their drafts and at times restructuring the entire offense. The internal review was not entirely dependent on one supervisor either. Staff conferred with colleagues, especially when the other attorney had worked on related provisions, or to get fresh eyes to test how the new statutory language would fare in common and unusual hypotheticals.

After final review by the Executive Director, the staff's draft statutory language and accompanying legal commentary were distributed to the agency Advisory Group for comment in the form of a "Code Revision Memorandum" (CRM) on the specified crime or other topic.<sup>191</sup> Findings from other jurisdiction research, sentencing statistics, and sometimes other matters would be compiled in a separate "research memorandum" (RM) containing mere background information for the Advisory Group.<sup>192</sup>

#### *B. Advisory Group Review Process*

To maximize transparency and enable public input in the drafting stage, all agency CRM and RM containing research and proposals were simultaneously released to the Advisory Group members and posted to the CCRC's public website.<sup>193</sup> Advisory Group members had a minimum of thirty days to review each CRM and provide written comments by preset deadlines.<sup>194</sup> Immediately after the deadline, all written comments received on a particular CRM were transmitted to the full Advisory Group and posted on the Agency website.<sup>195</sup> In its simultaneous online publication of all draft documents, Advisory Group written comments, and administrative matters below, the CCRC chose to go further than required by open government laws or the Agency's own statute. The Agency's statute specified that the CCRC's final recommendations must be "based on" the written comments received from Advisory Group members.<sup>196</sup> Accordingly, every recommendation in the Advisory Group's written comments received a written explanation from agency staff, shared directly and publicly posted online, as to the statutory rationale for the recommendation's

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191. *Id.*

192. *Id.*

193. Fiscal Year 2017 Budget Support Act of 2016, 63 D.C. Reg. 12932, § 3124(c) (Oct. 8, 2016).

194. *Id.*

195. *Id.* § 3124(f).

196. D.C. CODE § 3-153(d) (2016).

adoption, partial adoption, or rejection in the CCRC's subsequent or final proposed statutory language.<sup>197</sup>

Advisory Group members' engagement in the written comment process varied widely. While open to all seven (voting and non-voting) members, only the three institutional members (representatives of the District's two prosecutors' offices and the public defender) submitted written comments.<sup>198</sup> Also, while the local District prosecutor and public defender engaged in the written comment process throughout the CCRC's work, for the first two and a half years, the USAO-DC representative submitted almost no written comments.<sup>199</sup> However, all comments benefited the CCRC's revision work by catching drafting errors, bringing additional practice-based perspectives on how statutory language would be interpreted, and providing a further channel to the broader criminal justice community monitoring the Agency's work. Advisory Group written comments also left behind a deep and transparent record of drafting concerns, support, and alternatives for lawmakers and others to consider. Over the four and a half years of the CCRC's development of its recommendations, its Advisory Group members provided over 700 pages of written comments and hundreds of hours of group and individual meetings with agency staff.<sup>200</sup>

Despite its primary reliance on written exchanges, the CCRC's code revision process also included in-person, open-to-the-public meetings between the Agency staff and the Advisory Group. There were fifty-one such monthly meetings over the four and a half years of development of the RCCA, from October 2016 to March 2021.<sup>201</sup> Advance notices

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197. CRIM. CODE REFORM COMM'N, SUMMARY OF THE REVISED CRIMINAL CODE ACT OF 2021 (RCCA), app. d (2021) [hereinafter SUMMARY OF THE RCCA app. d], <https://ccrc.dc.gov/node/1531406> (cataloguing the CCRC's disposition of Advisory Group comments and listing the changes made from prior drafts).

198. CRIM. CODE REFORM COMM'N, SUMMARY OF THE REVISED CRIMINAL CODE ACT OF 2021 (RCCA), app. c (2021) [hereinafter SUMMARY OF THE RCCA app. c], <https://ccrc.dc.gov/node/1531396> (providing the Advisory Group's comments on draft documents).

199. *Id.* On February 22, 2017, April 24, 2017, and July 31, 2017, USAO-DC issued a cumulative total of five pages of comments on various initial drafts circulated by the CCRC. The next written comments that USAO-DC submitted were over two years later, on May 20, 2019, and totaled eleven pages, single-spaced. By comparison, prior to May 20, 2019, the other two institutional members of the Advisory Group, from OAG and PDS, submitted over 200 pages of combined written comments.

200. *Criminal Code Reform Commission*, DC.GOV, <https://ccrc.dc.gov/node/1201597> (showing all meeting minutes of the Advisory Committee). *See generally* SUMMARY OF THE RCCA app. c, *supra* note 198.

201. SUMMARY OF THE RCCA app. c, *supra* note 198.

with agendas (and materials to be discussed) were posted online, as well as meeting recordings and detailed minutes.<sup>202</sup> Every CRM containing new draft statutory language and legal commentary was on the agenda for at least one public meeting,<sup>203</sup> as was every set of comments received from Advisory Group members. Moreover, all other Advisory Group members participated in a majority of the Agency's fifty-one Advisory Group meetings, aside from the representative of the Deputy Mayor for Public Safety and Justice (DMPSJ) who was largely absent.<sup>204</sup>

Yet, the Advisory Group's meeting discussions were, at times, quite limited. Regarding revised statutory language, agency staff typically would give a summary before opening the draft revised language for group discussion.<sup>205</sup> When following up on Advisory Group members' written comments, staff usually aimed to understand the members' meaning. But, neither with respect to statutory language or the written comments did the staff seek to persuade or reconcile differences among members.<sup>206</sup> Oral discussion at Advisory Group meetings proved most productive at drafting language to more clearly express statutory requirements on which there was general policy agreement. In contrast, Advisory Group members often relied on their written responses and avoided direct oral discussion when it came to their policy differences. The reasons for these discussion dynamics among Advisory Group members are unclear and perhaps diverse.<sup>207</sup>

Feedback on draft CCRC provisions from outside the Advisory Group was minimal. The judiciary was not represented in the Advisory Group. The CCRC Executive Director contacted the Chief Judges of the D.C. Superior Court and Court of Appeals to describe the Agency's

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202. *Id.*

203. Similarly, if there were subsequent updates to the CRM, there would be at least one meeting opening the updated CRM for discussion.

204. COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REP. ON B24-0416, "REVISED CRIMINAL CODE ACT OF 2022," 24TH COUNCIL PERIOD, at 76 (2022), [https://lims.dccouncil.gov/downloads/LIMS/47954/Committee\\_Report/B24-0416-Committee\\_Report1.pdf?Id=148331](https://lims.dccouncil.gov/downloads/LIMS/47954/Committee_Report/B24-0416-Committee_Report1.pdf?Id=148331).

205. CRIM. CODE REFORM COMM'N, MINUTES OF PUB. MEETING JAN. 11, 2017 (2017), <https://ccrc.dc.gov/node/1214776>.

206. *Id.*

207. The fact that discussions were public and recorded may have affected some agency representatives' willingness to engage in frank conversation. However, more prosaic factors may have been at work, such as competing work demands of Advisory Group members.

work, request data, and solicit input;<sup>208</sup> however, neither the Superior Court nor the Court of Appeals chose to engage with the CCRC's drafting process.<sup>209</sup> Affirmative outreach to potentially interested community organizations was limited during the early stages of the CCRC, both due to the lack of interest in the pre-introduction stage of the bill by those contacted and lack of internal CCRC staff resources.<sup>210</sup> Only near the end of its work on revisions, in 2021, did the Agency receive funding for an external public relations contractor.<sup>211</sup> Moreover, throughout the four and a half years the CCRC developed its recommendations, there was virtually no press coverage.<sup>212</sup> Several local and national nonprofit organizations<sup>213</sup> monitored the CCRC's work via its publication of draft revisions on its website, but neither they nor other external persons or entities provided written comments to the Agency during the development of the Agency's code revision recommendations.

*C. Data: Criminological Research, Court Data, & Public Opinion Surveys*

In parallel with the CCRC's process for drafting revised statutes and the accompanying legal commentary, the Agency also gathered criminological research, collected data on charging and sentencing in the District, and designed and conducted a large-sample survey of District voters' opinions on the relative seriousness of criminal behavior. Statutorily authorized to receive relevant information from other agencies,<sup>214</sup> the CCRC was required to provide with its final recommendations relevant charging, sentencing and other statistical information on offenses affected by the agency recommendations.<sup>215</sup>

This statistical information and criminological research played relatively little role in the drafting of general provisions and revision of

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208. CRIM. CODE REFORM COMM'N, MINUTES OF PUB. MEETING JAN. 11, 2017 (2017) at 2, <https://ccrc.dc.gov/node/1214776>; 2017 D.C. CRIM. CODE REFORM COMM'N ANN. REP. at 9–11, <https://ccrc.dc.gov/node/1309246>.

209. See generally 2017 D.C. CRIM. CODE REFORM COMM'N ANN. REP., *supra* note 208.

210. *Id.* at 11–12.

211. 2021 D.C. CRIM. CODE REFORM COMM'N ANN. REP. at 2–3, [https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC\\_2021\\_Annual%20Report.pdf](https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC_2021_Annual%20Report.pdf).

212. Only one news outlet is known to have published about the Agency's work in this four-and-a-half-year time period. Martin Austerhuhle, *Should D.C. Scrap Outdated Laws Like The One That Outlaws 'Common Scolds?* WAMU 88.5 (May 8, 2017), <https://wamu.org/story/17/05/08/dc-scrap-outdated-laws-like-one-outlaws-common-scolds>.

213. E.g., the ACLU of the District of Columbia and the D.C. Justice Lab.

214. D.C. CODE § 3-152(f) (2016).

215. *Id.* § 3-152(b).

specific crimes. However, as discussed below, it provided an empirical basis for the controversial issue of setting penalty recommendations for revised offenses.<sup>216</sup>

Statutory penalties can have proportionality problems of two kinds. First, an individual crime penalty or penalty enhancement may no longer reflect their seriousness in the eyes of current District residents. Second, the full spectrum of criminal penalties and penalty enhancements that could be applied to a single criminal event may not reflect modern judgments of District residents. Either kind of disproportionality falls within the CCRC's statutory mandate to "[a]djust penalties, fines, and the gradation of offenses to provide for proportionate penalties."<sup>217</sup> However, to assess whether (and what) new penalties would be proportionate, the CCRC used several sources of objective data on how the District criminal justice actors and the public weighted crime seriousness.

The first data source that the Agency obtained and analyzed was D.C. Superior Court data on the charging, convictions, and sentencing for adults in the 2010 to 2019 period.<sup>218</sup> This work began immediately upon the start of the CCRC in 2016 and took years. After significant delays, the D.C. courts agreed to provide most of the data that the CCRC requested in an anonymized format.<sup>219</sup> Due to the inherently labyrinthine nature of District code citations, the varied statutory citation input methods for charges, and the manner in which the court system kept track of concurrent and consecutive sentencing, the data from the D.C. courts was messy.<sup>220</sup> Agency staff relied on another D.C. government unit<sup>221</sup> and a private contractor for data cleaning and

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216. See *infra* note 263 and accompanying text.

217. § 3-152(a)(6).

218. Online public data on arrests was also examined briefly. However, given the frequency with which cases were dropped or the charge codes used in arrest were changed when the cases were examined by prosecutors, it was not possible to develop a coherent longitudinal picture of how available charges were being used in the District.

219. 2017 D.C. CRIM. CODE REFORM COMM'N ANN. REP., *supra* note 208, at 9–10 (stating that the data set received in August 2017 did not distinguish charges for attempted crimes); 2018 D.C. CRIM. CODE REFORM COMM'N ANN. REP. at 8. The CCRC was unable to obtain data on sentencing by individual judges, anecdotally a major factor in sentencing disparities.

220. See CRIM. CODE REFORM COMM'N, SUMMARY OF THE REVISED CRIMINAL CODE ACT OF 2021 (RCCA), app. f, at 1–3, 6, 10 (2021) [hereinafter SUMMARY OF THE RCCA app. f], <https://ccrc.dc.gov/node/1531426> (providing a full description of the data cleaning efforts performed by the CCRC and its contractor).

221. Initially lacking funds to hire a data analyst of its own, the CCRC benefited from years of no-cost data analysis services from the Lab@DC, a new unit in District

analysis support<sup>222</sup> until the Agency was able to hire a social scientist on staff in 2020.<sup>223</sup>

While other District agencies provided various analyses of court data focused on enforcement, caseloads, and processing times, none looked at the data from a code revision perspective. The CCRC analysis sought to answer questions about: what charges were rarely or never brought; which overlapping charges were brought under what circumstances; when were available sentencing enhancements actually applied and how did they impact total imprisonment time; what effect did mandatory minimums appear to have on sentencing; and, above all, how imprisonment penalties compared to authorized statutory maximums and minimums.<sup>224</sup> The CCRC's exhaustive analysis shed light on these and other questions and showed how actual court sentences over the prior decade differed sharply from statutory maxima.<sup>225</sup>

The second data source that the CCRC reviewed was the Voluntary Sentencing Guidelines issued by the D.C. Sentencing Commission (formerly the SCCRC).<sup>226</sup> The guidelines were of limited value insofar as they addressed only felonies, were chiefly based on court sentencing data from a time period in the late 1990s and early 2000s, did not attempt to make distinctions within (grade) the wide-ranging behavior covered by many District offenses, and did not redress the problem of consecutive sentencing for many overlapping offenses.<sup>227</sup> Despite these constraints, the sentencing guidelines showed the judgment of one expert body in ranking the seriousness of existing District felonies.

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that provided expert advice to various District agencies. 2019 D.C. CRIM. CODE REFORM COMM'N ANN. REP. at 12. The Lab@DC was officially launched July 20, 2017, with a grant from the Laura and John Arnold Foundation to create an in-house data science team in the D.C. Government. EXEC. OFF. OF THE MAYOR, *Mayor Bowser Launches Lab @ DC* (July 19, 2017), <https://mayor.dc.gov/release/mayor-bowser-launch-lab-dc>.

222. See SUMMARY OF THE RCCA app. f, *supra* note 220 (regarding contractor services).

223. 2020 D.C. CRIM. CODE REFORM COMM'N ANN. REP., *supra* note 277, at 9 (stating that social scientist Margarita Bronshteyn was hired in October 2020).

224. See generally SUMMARY OF THE RCCA app. f, *supra* note 220.

225. See, e.g., *id.* at 43–123 (demonstrating that total months sentenced was far lower than the statutory maximum penalties).

226. See, e.g., D.C. CRIM. CODE REFORM COMM'N, ADVISORY GRP. MEMORANDUM #26 (2019) at 1, <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-26%E2%80%93DC-Code-Statutory-Penalties-and-Voluntary-Sentencing-Guidelines.pdf> (stating that the compiled “master list” contained information related to D.C. criminal statutes and maximum and minimum penalties and the CCRC recommendations).

227. See, e.g., *id.* at 4.

Moreover, public data from the Sentencing Commission<sup>228</sup> shed light on the criminal history of offenders and how crucially that informed court practices. Not surprisingly, given that nearly all District sentences complied with the sentencing guidelines recommendations,<sup>229</sup> the picture of a proportionate sentence under the sentencing guidelines largely matched that in court data.

The third data source used by the CCRC to assess penalty proportionality consisted of five public opinion surveys of District voters.<sup>230</sup> The surveys were designed to look beyond the views of judges and criminal justice practitioners entrenched in the current system and to understand how legal categorization of behavior into current D.C. Code crimes might distort the seriousness of that behavior (as perceived by the public).<sup>231</sup> The surveys presented short, written descriptions of a crime scenario, e.g., “[t]hreatening to kill someone face-to-face, while displaying a gun.”<sup>232</sup> Respondents were asked to numerically rate the seriousness of the given crime scenario from zero to twelve using a table listing “milestone” types of bodily injury that had numerical severity levels already assigned, e.g., “causing a minor injury treatable at home” (a four on the table) and “intentionally killing someone” (the maximum twelve on the table).<sup>233</sup> The survey was designed with assistance from graduate students at the George Washington University Trachtenberg School of Public Policy<sup>234</sup> and was like the design of prior research conducted by University of

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228. D.C. SENT’G COMM’N, *Sentencing Data*, <https://scdc.dc.gov/page/sentencing-data> (last visited Jan. 18, 2024).

229. 2022 SENT’G COMM’N ANN. REP. at iii (“Judicial compliance with the Sentencing Guidelines remains very high. In 2022, 97.3% of all felony counts sentenced were compliant with the Guidelines, compared to 99% in 2020 and 98.5% in 2021.”).

230. D.C. CRIM. CODE REFORM COMM’N, ADVISORY GROUP MEMORANDUM #27 (2019) at 1–11, <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-27-Public-Opinion-Surveys-on-Ordinal-Ranking-of-Offenses.pdf>.

231. *Id.* app. b, YouGov Codebooks Surveys 1-5, at 12–13 (finding that a more representative and diverse sample size would provide holistic views of public perception of seriousness of criminal behavior).

232. *Id.* app. d, GW Student Report on Survey 1, at 13, 15 (stating that the demographics of the sample size led to difference in perception of the severity of criminal behavior).

233. *Id.* app. a, Survey Responses, at 1, 10.

234. *Id.* at 1.

Pennsylvania Law School professor Paul Robinson and others regarding penalties in Pennsylvania<sup>235</sup> and New Jersey.<sup>236</sup>

The survey indicated that, as compared to the milestone crime scenarios resulting in bodily injury, District voters consistently ranked the test offenses for crimes like robbery, burglary, carjacking, firearm brandishing and other offenses as *less* severe—often, radically less severe than their applicable statutory penalties reflected.<sup>237</sup> For example, two carjacking scenarios were tested in the survey. In one, a person pulled the victim out of a car and caused them minor bodily injury (i.e., less serious than a broken bone or other injury requiring medical care), and in the other the person brandished a firearm to get the person out of the car (but caused no other physical injury). In both scenarios voters rated the severity about the same as one assault causing significant bodily injury (e.g., like a broken bone, something requiring medical treatment but not life threatening).<sup>238</sup>

But the statutory maximums for the many chargeable crimes in the D.C. Code corresponding to these carjacking-type behaviors are sharply higher than the maximum for one assault causing significant bodily injury.<sup>239</sup> Under the D.C. Code an assault with “significant bodily injury” is a low-severity felony that carries three year maximum imprisonment,<sup>240</sup> a maximum higher than many states.<sup>241</sup> But the District’s armed carjacking charge carries a mandatory minimum of fifteen years and a maximum of thirty years (assuming no prior felonies

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235. See Paul H. Robinson & Univ. of Pa. Crim. L. Rsch. Grp., *Report on Offense Grading in Pennsylvania*, (UNIV. OF PA. L. SCH., PUB. L. RSCH. PAPER NO. 10-01, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1527149](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527149) at 9 (stating that the survey participants were asked to use the “milestone” framework to place their perceptions of behavior); see also Robinson et al., *supra* note 80.

236. See Paul H. Robinson, Rebecca Levenson, Nicholas Feltham, Andrew Sperl, Kristen-Elise Brooks, Agatha Koprowskiet et al., *Report on Offense Grading in New Jersey* 15–17 (2011), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1339&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1339&context=faculty_scholarship) (discussing the “milestone” framework in the methodology section).

237. See CRIM. CODE REFORM COMM’N, SUMMARY OF THE REVISED CRIMINAL CODE ACT OF 2021 (RCCA), app. i, at 117, 122–23, 132–33 (2021) [hereinafter SUMMARY OF THE RCCA app. i], <https://ccrc.dc.gov/node/1531446> (finding a multi-year gap between the public’s perception of proportional punishment and the statutorily mandated penalties).

238. *Id.* at 122, 133.

239. *Id.* tbl. 12, at 131 (listing penalties by robbery severity).

240. D.C. CODE § 22-404(a)(2) (2023).

241. See CRIM. CODE REFORM COMM’N, SUMMARY OF THE REVISED CRIMINAL CODE ACT OF 2021 (RCCA), app. j, at 359, 364 (2021) [hereinafter SUMMARY OF THE RCCA app. j], <https://ccrc.dc.gov/page/recommendations> (summarizing research on the criminal code provisions of other jurisdictions).



or aggravating circumstances),<sup>242</sup> and even unarmed carjacking has a mandatory minimum of seven years and a maximum of twenty-one years.<sup>243</sup> Moreover carjacking-type-behavior can, in addition, be charged and convicted as an ordinary robbery (maximum fifteen years).<sup>244</sup> An armed carjacking can also be charged and convicted for possession of a firearm during a crime of violence, an offense carrying a mandatory minimum of five years and a maximum of fifteen years.<sup>245</sup> There are still other non-merging felony convictions for behavior that moves another's car without permission, including unauthorized use of a motor vehicle (seven years),<sup>246</sup> and carrying a dangerous weapon (five years).<sup>247</sup>

Crucially, judges in the District can run any or all these convictions for carjacking-type behavior concurrently or consecutively.<sup>248</sup> So, for what voters think is behavior of the same basic seriousness, the D.C. Code variously authorizes a maximum of three years for lower-severity felony assault, up to fifty-eight years (and a mandatory minimum of seven years) for unarmed carjacking, or up to seventy-two years (and a mandatory minimum of fifteen years) for armed carjacking.<sup>249</sup>

Lastly, in addition to the above data sources, the CCRC reviewed public health data on District life expectancy, criminological literature on the effects of long-term sentences and changes in sentence length on deterrence, as well as data on actual imprisonment terms in other jurisdictions.<sup>250</sup>

This latter information was needed to help set absolute numbers for the most severe penalties. Those top numbers would form a ceiling

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242. D.C. CODE § 22-2803(c) (2023).

243. *Id.* § 22-2803(a) (2).

244. *Id.* § 22-2801; *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997) (convictions for armed carjacking and robbery do not merge).

245. D.C. CODE § 22-4504(b); *Matthews v. United States*, 892 A.2d 1100, 1102 (D.C. 2006) (upholding convictions for both D.C. CODE § 22-4504(b) and armed carjacking).

246. D.C. CODE § 22-3215; *Austin v. United States*, 292 A.3d 763, 771-72 (D.C. 2023) (convictions for unauthorized use of a motor vehicle and carjacking do not merge).

247. D.C. CODE § 22-4504(a)(1); *Matthews*, 892 A.2d at 1107-08 (upholding convictions for both carrying a dangerous weapon and armed carjacking).

248. D.C. CODE § 22-112; *see also* Paul H. Robinson, Matthew G. Kussmaul & Muhammad Sarahne, *How Criminal Code Drafting Form Can Restrain Prosecutorial and Legislative Excesses: Consolidated Offense Drafting*, 58 HARV. J. ON LEGIS. 69, 75 (2021) (explaining that prosecutors have “excessive leverage” in plea negotiations when judges have discretion over whether sentences are consecutive or concurrent).

249. For a longer discussion of the problem of overlapping D.C. Code offenses that address carjacking-type behavior, *see* Michael Serota, *Second Looks & Criminal Legislation*, 17 OHIO ST. J. CRIM. L., 495, 506-14 (2020).

250. *Id.* at 521.

below which less severe penalties would need to be differentiated. The MPC Sentencing recommendations issued in 2017 provided guidance on the highest imprisonment level as life *with* the possibility of parole.<sup>251</sup> However, to set a definite term of years equivalent to a life sentence with possibility of parole, the CCRC considered public health and court data. Agency research found: 89% of those convicted of first-degree murder in the District were non-Hispanic, Black men; that life expectancy for these men was just under sixty-nine years; and that, absent any new judicial “second look” procedure to review long term sentences (another MPC Sentencing recommendation), a convicted person would have to serve at least 85% of their sentence.<sup>252</sup> This information, along with consideration of a supporting federal calculation that thirty-nine years constituted an effective life sentence<sup>253</sup> and District court data and other authorities,<sup>254</sup> provided objective guidance on how to establish the upper limit of imprisonment penalties.

Criminological and sentencing research on other jurisdictions also shed light on the expected effects of any proposed penalty changes and whether such changes would be consistent with national trends in penalties. Well-established research highlighted by the Department of Justice and a multitude of criminology sources established that moderate changes in statutory penalties (especially mid and severe felony penalties) would have little or no expected effect on their

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251. As the District is not a death penalty jurisdiction, the ALI recommendation for the District’s most severe sentence is life *with* possibility of release sentence. MODEL PENAL CODE: SENT’G § 6.06 cmt. k at 159. (AM. L. INST., Proposed Final Draft 2017). This MPC recommendation was the basis for the CCRC recommendation for the most severe penalty available for first degree murder sentencing. CRIM. CODE REFORM COMM’N, SUMMARY OF THE REVISED CRIMINAL CODE ACT OF 2021 (RCCA), cmt. on subtitle I, at at 380-81 (2021) [hereinafter SUMMARY OF THE RCCA cmt. on subtitle I], <https://ccrc.dc.gov/node/1531366>. The MPC also recommended a twenty-year maximum for the penultimate imprisonment penalty and documented that this was followed in many (though not most) states. MODEL PENAL CODE: SENT’G § 6.06 cmt. k(3) at 163–64.

252. SUMMARY OF THE RCCA cmt. on subtitle I, *supra* note 251, at 378.

253. *Id.* at 377.

254. *Id.* at 376–82 (stating that life expectancy data plays a large role in determining when a term-of-years sentence becomes a life sentence; finding that the disproportionate incarceration of Black men in the District adds a complex racial element to Black men being likely to die while serving out their sentences); *see also* D.C. CRIM. CODE REFORM COMM’N, ANALYSIS OF LIFE, LIFE-EQUIVALENT, AND LONG-TERM SENTENCES IN THE DISTRICT OF COLUMBIA 2010-2019 (2021), <https://ccrc.dc.gov/node/1558221>.

deterrence.<sup>255</sup> Statistical relationships identified in criminological literature, e.g., the age-crime curve<sup>256</sup> and evidence of potential criminogenic effects of incarceration,<sup>257</sup> also were considered when determining penalty classifications for the new criminal code. Unfortunately, the Agency was unable to find scholarship on the likely changes in deterrence or incapacitation that might result from moderate changes in statutory penalties for specific offenses. Current District sentencing data for specific offenses was compared to authorized maxima<sup>258</sup> and time-served data from other jurisdictions,<sup>259</sup> however, to gain a rough sense of how current local sentencing and proposed revisions compared with other jurisdictions (notwithstanding the District's lack of parole and strict truth-in-sentencing laws).

Agency analysis of all the abovementioned empirical research and data sources was ongoing and, to the extent available, used in drafting offense revisions and legal commentary. Commonly, staff used the information to help distinguish possible gradations and decide whether and how to restructure (merge or break out) overlapping offenses.<sup>260</sup> For example, gradation recommendations for a crime like robbery or assault included examination of survey findings showing sharply different views of the seriousness of conduct was depending on whether a gun was present and hidden, displayed, or used to harm another—distinctions not always reflected in current District law.<sup>261</sup> As with draft statutory language and legal commentary, empirical research and data were shared with the Advisory Group, raised in Advisory Group meetings, and posted on the Agency's website.

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255. See, e.g., NAT'L INSTS. OF JUST., *Five Things About Deterrence* (May 2016) at 1–2, <https://nij.gov/five-things/pages/deterrence.aspx#notel> (finding that certain penalties do little to deter crime because of numbness it can cause in convicted individuals serving long sentences).

256. See, e.g., SUMMARY OF THE RCCA cmt. on subtitle I, *supra* note 251, at 382 (stating that the age-crime curve suggests that the likelihood of an individual to commit crime decreases as they get older).

257. See, e.g., *id.* at 388 (asserting that incarceration can amplify factors, such as poverty and isolation, leading to a higher likelihood of reoffending).

258. See, e.g., *id.* at 386 n.74 (stating that D.C. Code authorizing up to sixty years of imprisonment for the crime of burglary is far greater than other jurisdictions).

259. Danielle Kaeble, *Time Served In State Prison, 2016*, BUREAU OF JUST. STAT., Nov. 2018, at 2, <https://bjs.ojp.gov/content/pub/pdf/tssp16.pdf> (finding that the median time served for all offenses was 1.3 years).

260. See, e.g., SUMMARY OF THE RCCA cmt. on subtitle I, *supra* note 251, at 142–46 (stating that the D.C. court systems would determine if the elements of one offense is a subset of another to decide the question of merger).

261. SUMMARY OF THE RCCA app. i, *supra* note 237, at 105.

However, the principal use of the abovementioned data sources and empirical research was in development of the Agency's recommended penalty classes, assignment of specific offenses to these penalty classes, and penalty enhancements—a years-long process that started early but came to a head at the back-end of the sequence of code reform work.<sup>262</sup> The CCRC's approach to penalty proportionality was distinguished by two features that were the sources of later misunderstanding and merit particular note.

First, as it did for liability determinations, the CCRC took a whole-code approach to ensuring penalty proportionality for *criminal behavior* in its recommendations.<sup>263</sup> What mattered more under this approach was whether the revised code's overall punishment for criminal behavior was sufficient, regardless of whether the liability and punishment for that behavior was divided across multiple criminal statutes. The approach sought to correct the distortion caused by overlapping crimes that addressed the same principal harm but were drafted differently enough that they each could be separately charged and punished, with imprisonment penalties running consecutive to one another.

For example, as noted above, the current D.C. Code authorizes liability, punishment, and consecutive sentences for carjacking-type behavior through a host of overlapping felony crimes—e.g., carjacking, robbery, unauthorized use of a motor vehicle, weapons offenses (if present) and even kidnapping. As the public opinion surveys showed, the cumulative penalties authorized for carjacking-type behavior across these overlapping offenses were higher than murder penalties and appeared many times higher than what public opinion supported.<sup>264</sup> While the revised statutes could partly tackle this problem by redrafting offense elements and merging some duplicative offenses, there remained instances where overlap would remain—e.g., between carjacking and unauthorized use of a vehicle or weapon offenses. In such instances, the whole-code approach to proportionality

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262. The first major draft of agency penalty recommendations was issued to the Advisory Group on October 3, 2019, after nearly a year of internal staff development. D.C. CRIM. CODE REFORM COMM'N, FIRST DRAFT OF REPORT #41 - ORDINAL RANKING OF MAXIMUM IMPRISONMENT PENALTIES (2019) at 3, 5, <https://ccrc.dc.gov/node/1436756>.

263. See, e.g., SUMMARY OF THE RCCA cmt. on subtitle I, *supra* note 251, at 385 (recommending that the D.C. Code be considered in its entirety to ensure that individuals were not being doubly sentenced for overlapping crimes).

264. CRIM. CODE REFORM COMM'N, SUMMARY OF THE REVISED CRIMINAL CODE ACT OF 2021 (RCCA), app. g, at 8 (2021) [hereinafter SUMMARY OF THE RCCA app. g], <https://ccrc.dc.gov/node/15311431> (providing a comparison of RCC offense penalties and District charging and conviction data).

meant that these other offenses' additional authorized penalties or penalty enhancements were considered.

The CCRC's whole-code approach to proportionality rendered its penalty recommendations unsuitable for simplistic, one-to-one comparisons between the highest authorized penalty of a revised statute and an existing District law with a similar or identical name. Differences might exist between the revised and existing District offenses in terms of their elements and grading. But, even where the elements and grading of a particular CCRC's revised statute generally seemed to line up with another offense in current District law, a revised statute's penalties would not necessarily align because the revised statute's penalties were set with the entire constellation of available penalties (and penalty enhancements) in mind.

A second feature of the CCRC's development of penalty recommendations that often would be misconstrued by later reviewers was that, for nearly all types of criminal behavior, the revised code's maximum sentences encompassed the imprisonment penalties that were *actually issued* by judges over the prior decade for comparable behavior.<sup>265</sup> New penalty recommendations were based on a review of all the above-listed authorities (recent judicial sentencing practice in the District, Sentencing Commission guidelines, public opinion survey data, and criminology expert literature).<sup>266</sup> No authority was given priority, and it is not clear how any single algorithm weighing different authorities would have worked. Each revised offense posed unique challenges depending, for example, on other overlapping offenses, lesser-included offenses, gradations, frequently applicable penalty enhancements, and intra-offense gradations.

However, analysis of court statistics from 2010 to 2019 were constantly reviewed to see how the revised code's penalties compared to existing District judicial practice.<sup>267</sup> Again, while simple one-to-one comparisons of an existing D.C. Code and a revised statute often were misleading, a dive into court data would show at the case-level which of the available overlapping charges in District law were brought, whether they were concurrently or consecutively sentenced, and the composite amount of imprisonment actually imposed on a convicted person for their behavior.<sup>268</sup> That information from court data could be compared to revised penalties that took into account the whole-

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265. *See generally id.*

266. CCRC REPORT TRANSMITTAL MEMORANDUM, *supra* note 4, at 1.

267. SUMMARY OF THE RCCA app. f, *supra* note 220, at 1.

268. *Id.* at 1, 7.

code, behavior-based approach mentioned above. Usually though, such complex analysis of existing court data and comparison with multiple, comparable crimes in the revised code was not necessary. Typically, a revised crime's penalty fully captured existing practice for the similarly named crime in the current D.C. Code, including the rare worst-case scenarios that had come before the court. Only for a few offenses, based on evidence from public polling, national norms, or the existence of overlapping statutes that would provide additional liability, were recommendations made to significantly increase or decrease penalties.<sup>269</sup>

Coupled with its whole-code approach to providing proportionate penalties for criminal behavior, the CCRC's focus on existing District court practice—as opposed to existing statutory maximums—often meant that a revised statute's maximum was set lower than under existing law. Such apparent discrepancies were due chiefly to the fact that many District statutory penalties were paper tigers,<sup>270</sup> decades out-of-step with actual District sentencing practices or the sentencing guidelines. (The whole-code approach of the revised statutes was a relatively minor factor in explaining discrepancies between existing and revised penalties). Detailed written explanations of the CCRC's rationale for particular criminal penalties that pointed out existing court practice and how other statutes provided additional penalties were produced and opened for Advisory Group discussion.<sup>271</sup> Yet, explaining how the revised statutory penalties encompassed existing District penalties would remain an ongoing challenge for the draft legislation.

#### *D. Final Agency Reform Recommendations*

The CCRC met its statutory deadline of March 31, 2021, with the issuance to the District's Council and Mayor of a "Revised Criminal

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269. See, e.g., SUMMARY OF THE RCCA cmt. on subtitle I, *supra* note 251, at 385 (asserting that racial biases are among many factors that can determine unequal application of statutory penalties, prompting the RCC recommendations).

270. For example, despite the very high authorized penalties for carjacking discussed above, in practice, the actual penalties for carjacking have hewed closely to the mandatory minimums for carjacking. See SUMMARY OF THE RCCA app. f, *supra* note 220, at 45 (indicating that for adult sentences from 2010 to 2019, 90 to 95% of those sentenced for armed carjacking received only the mandatory minimum of 180 months, and 50 to 75% of those convicted for unarmed carjacking received only the mandatory minimum of eighty-four months).

271. See e.g., SUMMARY OF THE RCCA app. d, *supra* note 197, at 306, 370 (finding that D.C. statutory penalties and sentences imposed by judges for carjacking are higher than the RCC penalty recommendations).

Code” (RCC) containing statutory language, an accompanying Commentary explaining how and why the RCC changed existing law, and charging, sentencing, and other relevant statistics. The prior week, on March 24, 2021, all five voting members of the CCRC’s Advisory Group had unanimously approved submission to the Council and Mayor of these recommended changes to criminal statutes and accompanying information.<sup>272</sup>

The scope of the RCC was sweeping. Although it did not address less frequently enforced offenses, the RCC included revised language for over 97% of the adult crimes then prosecuted in the District, in addition to entirely new language in general provisions.<sup>273</sup> The statutory text of the revised code was over 200 pages in length, and the accompanying commentary detailing the changes from current District law (statutory and caselaw) for each statutory section was nearly 1900 pages in length.<sup>274</sup>

Appended to the CCRC’s March 31, 2021, recommendations were volumes of background information to provide context for the recommendations. To facilitate comparison of the RCC with current D.C. Code statutes, a table of correspondence was created matching each RCC offense to comparable offenses in the current D.C. Code and the sentences imposed for those crimes from 2010 to 2019.<sup>275</sup> A compilation of Advisory Group members’ written comments and the complete agency written responses on how each comment was addressed was also attached.<sup>276</sup>

The RCC contained all the main structural features in the MPC (and most states’ criminal codes), including a general part. Initial provisions clarified that the general provisions only applied to interpretation of revised statutes in the RCC (not unreviewed statutes elsewhere in the D.C. Code) and provided for an effective date at least one year from enactment.<sup>277</sup> Standardized mental state definitions very similar to those in the MPC were included (purpose, knowledge, recklessness, negligence), along with rules describing how their use or strict liability

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272. D.C. CRIM. CODE REFORM COMM’N, MEETING MINUTES MARCH 24, 2021 (2021) at 2, <https://ccrc.dc.gov/node/1529702>. However, the USAO-DC representative also issued separate statements indicating that they did not support all of the recommendations. *Id.*

273. CCRC REPORT TRANSMITTAL MEMORANDUM, *supra* note 4, at 3.

274. MARCH 2021 RECOMMENDATIONS FOR THE COUNCIL & MAYOR, *supra* note 12.

275. SUMMARY OF THE RCCA app. g, *supra* note 264, at 1.

276. *See generally* SUMMARY OF THE RCCA app. c, *supra* note 198; SUMMARY OF THE RCCA app. d, *supra* note 197.

277. Council of D.C. B24-0416, 25th Council Period (D.C. 2021), <https://lims.dccouncil.gov/Legislation/B24-0416>.

applied to every element of every offense.<sup>278</sup> The primary innovations regarding mental state definitions were changes to how they applied variously to circumstance, result, and conduct elements (which also had been slightly redefined compared to the MPC).<sup>279</sup>

For the first time in the District, general defenses of justification (e.g., self-defense)<sup>280</sup> and excuse defenses (e.g., duress and entrapment) were to be codified instead of being left to centuries-old common law,<sup>281</sup> and the elements to prove liability for inchoate crimes (attempt, solicitation, and conspiracy)<sup>282</sup> were fully described. A standardized penalty classification system was proposed consisting of nine felony and five misdemeanor classes,<sup>283</sup> and multiple broadly applicable penalty enhancements.<sup>284</sup> Finally, a list of nearly one hundred generally applicable definitions, from the rarely used (e.g., “machine gun”) to the commonplace (e.g., “property”), also was codified, providing conceptual and terminological consistency throughout the revised code.<sup>285</sup>

### 1. *Examples of changes in substantive law*

The special part of the RCC recommended new language for nearly 300 offenses and gradations, organized by the type of social harm involved (e.g., offenses against persons or property offenses).<sup>286</sup>

One instance where the RCC directly limited liability and penalties by changing the elements of an offense was for felony murder. Although some jurisdictions like Michigan, Kentucky, and Hawaii have abolished felony murder, the RCC instead followed reform jurisdictions like Massachusetts and California by re-grading felony murder as second-degree murder (rather than first), applied only to

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278. *Id.* at 17–19 (chapter 2) (stating that strict liability may be statutorily imposed or by the phrase “in fact” modifying an element of the offense).

279. *Id.* at 16–17.

280. *Id.* at 28–29 (chapter 4).

281. *Id.* at 33, 35 (chapter 5).

282. *Id.* at 25–26 (chapter 3).

283. *Id.* at 36–38 (chapter 6 providing for felony and misdemeanor class maximum penalties of: Class 1, 45 years; Class 2, 40 years; Class 3, 30 years; Class 4, 24 years; Class 5, 18 years; Class 6, 12 years; Class 7, 8 years; Class 8, 4 years; Class 9, 2 years; Class A, 1 year; Class B, 180 days; Class C, 60 days, Class D, 10 days, and Class E, fine only).

284. *Id.* at 39–43 (chapter 6) (stating that notice is mandatory before an offense is subject to penalty enhancements).

285. *Id.* at 43–59 (chapter 7).

286. MARCH 2021 RECOMMENDATIONS FOR THE COUNCIL & MAYOR, *supra* note 12, at 3.



deaths occurring in furtherance of one of eight serious felonies, and dropped accomplice liability for felony murder.<sup>287</sup>

In other offenses, the RCC expanded liability and penalties, though sometimes in an indirect way. For example, the RCC redefined a term so that an assault by strangulation would be punished as a felony rather than a misdemeanor.<sup>288</sup> Under current District law, an assault shifted from being a misdemeanor to a low-severity felony if the harm caused was a “significant bodily injury,” a term defined as “an injury that requires hospitalization or immediate medical attention.”<sup>289</sup> That functional definition of “significant bodily injury” led to extensive litigation about the need for medical attention.<sup>290</sup> Over time, case law has identified some types of injuries (e.g., a laceration of a size and depth to require stitches<sup>291</sup>) that categorically constitute a “significant bodily injury.” However, strangulation, an injury that often leaves little visible physical evidence, can still be extremely dangerous and profoundly impactful on victims.<sup>292</sup>

Without changing the elements of a lower-severity felony assault, the RCC effectively made strangulation a predicate injury by redefining “significant bodily injury” to categorically include “a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation.”<sup>293</sup> Other types of injuries also were categorically included in the revised definition, making it much clearer for prosecutors, judges, and juries. Notably, after Congress blocked the

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287. *Id.* at 59–60; *see also* CRIM. CODE REFORM COMM’N, SUMMARY OF THE REVISED CRIMINAL CODE ACT OF 2021 (RCCA), cmt. on subtitle II, at 23 (2021) [hereinafter SUMMARY OF THE RCCA cmt. on subtitle II], <https://ccrc.dc.gov/node/153171> (stating that a clear motivation of the revision is to align the proportionality of an offense with the actual state of mind of the actor).

288. D.C. CRIM. CODE REFORM COMM’N, REVISED CRIM. CODE ACT (RCC) (2023), at 36, 65, 67.

289. D.C. CODE § 22-404(a)(2) (2023).

290. *See* *Belt v. United States*, 149 A.3d 1048, 1053 (D.C. 2016).

291. *Belt*, 149 A.3d at 1057 (finding that the context of a situation in which a victim does not seek out medical attention is critical to determine whether the severity of the injury meets the threshold of “significant bodily injury”).

292. *See* SUMMARY OF THE RCCA cmt. on subtitle I, *supra* note 251, at 625 (asserting that non-visible injuries often lead to recurring abuse because of the fallacy that the victim is not seriously injured).

293. *Id.*; SUMMARY OF THE RCCA cmt. on subtitle I, *supra* note 251, at 57. The full revised definition kept the functional definition and supplemented it with various harms that were categorically deemed to be a “significant bodily injury.” *See also* SUMMARY OF THE RCCA cmt. on subtitle II, *supra* note 287, at 621.

District's legislation in 2023, a separate bill was introduced and passed in the District that made strangulation a separate offense.<sup>294</sup>

A third example of RCC statutory changes was the RCC proposal to eliminate the District's current carjacking statute<sup>295</sup> as a separate crime and instead punish it as a more severe gradation of robbery.<sup>296</sup> The carjacking statute was passed in 1993 in the wake of extensive reporting on the tragic and violent killing of a woman, Pamela Basu, in a nearby Maryland town.<sup>297</sup> However, the statute was written to broadly apply to any taking of a car while the owner was nearby, regardless of the use of force or threats,<sup>298</sup> and applied the highest mandatory minimum penalty in the D.C. Code aside from first-degree murder.<sup>299</sup> Most importantly, the statute was written in a slightly different manner than robbery, such that both robbery and carjacking charges can be (and often are) brought for the same incident, multiplying liability.<sup>300</sup> To avoid duplicative liability and align elements and penalties with robbery, the RCC recommended following the practice of about half the states that underwent MPC-based reform and simply eliminated carjacking as a separate crime.<sup>301</sup> If a carjacking involved infliction of a serious bodily injury or death, the RCC would treat it as an aggravated robbery or an additional murder charge could be brought.<sup>302</sup> As discussed below, amid a sharp rise in carjackings in 2022, the D.C. Council rejected this change during the legislative review of the RCC.

A final example of a major change in the RCC was the proposed elimination of all mandatory minimum penalties. Neither the RCC general part's penalty classes nor any individual offense in the RCC

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294. D.C. CODE § 22-404.04 (2023).

295. *Id.* § 22-2803.

296. SUMMARY OF THE RCCA cmt. on subtitle I, *supra* note 251, at 50.

297. Ted Gup, *A Savage Story*, TIME MAG. (Sept. 21, 1992), <https://content.time.com/time/subscriber/article/0,33009,976504,00.html>; Graciela Sevilla & Dan Beyers, *Mother Killed in Apparent Carjacking*, WASH. POST (Sept. 9, 1992), <https://www.washingtonpost.com/archive/politics/1992/09/09/mother-killed-in-apparent-carjacking/7acf9a1e-f55b-43ac-929b-b888785c67aa/>.

298. *Young v. United States*, 111 A.3d 13, 14 (D.C. 2015) (finding that the actor was convicted of carjacking even when he did not speak to or touch the victim during the incident).

299. D.C. CODE § 22-2803.

300. *See Bryant v. United States*, 859 A.2d 1093, 1108 (D.C. 2004) (citing *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997) (noting that armed carjacking and armed robbery convictions do not merge).

301. *See* D.C. CRIM. CODE REFORM COMM'N, *supra* note 246, at 359 (identifying four states out of the twenty-nine researched that had separate carjacking offenses; five others had separate gradations of robbery addressing robbery of a car).

302. D.C. CRIM. CODE REFORM COMM'N, *supra* note 276, at 302.

special part authorized a mandatory minimum sentence. The RCC's rejection of mandatory minimum sentences followed the recommendations of the recent Model Penal Code: Sentencing,<sup>303</sup> as well as renowned expert bodies, such as the Judicial Conference of the United States<sup>304</sup> and the American Bar Association.<sup>305</sup> The basis for all these recommendations was the lack of judicial discretion to give a lower sentence when warranted, even if normally, the mandatory minimum should be imposed. Under current District law, mandatory minimum sentences exist chiefly for first degree murder (thirty years),<sup>306</sup> carjacking (seven years if unarmed, fifteen years if armed),<sup>307</sup> and committing specified crimes while possessing a dangerous weapon (five years).<sup>308</sup> However, D.C. court statistics<sup>309</sup> and public opinion surveys<sup>310</sup> indicate that, in many instances, these mandatory minimum sentences punish offenders more severely than judges or the public think appropriate. This was a rare instance where the RCC's recommendation would have put the District in front of all states since none, to date, have eliminated all mandatory minimum sentences.<sup>311</sup> However, as noted below, the D.C. Council pulled back from this

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303. MODEL PENAL CODE: SENT'G § 6.06 (AM. L. INST., Proposed Final Draft 2017) 166 (stating that various factors, such as race, ethnicity, and the personal biases of prosecutors lead to inconsistent enforcement of mandatory minimum sentences).

304. LETTER FROM HONORABLE RICARDO S. MARTINEZ, CHAIR OF COMM. ON CRIM. LAW OF THE JUD. CONF. OF THE U.S., TO WILLIAM H. PRYOR JR., OF THE U.S. SENT'G COMM'N (July 31, 2017) at 2-3, <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/CLC.pdf>.

305. A.B.A. H.D. Res. 10B (2017) at 2-4; *see also* Debra Cassens Weiss, *ABA House Backs Ban on Mandatory Minimums*, A.B.A. J. (Aug. 15, 2017, 10:15 AM), [https://www.abajournal.com/news/article/aba\\_house\\_backs\\_ban\\_on\\_mandatory\\_minimums\\_prosecutor\\_discretion\\_in\\_sentenci](https://www.abajournal.com/news/article/aba_house_backs_ban_on_mandatory_minimums_prosecutor_discretion_in_sentenci) (explaining that the ABA House of Delegates' Resolution 10B, holistically opposed to the current and future use of mandatory minimums by Congress and state legislatures, intends to ensure fairness, due process, and proportionality in sentencing).

306. D.C. CODE § 22-2104 (2023).

307. *Id.* § 22-2803.

308. *Id.* § 22-4502.

309. *See, e.g.*, CRIM. CODE REFORM COMM'N, *supra* note 271, at 815 (showing a majority of unarmed carjackings and over 90% of armed carjacking sentences were at the mandatory minimum).

310. SUMMARY OF THE RCCA app. i, *supra* note 237, at 130-31.

311. COUNCIL OF D.C., COMM. ON JUDICIARY AND PUB. SAFETY, REP. ON B24-0416, "REVISED CRIM. CODE ACT OF 2022," 24th Council Period, at 7 (2022), [https://lms.dccouncil.gov/downloads/LIMS/47954/Committee\\_Report/B24-0416-Committee\\_Report1.pdf?Id=148331](https://lms.dccouncil.gov/downloads/LIMS/47954/Committee_Report/B24-0416-Committee_Report1.pdf?Id=148331).

change in its final legislation, retaining a mandatory minimum for first degree murder.<sup>312</sup>

## 2. *Examples of changes in related criminal procedures*

Two procedural changes in the RCC that garnered major attention (and opposition) in the legislative review process were expansions of the right to a judicial “second look” review of long-term sentences and the right to a jury trial in misdemeanor cases. Both procedural changes were based on the CCRC’s mandate to provide for proportionate penalties.<sup>313</sup>

At the time the RCC was completed, District law already specified a judicial “second look” review procedure at long-term sentences for persons who were under twenty-five at the time of their offense and already had served at least fifteen years of their sentence.<sup>314</sup> Under the law, a judge may reduce or end the imprisonment term only if certain findings were made, including that the individual was “not a danger to the safety of any person” or the community and that the overall “interests of justice warrant a sentence modification.”<sup>315</sup> Following the recommendation of the ALI’s recent MPC: Sentencing that there be a judicial second look at all long-term sentences,<sup>316</sup> the RCC proposed removal of the District’s age restriction on its second look procedure so the procedure would be available to convicted persons who were of any age at the time of their offense. The CCRC recommended setting the most severe penalty classifications as high as forty-five and forty years, but this was predicated on the availability of some such second look review,<sup>317</sup> otherwise, such sentences would frequently constitute effective life without parole sentences (contrary to other expert sentencing recommendations in the MPC<sup>318</sup>).

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312. *Id.* at 27–28.

313. D.C. CODE § 3-152(a)(6). Of course, the CCRC was also authorized to provide revisions to “criminal statutes” generally, including procedures, and to broadly “[p]ropose such other amendments as the Commission believes are necessary.” *Id.* § 3-152(a)(10).

314. *Id.* § 24-403.03.

315. *Id.* § 24-403.03(a)(2).

316. MODEL PENAL CODE: SENT’G § 305.6 (AM. L. INST., Proposed Final Draft 2017) at 565, 567. The RCC did not adopt other provisions of the MPC “second look” procedure, instead retaining existing District procedures.

317. SUMMARY OF THE RCCA cmt. on subtitle I, *supra* note 260, at 378.

318. MODEL PENAL CODE: SENT’G § 6.06 (AM. L. INST., Proposed Final Draft 2017) at 159.

Existing District law also makes juries available for persons charged with misdemeanors carrying a penalty of more than 180 days.<sup>319</sup> Amid its 1990s crime wave, the District had cut its more expansive right to jury trials for misdemeanors to free courthouse resources (jury trials typically take more time) for increased felony trials.<sup>320</sup> Decades later, the cuts persist and have warped the District's statutory sentences and plea bargaining.<sup>321</sup> For example, USAO-DC charging practices favor filing attempt charges (which carry a 180-day maximum and therefore are not jury-demandable) even for completed crimes, and statutory penalties have been set at 180 days not because those penalties reflected the seriousness of those offenses but because procedure was considered more important.<sup>322</sup> Historically, D.C. judges delivered guilty verdicts at a much higher rate than juries.<sup>323</sup> Given heightened concerns about trust in the justice system that prevailed during development of the RCC,<sup>324</sup> the CCRC sought to extend the same jury rights as in most states<sup>325</sup> and to increase community voices in the

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319. D.C. CODE § 16-705. The District's rule that an offense must carry a penalty of more than 180 days to be jury-demandable is at the *minimum* guaranteed under the Constitution, which generally makes misdemeanors punishable by more than six months imprisonment jury-demandable. *Baldwin v. New York*, 399 U.S. 66, 68–69 (1970).

320. See CRIM. CODE REFORM COMM'N, SUMMARY OF THE REVISED CRIMINAL CODE ACT OF 2021 (RCCA), cmt. on subtitles III-V, at 462–63 (2021) [hereinafter SUMMARY OF THE RCCA cmt. on subtitles III-V], <https://ccrc.dc.gov/node/1531376> (describing the District's penalty reduction of various criminal offenses, which essentially rendered those offenses non-jury demandable, to promote expediency and efficiency in judicial proceedings).

321. *Id.* at 467, 479.

322. *Id.* at 467–71.

323. See Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, WASH. CITY PAPER (Sept. 12, 2019).

324. Less than a year before the CCRC submitted its recommendations, District residents held some of the largest protests in the nation after the May 25, 2020, murder of George Floyd. See Rebecca Tan, Marissa J. Lang, Antonio Olivo, Rachel Chason & John Woodrow Cox, *Night of Destruction Across D.C. After Protesters Clash with Police Outside White House*, WASH. POST (June 1, 2020), [https://www.washingtonpost.com/local/dc-braces-for-third-day-of-protests-and-clashes-over-death-of-george-floyd/2020/05/31/589471a4-a33b-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/local/dc-braces-for-third-day-of-protests-and-clashes-over-death-of-george-floyd/2020/05/31/589471a4-a33b-11ea-b473-04905b1af82b_story.html). Also, just before submitting its final recommendations on March 31, 2021, the January 2021 Capitol insurrection occurred with mass arrests and prosecutions following for years. See *Capitol Breach Investigation Resource Page*, OFF. OF THE U.S. ATT'Y FOR THE D.C., <https://www.justice.gov/usao-dc/capitol-breach-investigation-resource-page> [<https://perma.cc/V4VY-R5CC>].

325. See *Bado v. United States*, 186 A.3d 1243, 1248 n. 9 (D.C. 2018) (en banc).

justice system.<sup>326</sup> Although it was unknown how a shift in jury access would affect charging practices or demands on judicial resources, the CCRC recommended a phase-in of the expanded right to a jury trial over several years.<sup>327</sup>

Subsequent legislative review of the RCC would focus chiefly on the few abovementioned matters (carjacking, penalties for various serious felonies, and procedural expansions of the rights to a “second look” review of long-term sentences and a jury trial in misdemeanor cases). However, the highlighted changes were but a few of the hundreds, if not thousands, proposed in the RCC and accepted without controversy.

#### IV. PROPOSED LEGISLATION: REVISED CRIMINAL CODE ACT OF 2021

Legislative review of the CCRC’s reform recommendations was nearly as long, quiet, and deliberative at the local level as it was short, loud, and vacuous at the national level. This Part recounts the blow-by-blow of how the first MPC-based, state-level reform in a generation drew overwhelming support through the District’s legislature despite increasing headwinds of rising crime rates and shifting politics around crime. Yet, the muted and fragmented messaging from District leaders was grossly insufficient to overcome attacks on the bill from a new House majority set on portraying the bill as an example of mistaken democratic party policy when more traditional tough-on-crime legislation was needed to thwart the recent spike in D.C. crime. For the first time in a generation, District legislative autonomy was overridden, and criminal code reform pushed off to an uncertain future.

##### *A. Bill Introduction and Hearings*

With the issuance of its March 30, 2021, recommendations, the Agency completed its primary responsibility to draft comprehensive criminal code reform recommendations.<sup>328</sup> The official term of the agency’s statutorily designated Advisory Group also ended.<sup>329</sup>

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326. *Id.* at 1264 (Washington, J., concurring) (“Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public’s trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial.”).

327. COUNCIL OF D.C., COMM. ON JUDICIARY AND PUB. SAFETY, REP. ON B24-0416, “REVISED CRIM. CODE ACT OF 2022,” 24th Council Period, at 15, 71 (2022), [https://lms.dccouncil.gov/downloads/LIMS/47954/Committee\\_Report/B24-0416-Committee\\_Report1.pdf?Id=148331](https://lms.dccouncil.gov/downloads/LIMS/47954/Committee_Report/B24-0416-Committee_Report1.pdf?Id=148331).

328. D.C. CODE § 3-152(a) (2023).

329. *Id.* § 3-153(g).

However, the Agency's work was far from complete. The RCC recommendations provided new criminal code statutory text but had not submitted the language in the form of a bill that could be introduced. Also, if successfully passed into law, implementation of the recommendations would further entail a host of technical assistance and training issues for which the CCRC would be the most knowledgeable. Moreover, there was a significant last-mile problem in that many regulatory and other crimes in the existing D.C. Code, including some felonies and frequently charged misdemeanors, were not included in the RCC for lack of time.<sup>330</sup> Other criminal statutes concerning court procedure and the corrections system were also within the CCRC's statutory mandate but not addressed in the RCC.<sup>331</sup>

Foreseeing continued need for the CCRC, Council legislation in 2020 had made the Agency permanent and slightly adjusted its responsibilities.<sup>332</sup> Consequently, after completing its March 30, 2021 recommendations, the CCRC retained a broad mandate to "provide, upon request by the Council or on its own initiative, a legal or policy analysis of proposed legislation or best practices concerning criminal offenses, procedures, or reforms, including information on existing District law, the laws of other jurisdictions, and model legislation."<sup>333</sup> In April 2021, the CCRC internally bifurcated its staffing to support two streams of activity-supporting legislative review of the RCC and developing additional criminal code reform recommendations.<sup>334</sup>

First, two of the Agency's five staff were detailed to the Council's JPS Committee to aid advancement of the RCC recommendations into law.<sup>335</sup> The first task of these staff was to help craft a bill to enact the RCC. Because the CCRC's prior recommendations to enact Title 22 had not been taken up by the Council and intervening years had seen a host of changes made to criminal statutes, substantial work was needed for staff to draft repealing provisions for statutes dating back to the 1800s.<sup>336</sup> Formatting and other technical changes were also required to make the RCC text comply with Council bill drafting

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330. 2021 D.C. CRIM. CODE REFORM COMM'N ANN. REP., *supra* note 211, at 3-5.

331. D.C. CODE § 3-152(d).

332. *Fiscal Year 2021 Budget Support Act of 2020*, 67 D.C. Reg. 10493 (Dec. 3, 2020), <https://lims.dccouncil.gov/Legislation/B23-0760> (Title III, Subtitle A. Criminal Code Reform Commission).

333. D.C. CODE § 3-152(d).

334. 2021 D.C. CRIM. CODE REFORM COMM'N ANN. REP., *supra* note 211, at 3-4.

335. *Id.* at 3.

336. CRIM. CODE REFORM COMM'N, REP. #1: RECOMMENDATIONS FOR ENACTMENT OF D.C. CODE TITLE 22 AND OTHER CHANGES TO CRIM. STATUTES (2017) at 2, 16; 2021 D.C. CRIM. CODE REFORM COMM'N ANN. REP., *supra* note 211, at 3.

preferences.<sup>337</sup> By the end of the summer of 2021, the bill was completed and passed back to the CCRC to formally request introduction.

Accordingly, at the start of its fall session on October 1, 2021, the CCRC submitted to the Council the Revised Criminal Code Act of 2021 (“RCCA”), making only technical formatting changes to the RCA as recommended by the CCRC.<sup>338</sup> Subsequently, the Agency staff on detail with the JPS Committee then continued through March 2022 to provide technical assistance on the bill as hearings were held, amendments were considered, and the Committee report was prepared.<sup>339</sup>

Second, the CCRC’s Executive Director and two remaining staff conducted public outreach and supplemented the RCA recommendations. With the assistance of a local organization that had been contracted to support the Agency’s public outreach,<sup>340</sup> the CCRC reached out to discuss its reform recommendations with a wider array of criminal justice stakeholders in 2021. As part of these efforts, “on June 16-17, 2021, the agency” organized a “public, two-day, online symposium” on the D.C. criminal code’s origins, current operation, “the CCRC reform recommendations,” and how those recommendations could affect the District’s criminal justice system.<sup>341</sup> Meanwhile, additional reform recommendations were drafted for a number of felony offenses that had not been part of the earlier RCA.<sup>342</sup> Drafts for these new revised statutes were posted online for public comment and circulated to former Advisory Group members soliciting their comments, similar to the prior, formal process.<sup>343</sup> A new data analysis of

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337. 2021 D.C. CRIM. CODE REFORM COMM’N ANN. REP., *supra* note 211, at 3–4.

338. COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REP. ON B24-0416, “REVISED CRIMINAL CODE ACT OF 2022,” 24th Council Period, at 2, 5, 19 (2022), [https://lims.dccouncil.gov/downloads/LIMS/47954/Committee\\_Report/B24-0416-Committee\\_Report1.pdf?Id=148331](https://lims.dccouncil.gov/downloads/LIMS/47954/Committee_Report/B24-0416-Committee_Report1.pdf?Id=148331).

339. 2021 D.C. CRIM. CODE REFORM COMM’N ANN. REP., *supra* note 211, at 4.

340. *Id.* at 3 (D.C. Justice Policy Institute). The CCRC had no public outreach staff of its own. *Id.*

341. 2021 D.C. CRIM. CODE REFORM COMM’N ANN. REP., *supra* note 211, at 3; *see also* CRIM. CODE REFORM COMM’N, RECOMMENDATIONS, DC. GOV., <https://ccrc.dc.gov/page/recommendations> (last visited Jan. 18, 2024) (describing the recording’s details of the symposium, including attendance by experts and leaders on D.C. criminal law such as Professor James Forman Jr.).

342. E.g., obstruction of justice, terrorism, perjury, and bigamy. 2021 D.C. CRIM. CODE REFORM COMM’N ANN. REP., *supra* note 211, at 4.

343. CRIM. CODE REFORM COMM’N, D.C. CRIM. CODE REFORM COMM’N 2022 PERFORMANCE OVERSIGHT HEARING TESTIMONY OF EXEC. DIR. RICHARD SCHMECHEL (2022), at 3, [https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC\\_2022\\_Performance\\_Oversight\\_Hearing\\_Testimony\\_2-18-22.pdf](https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC_2022_Performance_Oversight_Hearing_Testimony_2-18-22.pdf).



life and life-equivalent sentences in D.C. courts was also researched and issued at this time.<sup>344</sup>

At the end of 2021, the Council's JPS Committee held three days of legislative hearings on the RCCA. The first day, November 4, 2021, heard panelists invited by the JPS Committee—a range of academics, researchers, policy experts, and individuals with lived experience in the criminal justice system.<sup>345</sup> Witnesses spoke favorably of the legislation, with many providing national and historical context perspectives on the benefits of MPC-based reform and the evidence base for various changes in the RCCA.<sup>346</sup> The second hearing, on December 2, 2021, consisted of public witnesses who overwhelmingly testified in support of the bill.<sup>347</sup> However, there were a few themes in criticism, even among supporters. Some witnesses wanted the bill to decriminalize small-quantity drug possession and prostitution,<sup>348</sup> some victims' rights organizations asked for specific changes to how statutes referred to victims,<sup>349</sup> and some witnesses opposed a proposed defense to statutory rape for mistake of age under limited circumstances.<sup>350</sup>

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344. CRIM. CODE REFORM COMM'N, ANALYSIS OF LIFE, LIFE-EQUIVALENT, AND LONG-TERM SENTENCES IN THE D.C. 2010-2019 (2021), <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC-Analysis-of-District-Life-Life-Equivalent-and-Long-Term-Sentences-9-10-21.pdf>.

The research found that there were just ten cases in the District from 2010-2019 in which life sentences were imposed, but these cases involved a total of 200 convictions, fifty of which received a life sentence. *Id.* at 6.

345. COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REP. ON B24-0416, "REVISED CRIM. CODE ACT OF 2022," 24th Council Period, at 33-53 (2022) [https://lims.dccouncil.gov/downloads/LIMS/47954/Committee\\_Report/B24-0416-Committee\\_Report1.pdf?Id=148331](https://lims.dccouncil.gov/downloads/LIMS/47954/Committee_Report/B24-0416-Committee_Report1.pdf?Id=148331).

346. *Id.* at 2, 33-53.

347. *Id.* at 53-70.

348. *See, e.g., id.* at 61 (testimony of Queen Adesuyi—Senior National Policy Manager, Drug Policy Alliance).

349. *See, e.g., id.* at 57-58 (testimony of Matthew Ornstein, Director of Litigation and Enforcement, Network for Victim Recovery of DC (NVRDC)).

350. *See id.* at 67 (testimony of Allison M. Jackson, MD, MPH, FAAP—Division Chief, Child & Adolescent Protection Center, Children's National Health System). The RCCA provided for a mistake of age defense when the victim of statutory rape (a sex act or contact where there is no alleged force, fraud, or coercion) was at least fourteen years old or older, the victim made affirmative representations of being a legal age, and the judge or jury found that it was reasonable for the defendant to believe the victim under the circumstances of the case. *See id.* at 23-24. This proposed mistake of age defense made conviction much easier than the recent MPC recommendation that the prosecution must prove as an element of their case the defendant was reckless as to the victim's age. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. L. INST., Tentative Draft No. 6, 2022) at 110, [https://www.ali.org/media/filer\\_](https://www.ali.org/media/filer_)

The third day of hearings, December 16, 2021, included only government witnesses.<sup>351</sup> The testimony of the Advisory Group voting members largely tracked their prior positions and statements to the CCRC, and all generally supported the bill, albeit with some qualifications.<sup>352</sup> Deputy Mayor Chris Geldart testified that “while the Executive is generally supportive of the RCCA,”<sup>353</sup> there should be a longer process of public review.<sup>354</sup> The Director of the Office of Victim Services and Justice Grants, who submitted written testimony after the third day of hearings, raised concerns about the RCAA’s stalking statute, the legislation’s manner of addressing sexual assault absent force, fraud, coercion, or incapacity, and the legislation’s use of the term “complainant” instead of “victim.”<sup>355</sup> Also in written testimony submitted after the hearing, the Chief Judges of the D.C. Court of Appeals and the D.C. Superior Court (collectively “the D.C. courts”) wrote that the RCCA’s expanded jury trial rights and expanded “second look” provisions would increase the need for jurors, judicial time, and mitigation specialists.<sup>356</sup> The D.C. courts asked “that the bill should include sufficient time between the enactment and the effective date, including a phased transition plan to incorporate new criminal code offenses under the RCCA.”<sup>357</sup>

Virtually no press attention was given to the RCCA introduction or the subsequent Council hearings. Only one article was written on the legislation prior to or in the months immediately after the hearings.<sup>358</sup> National press, including the Washington Post’s otherwise prolific criminal justice reporting team and editorial board, also was silent.

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public/05/8e/058eb1a1-5c05-40d5-83db-407445e510b2/sexual\_assault\_-\_td6.pdf.

The draft was subsequently approved by the ALI, subject to changes not relevant to this provision. See *Model Penal Code: Sexual Assault and Related Offenses*, AM. L. INST., <https://www.ali.org/projects/show/sexual-assault-and-related-offenses> [https://perma.cc/N2NH-7XKX].

351. REP. ON B24-0416, at 70–87.

352. *Id.*

353. *Id.* at 30.

354. *Id.* at 30–31.

355. *Id.* at 31–32. As noted in the Committee Report, it is unclear if Director Garcia was aware of the RCCA’s separate offense of nonconsensual sexual contact or that the offense provided higher penalties for “frozen fright” and similar scenarios of sexual acts or contacts in the absence of force, fraud, coercion, or incapacity. *Id.* at 32.

356. *Id.* at 87–88.

357. *Id.* at 87.

358. Martin Auster Muhle, *D.C. Council Takes on Sweeping Rewrite of 100-Year-Old Criminal Code*, DCIST (Nov. 5, 2021, 8:34 AM), <https://dcist.com/story/21/11/04/dc-council-rewrite-criminal-code>.

After the public hearings in November and December 2021, the CCRC continued its two-track work division to support legislative consideration of the RCCA and to develop new recommendations to reform criminal statutes. One CCRC attorney-advisor stayed on detail full time with the JPS Committee through 2022 to provide research and technical support through the Council's review of the RCCA, including drafting legislative amendments.<sup>359</sup> The other attorney-advisor who had been detailed to the JPS Committee, Mr. Jinwoo Park, returned to the CCRC in April 2022 and was then appointed as the new Agency Executive Director.<sup>360</sup> In the following months, Mr. Park participated with JPS staff and Councilmember Allen in a string of public meetings to discuss the RCCA with concerned neighborhood groups.<sup>361</sup>

Meanwhile, the CCRC staff also continued to work on the development of additional (new) revisions of criminal statutes using a similar process to that used to develop the RCCA (e.g., multiple drafts, public posting for comment, consultation with former Advisory Group members). In May and July 2022, the CCRC finalized and recommended to the Council two small but significant caches of new recommendations that could be added to the RCCA bill.<sup>362</sup>

Finally, as the D.C. Council returned from its summer recess in 2022, public debate about the RCCA at last began to stir. Over the summer of 2023, polling had been released by the national criminal justice reform organization fwd.us and District-based D.C. Justice Lab showing local support for the RCCA.<sup>363</sup> But, media outlets continued to remain silent about the RCCA until a lengthy September 10, 2022 editorial by the Board of the Washington Post that discussed an increase in violent crime in the District post-pandemic, and ended with

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359. CRIM. CODE REFORM COMM'N, RESPONSES TO PERFORMANCE OVERSIGHT HEARING QUESTIONS (2023) at 3, <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC-Committee-Performance-Oversight-Pre-Hearing-Questions-Part-1.pdf>.

360. *Id.*

361. *Id.* at 5.

362. REP. ON B24-0416, at 19–20. The additional revised statutes included: terrorism offenses; offenses related to obstruction of justice or other governmental functions; perjury and other official falsification offenses; bigamy; gambling offenses; and resisting arrest. *Id.*

363. See HIT STRATEGIES, D.C. JUSTICE LAB & FWD.US, DISTRICT VOTERS OVERWHELMINGLY SUPPORT REVISED CRIMINAL CODE ACT (2022), [https://dcjusticelab.org/wp-content/uploads/2022/07/RCCA-Glossy\\_final.pdf](https://dcjusticelab.org/wp-content/uploads/2022/07/RCCA-Glossy_final.pdf) (finding that an overwhelming majority of D.C. voters support the RCCA after a brief introduction to its provisions and would support a candidate likely to vote for the legislation).

a passing reference to the RCCA's proposal to eliminate carjacking as a separate crime, reduce penalties for some crimes, and expand the judicial "second look" review.<sup>364</sup> It was against this backdrop of minimal press coverage and a nascent spike in District crime that a legislative vote on the RCCA was finally scheduled.

*B. Legislative Amendments, Media Narratives, and Council Votes*

On October 14, 2022, nearly ten months after completion of the RCCA legislative hearings and less than three months before the end of the legislative session, JPS Committee Chairman Allen announced his intent to hold a vote on October 26 on an amended version of the bill ("Committee print").<sup>365</sup> The decision of the JPS Committee to move the bill so late in 2022 would prove fateful.<sup>366</sup>

The Committee print included a host of changes, both substantive and non-substantive, virtually all of which made the bill narrower, more punitive, and/or delayed the effective date of the legislation. The Committee amendments retained carjacking as a separate statute, citing an enhanced violation of privacy when stealing a car as opposed to a robbery and declaring it more serious.<sup>367</sup> The Committee raised penalties (as compared to the RCCA as introduced) for robbery, carjacking, and burglary.<sup>368</sup> Against the recent MPC Sentencing and

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364. Editorial Board, *Opinion - 'Residents are scared': Violent Crime is All Too Common in D.C.*, WASH. POST (Sept. 10, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/09/10/dc-violent-crime-solutions>. Overlooking its own points earlier in the article that located the roots of crime in poverty, racial inequity, and the disruption of the coronavirus, the Washington Post board concluded with a general warning against "creating a culture in which people engage in wrongdoing because they think there are few consequences." *Id.*

365. Erik Salmi, *DC Council's Committee on the Judiciary and Public Safety to Vote on Revised Criminal Code Act*, OFF. OF COUNCILMEMBER CHARLES ALLEN (Oct. 14, 2022), [https://www.charlesallenward6.com/dc\\_council\\_s\\_committee\\_on\\_the\\_judiciary\\_and\\_public\\_safety\\_to\\_vote\\_on\\_revised\\_criminal\\_code\\_act](https://www.charlesallenward6.com/dc_council_s_committee_on_the_judiciary_and_public_safety_to_vote_on_revised_criminal_code_act).

366. As discussed below, Congress continues to limit the legislative autonomy of the District by requiring every District criminal law to undergo a 60-day review period in which a Congressional motion of disapproval can block the law from going into effect. REP. ON B24-0416, at 326. Had the RCCA been advanced out of Committee and voted on in May or June 2022 (before the summer recess), it would have been reviewed under a House controlled by a Democratic majority. However, it should be noted that the District held its primary election on June 21, 2022—effectively predetermining the outcome of the general election, given the strong Democratic composition of the D.C. electorate. Had the RCCA been advanced prior to the primary it likely would have been a more significant issue in local elections, possibly resulting in different Council and Mayoral positions on the RCCA.

367. *Id.* at 21.

368. *Id.* at 20–22.

MPC Sexual Assault expert recommendations, and without addressing those recommendations, the Committee print also removed language creating a judicial deferral mechanism for misdemeanors; struck a mistake of age defense to certain sex crimes; changed the definitions of sexual act and sexual contact; increased from fifteen to twenty years the time before eligibility for a judicial second look at a long term sentence; and restored a mandatory minimum sentence of twenty-four years for first-degree murder.<sup>369</sup> The effective date of the entire RCCA also was set about three years off (October 1, 2025) instead of one year, except that the expansion of the right to a jury in misdemeanors was pushed off much further, to 2030 for some offenses.

With the release of the Committee print's amendments there was a new, critical analysis of their effect on racial equity conducted by the Council Office on Racial Equity (CORE). Overall, the CORE analysis found that both the RCCA as introduced and the Committee print would have a positive impact on reducing racial inequity in the criminal justice system.<sup>370</sup> However, on nearly all the metrics and aspects of the bill measured (e.g. eliminating diversion paths and reducing long-term sentences), CORE found that, as compared to the introduced bill, the Committee changes would serve to "maintain the status quo of racial inequity in the District of Columbia."<sup>371</sup>

Also, accompanying the release of the Committee's amendments to the RCCA was a fiscal impact statement by the District's Chief Financial Officer.<sup>372</sup> The statement reported that the bill cost \$52.9 million through the 2026 fiscal year (September 30, 2026),<sup>373</sup> \$37 million of which was to provide 120 hours of training at overtime pay rates to all 3700 officers of the Metropolitan Police Department (MPD).<sup>374</sup> Notably, the costs and savings to federal agencies (including courts and prisons) were not included in the estimate.<sup>375</sup>

The changes in the Committee print adopted in whole or part the principal changes that had been first requested by USAO-DC when the CCRC was developing its recommendations, many of which had been

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369. *Id.* at 18–29.

370. *Id.* at 1231–32.

371. *Id.* at 1232 (“The Committee Print’s changes to the introduced version—the reintroduction of the mandatory minimum sentence for first degree murder, exceptions undermining the code’s clear penalty structure, and eliminating the diversion pathway—will maintain the status quo of racial inequity in the District of Columbia.”).

372. *Id.* at 1189–94.

373. *Id.* at 1194.

374. *Id.* at 1191–92.

375. *Id.* at 1190.

subsequently raised by Mayor Bowser and (regarding court procedures) the D.C. courts. However, the Committee's amendments did not fully mollify these critical voices. In the week preceding the Committee vote, the U.S. Attorney for the District of Columbia, recognized that the amended bill addressed "several of our most significant concerns" and supported a Committee vote ("mark-up") even though it still had various concerns.<sup>376</sup> Mayor Bowser said that there was "consensus" around 95% of the rewrite of the code" but called for further changes to the bill.<sup>377</sup> On the other hand, in the two weeks prior to the Committee vote, a chorus of voices went public with statements in support of the amended bill, including: the D.C. Attorney General,<sup>378</sup> the Public Defender Service for D.C.,<sup>379</sup> and local victim rights groups like the Network for Victim Recovery of D.C.<sup>380</sup>

Notwithstanding the engagement of government and nonprofit organizations familiar with the bill, there still were only a few D.C.-area news stories that addressed the massive legislation in the window before the Committee vote.<sup>381</sup> On the eve of the vote, the Washington

376. *U.S. Attorney's Office's Statement on D.C. Criminal Code Reform*, OFF. OF THE U.S. ATT'Y FOR THE D.C. (Oct. 14, 2022), <https://www.justice.gov/usao-dc/pr/us-attorneys-offices-statement-dc-criminal-code-reform>; see also Letter from Matthew M. Graves, U.S. Attorney for the D.C., to the D.C. Council (Oct. 20, 2022), <https://www.scribd.com/document/607568374/Council-of-DC-RCCA-10-20-2022-1>.

377. Martin Auster Muhle, *Bowser Objects to Provisions of Criminal Code Overhaul, Asks Lawmakers to Reconsider*, DCIST (Oct. 25, 2022, 4:25 PM) <https://dcist.com/story/22/10/25/bowser-objects-portions-criminal-code-overhaul>.

378. Letter from Karl A. Racine, Attorney General, to the D.C. Council (Oct. 24, 2022), <https://www.scribd.com/document/602904644/Ltr-From-KAR-to-Council-Re-RCCA#>.

379. Letter from Heather N. Pinckney, Public Defender Service Director, to the D.C. Council (Oct. 24, 2022), <https://www.scribd.com/document/602904647/Letter-to-Judiciary-Committee-Members-10-24-2022#>.

380. Letter from Bridgette Stumpf, Executive Director of the Network for Victim Recovery of DC, to the D.C. Council (Oct. 12, 2022), <https://static1.squarespace.com/static/55252f4ae4b0d5d2f335c8e8/t/63739ed4cad4b84656e91535/1668521684237/Letter+of+Support+-+RCCA.pdf>.

381. See, e.g., Jenny Gathright, *D.C. Council Prepares to Vote on Overhaul of Criminal Code*, DCIST (Oct. 14, 2022, 3:26 PM), <https://dcist.com/story/22/10/14/dc-council-vote-criminal-code>; Eric Flack, *DC Council Set to Approve Sweeping Criminal Justice Reform*, WUSA9 (Oct. 14, 2022, 7:17 PM), <https://www.wusa9.com/article/news/crime/dc-criminal-code-overhaul-reform-charles-allen-karl-racine-criminal-justice/65-d1995f4f-e81c-4e38-a5d5-fl18c8d10f02>; Ida Domingo, *DC's Criminal Laws are a Mess: Council to Vote on Century-Old Criminal Code*, 7NEWS (Oct. 26, 2022, 4:01 AM), <https://wjla.com/news/local/dc-council-committee-vote-friday-changes-revised-criminal-code-act-of-2022-councilmember-charles-allen-mayor-murie-bowser-120-years-historic-washington-district-criminal-laws-modernization-crime-reform>; Martin Auster Muhle, *Bowser Objects To Provisions Of Criminal Code Overhaul, Asks Lawmakers to Reconsider*, DCIST (Oct. 25, 2022, 4:25 PM), <https://dcist.com/story/22/10/25/bowser-objects-portions-criminal-code-overhaul>.

Post editorial board for the first time squarely addressed the legislation, albeit in an equivocal manner that called for “careful consideration,” “thorough debate,” and continued “public feedback” and revision until the 2025 effective date.<sup>382</sup> The latter point seemed to take it for granted that the legislation would pass.

In fact, on October 26, 2022, the JPS Committee unanimously approved the Committee print without further amendments.<sup>383</sup> On November 1, 2022, just five days later, the full Council unanimously approved the Committee print of the RCCA without further amendment in its first vote.<sup>384</sup>

These unanimous Committee and Council votes did not end debate, however, and instead seemed to kick off a more determined opposition. Under the District’s legislative process, two votes are required by the full Council for a law to be passed, and the second (final) vote was scheduled for the next legislative meeting of the Council on November 15, 2022.<sup>385</sup> In the intervening days, media opposition by the Mayor and USAO-DC continued, calling for increasing certain penalties in the bill, and for severing and postponing expansions of jury rights for misdemeanors and of a judicial second look after twenty years of long-term sentences.<sup>386</sup> In a letter to the D.C. Council, the D.C. courts expressed opposition to the expansion of a judicial second look review and the increasing jury demandability of many misdemeanors.<sup>387</sup> Specifically, the D.C. courts

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382. Editorial Board, *Opinion - D.C. is Finally Rewriting its Criminal Code. It Needs to Keep Working*, WASH. POST, (Oct. 25, 2022, 5:07 PM), <https://www.washingtonpost.com/opinions/2022/10/25/dc-criminal-code-reform-rewrite-crime>.

383. Council of D.C. B24-0416, 25th Council Period (D.C. 2021), <https://lims.dccouncil.gov/Legislation/B24-0416>.

384. *Id.*

385. Editorial Board, *D.C. is Awash in Guns. Now is Not the Time to Reduce Firearm Penalties*, WASH. POST (Nov. 11, 2022, 4:40 PM), <https://www.washingtonpost.com/opinions/2022/11/11/dc-council-gun-law-changes/>; Council of D.C. B24-0416, 25th Council Period (D.C. 2021), <https://lims.dccouncil.gov/Legislation/B24-0416>.

386. Letter from Muriel Bowser, D.C. Mayor, to the D.C. Council (Nov. 14, 2022), <https://www.scribd.com/document/607740729/MMB-to-Chairman-Mendelson-Re-11-15-22-Leg-Session#>; Letter from Matthew M. Graves, U.S. Attorney for the D.C., to the D.C. Council (Nov. 15, 2022), <https://www.scribd.com/document/607771678/RCCA-USA-Graves-Letter-Re-Pinto-Amendment-11-15-22>.

387. See Letter from Anna Blackburne-Rigsby, Chief Judge of the D.C. Court of Appeals, and Anita Josey-Herring, Chief Judge of the Superior Court of the D.C., to the D.C. Council (Nov. 14, 2022), <https://www.scribd.com/document/607844123/>

opposed those provisions of the RCCA because of the Courts' high number of judicial vacancies and slow recovery from the COVID-19 public health emergency.<sup>388</sup> The Washington Post Editorial Board also shifted to oppose the bill, framing its argument by asking “what message will it send” to reduce statutory maximum penalties at a time of increasing crime, and warning about the “haste” of the bill’s process.<sup>389</sup> On the morning of the final vote, JPS Chairman Allen rebuked this framing about the “message” of the legislation in a time of higher crime by saying that the hope that ratcheted-up penalties would solve the recent rise in crime was false and in fact it was the status quo criminal laws under which the current rise in homicides had occurred.<sup>390</sup>

At the final Council vote on the RCCA on November 15, 2022, one amendment that would have increased two firearm offense penalties was attempted.<sup>391</sup> But, bill supporters rebuffed the amendment and pushed back against what they perceived as “legislating by headline” instead of evidence on crime deterrence and noting the fact that the bill changes wouldn’t even go into effect for three years.<sup>392</sup> The amendment failed three to ten after a short debate and the RCCA then received a final, unanimous vote of approval, thirteen to zero.<sup>393</sup>

After the maximum time allowed under District law and an interim silence, on January 3, 2023, Mayor Bowser vetoed the RCCA.<sup>394</sup>

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RCCA2022ImpactLetter-11142022final (“Thrusting additional legislative mandates on the Court at this time, without appropriate resources, is neither feasible nor advisable . . . The public we serve deserves a judicial system properly equipped to handle these significant legislative changes in a manner that does not compromise the fair and timely administration of justice.”). Notably, although they are tasked with interpreting local law in the District, the D.C. courts are federally funded (not by the District of Columbia). Peter R. Kolker, *Organization, Budgeting, and Funding of the District of Columbia’s Local Courts*, 11 UDC/DCSL L. REV. 43, 51–52 (2008).

388. *Id.*

389. Editorial Board, *D.C. is Awash in Guns. Now is Not the Time to Reduce Firearm Penalties*, WASH. POST (Nov. 11, 2022, 4:40 PM), <https://www.washingtonpost.com/opinions/2022/11/11/dc-council-gun-law-changes>.

390. Charles Allen, *D.C.’s Revised Criminal Code Will Make Residents Safer*, WASH. POST (Nov. 15, 2022, 10:09 AM), <https://www.washingtonpost.com/opinions/2022/11/15/dcs-revised-criminal-code-will-make-residents-safer>.

391. Council of D.C. B24-0416, 25th Council Period (D.C. 2021), <https://lims.dccouncil.gov/Legislation/B24-0416>.

392. Martin Austermuhle, *D.C. Council Approves Sweeping Overhaul of Criminal Code, Though Changes Won’t Take Effect Until 2025*, DCIST (Nov. 15, 2022, 4:36 PM), <https://dcist.com/story/22/11/15/dc-council-approves-major-overhaul-criminal-code>.

393. Council of D.C. B24-0416, 25th Council Period (D.C. 2021), <https://lims.dccouncil.gov/Legislation/B24-0416>.

394. *Id.*



“Anytime there’s a policy that reduces penalties, I think it sends the wrong message,” the Mayor told the press.<sup>395</sup> In her written statement to the Council, the Mayor said that the bill “does not make us safer” and called for removal of provisions so that a bill could be passed with “consensus agreement.”<sup>396</sup>

On January 17, 2023, the D.C. Council voted twelve to one to override the Mayor’s veto.<sup>397</sup> An extraordinary rejection of the Mayor’s assertion that the bill made the District less safe, the vote was just the sixth successful veto override by the D.C. Council in the nearly fifty years of District home rule.<sup>398</sup> The D.C. Police Union excoriated the Council, claiming “[t]his law, once enacted, will lead to violent crime rates exploding even more than they already have.”<sup>399</sup> Calling the Mayor’s rhetoric “irresponsible,” Council Chairman Mendelson predicted that “folks like the Freedom Caucus in Congress . . . are going to use the mayor’s veto and her rhetoric against us when this bill goes up to Congress.”<sup>400</sup> Some saw the Mayor’s actions as calculated. Councilmember Nadeau said: “This is political theater to create a perpetual scapegoat whenever there are issues in the future.”<sup>401</sup>

### *C. Congressional Review and Presidential Politics*

Even before the veto override had been transmitted to Congress, however, Representative James Comer (R-Ky.), chairman of the House

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395. Mark Seagraves, *DC Mayor Bowser Vetoes Criminal Code Overhaul*, NBC4 WASH. (Jan. 4, 2023), <https://www.nbcwashington.com/news/local/dc-mayor-bowser-vetoes-criminal-code-overhaul/3247124>.

396. Letter from Muriel Bowser, D.C. Mayor, to the Council of D.C. (Jan. 4, 2023), <https://www.scribd.com/document/617862949/MayorBowserLettertoDCCouncilB24450-14-23#>.

397. Council of D.C. B24-0416, 25th Council Period (D.C. 2021), <https://lims.dccouncil.gov/Legislation/B24-0416>.

398. *Council Overwhelmingly Overrides Veto, Sustains Substantive Criminal Code Revision*, COUNCIL OF D.C. (Jan. 18, 2023), <https://dccouncil.gov/council-overwhelmingly-overrides-veto-sustains-substantive-criminal-code-revision>.

399. D.C. Police Union (@DCPoliceUnion), TWITTER (Jan. 17, 2023, 3:35 PM), <https://twitter.com/DCPoliceUnion/status/1615447857623883789/photo/1>. The D.C. Police Union also blamed the Council for the crime increase, saying: “This exponential increase in crime can be directly attributed to Charles Allen and the City Council’s efforts to coddle criminals and reduce the effectiveness of the police department.” *Id.*

400. Omari Daniels & Michael Brice-Saddler, *D.C. Council Overrides Mayor’s Veto of Controversial New Criminal Code*, WASH. POST (Jan. 17, 2023, 1:16 PM), <https://www.washingtonpost.com/dc-md-va/2023/01/17/dc-crime-bill-council-override-veto/>.

401. *Id.*

Oversight and Accountability Committee, declared in late January: “We will use every remedy available to the House to prevent the D.C. Council’s pro-criminal bill from becoming law.”<sup>402</sup> The 1975 federal legislation that granted the District limited home rule required for all Council legislation a period (sixty days for criminal laws, thirty days for all other legislation) of congressional review within which Congress could enact a joint resolution of disapproval to nullify the District law.<sup>403</sup>

On February 2, 2023, Representative Andrew Clyde introduced House Joint Resolution 26, “Disapproving the action of the District of Columbia Council in approving the Revised Criminal Code Act of 2022” (“disapproval resolution”).<sup>404</sup> Quoting Mayor Bowser’s veto statement that the bill “does not make us safer,” Representative Clyde framed the legislation as “radical,” “severely misguided,” “soft-on-crime,” and “dangerous,” “making our nation’s capital city a safe haven for violent criminals.”<sup>405</sup>

In opposition to the House Republicans’ disapproval resolution, the White House Office of Management and Budget (OMB) issued a Statement of Administration Policy (SAP) on February 6, 2023.<sup>406</sup> The SAP did not address the merits of the bill, simply saying Congress should respect the District of Columbia’s autonomy to govern its own local affairs.<sup>407</sup>

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402. Meagan Flynn & Michael Brice-Saddler, *D.C. Braces for Barrage of Republican Intervention in Local Governance*, WASH. POST (Jan. 19, 2023, 2:45 PM), [https://www.washingtonpost.com/dc-md-va/2023/01/19/dc-republican-congress-intervention/?itid=ap\\_meaganflynn](https://www.washingtonpost.com/dc-md-va/2023/01/19/dc-republican-congress-intervention/?itid=ap_meaganflynn).

403. D.C. CODE § 1-206.02(c) (2024).

404. H.R.J. Res. 26, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-joint-resolution/26/actions>.

405. Press Release, Congressman Andrew Clyde, Rep. Clyde, Sen. Hagerty Introduce Resolution to Block DC’s Dangerous Crime Bill (Feb. 2, 2023), <https://clyde.house.gov/news/documentsingle.aspx?DocumentID=671>.

Representative Clyde’s press announcement also attacked the bill because it hurts victims of crime because it creates a new right to petition for early release from prison. *Id.* No mention was made of District victims’ rights groups supporting the legislation. *See supra* text accompanying notes 345–46. *But cf. supra* text accompanying note 349 (noting minor suggestions by victims’ rights groups).

406. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMIN. POL’Y, H.J. RES. 26 – DISAPPROVING THE ACTION OF THE DISTRICT OF COLUMBIA COUNCIL IN APPROVING THE REVISED CRIMINAL CODE ACT OF 2022 (2023).

407. *Id.* (“For far too long, the more than 700,000 residents of Washington, D.C. have been deprived of full representation in the U.S. Congress. This taxation without representation and denial of self-governance is an affront to the democratic values on

The same day, however, a conflicting message was issued by D.C. Mayor Bowser that attacked the merits of the bill. While again stating that she agreed with “95%” of the legislation, the Mayor announced that she would introduce a bill to revise the RCCA.<sup>408</sup> The resulting legislation proposed just eleven substantive changes to the RCCA. The two broadest changes were the elimination of the RCCA’s restoration of a broader right to jury trials and elimination of a right to judicial review of long-term sentences after twenty years of incarceration.<sup>409</sup> Seven other changes sought increased penalties for certain repeat offender penalty enhancements and increased maximum penalties for offenses of robbery, carjacking, burglary, possession of a dangerous weapon, possession of a firearm by an unauthorized person, and unauthorized use of a motor vehicle. The last two proposed changes concerned offense elements to expand liability for crimes of misdemeanor: resisting arrest and blocking a public passage.

Thus, as congressional Republicans went on the attack, the District’s executive and legislative branches remained publicly divided.<sup>410</sup> While on record saying she was against congressional interference with local matters, Mayor Bowser qualified this by saying there was “a lot of concern in our city” about the legislation and “frankly, members of Congress have expressed similar concerns.”<sup>411</sup> Unlike many other District leaders, Mayor Bowser also reportedly chose not to lobby

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which our Nation was founded. H.J. Res. 24 and H.J. Res. 26 are both clear examples of how the District of Columbia continues to be denied true self-governance and why it deserves statehood. While we work towards making Washington, D.C. the 51st state of our Union, Congress should respect the District of Columbia’s autonomy to govern its own local affairs.”).

408. Michael Brice-Saddler, Omari Daniels & Meagan Flynn, *Bowser Proposes Changes to D.C. Criminal Code Bill as Congressional Action Nears*, WASH. POST (Feb. 6, 2023, 4:14 PM), <https://www.washingtonpost.com/dc-md-va/2023/02/06/bowser-dc-criminal-code-changes>.

409. Council of D.C. B25-0123, 25th Council Period (D.C. 2023), <https://lims.dccouncil.gov/Legislation/B25-0123>.

410. The District’s newly elected local prosecutor, Brian Schwalb, continued to support the RCCA as had his predecessor, Karl Racine. Press Release, Att’y Gen. Brian L. Schwalb, AG Schwalb Statement on the Passage of the Revised Criminal Code Act (Jan. 17, 2023), <https://oag.dc.gov/release/ag-schwalb-statement-passage-revised-criminal-code>.

411. Meagan Flynn & Michael Brice-Saddler, *Bowser Says Congress Shouldn’t Interfere as It Weighs Nixing Two D.C. Bills*, WASH. POST (Feb. 4, 2023, 6:00 AM), <https://www.washingtonpost.com/dc-md-va/2023/02/04/bowser-congress-disapproval-criminal-code>.

House leaders against the disapproval resolution.<sup>412</sup> The District's Chief of Police, a mayoral appointee, told press that Congress should "[r]eview [the RCCA] through the lens of you being a victim."<sup>413</sup> The net result was a fractured, uncoordinated effort by the District's elected leaders to safeguard the legislation.<sup>414</sup>

Despite the White House SAP, thirty-one House Democrats voted for the disapproval resolution, and it passed 250 to 173 on February 9, 2023.<sup>415</sup> Just four hours before the House vote, Democratic Congresswoman Angie Craig was assaulted in the elevator of her apartment building.<sup>416</sup> While it is unclear how much word of the assault may have spread before the vote,<sup>417</sup> afterwards the story was picked up by a host of local and national media outlets and described in conjunction with the passage of the disapproval resolution, giving extra spin to partisan messaging that District crime was out of control.<sup>418</sup> The companion Senate bill to advance the disapproval resolution was introduced by Senator Bill Hagerty the very same day with forty-seven Republican co-sponsors.<sup>419</sup>

In mid- and late February 2023 a new, more unified lobbying effort by District-elected leaders appeared to be holding off significant

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412. Cuneyt Dil, *D.C. Mayor Stands by as Congress Intervenes in Crime Law*, AXIOS (Feb. 10, 2023), <https://www.axios.com/local/washington-dc/2023/02/10/dc-mayor-congress-criminal-code-andrew-clyde> ("It is not up to the mayor to lobby for something she doesn't believe in," a source familiar with Bowser's thinking said.).

413. Alejandro Alvarez, *DC Police Chief Worries Criminal Code Overhaul Doesn't Support Victims of Violence*, WTOP NEWS (Feb. 1, 2023, 5:45 AM), <https://wtop.com/dc/2023/02/dc-police-chief-worries-criminal-code-overhaul-doesnt-support-victims-of-violence>.

414. Meaghan Flynn & Michael Brice-Saddler, *Bowser Lobbies Senate Amid Worries About Losing Democrats on D.C. Home Rule Votes*, WASH. POST (Feb. 25, 2023, 12:42 PM), <https://www.washingtonpost.com/dc-md-va/2023/02/25/bowser-senate-resolutions-bills-criminal-code>.

415. H.J. Res. 26, 118th Cong., 169 CONG. REC. H784 (2023) (roll call), <https://clerk.house.gov/Votes/2023119>.

416. Angie Craig (@RepAngieCraig), TWITTER (Feb. 9, 2023, 12:53 PM), <https://twitter.com/RepAngieCraig/status/1623741866461081601/photo/1>.

417. At least one news outlet attributed Democratic House support for the bill to the attack on Representative Craig. Alexander Bolton, *Manchin Will Vote Against New DC Crime Law*, THE HILL (Feb. 28, 2023, 8:54 AM), <https://thehill.com/homenews/senate/3877058-manchin-will-vote-against-new-dc-crime-law>.

418. See, e.g., Peter Hermann, *Authorities Discuss 'Resolution' to Case From Congresswoman's Assault*, WASH. POST (Feb. 17, 2023, 3:13 PM), <https://www.washingtonpost.com/dc-md-va/2023/02/17/angie-craig-dc-assault-resolution> (noting the connections between Representative Craig's assault and congressional attitudes towards the resolution).

419. S.J. Res. 12, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate-joint-resolution/12/cosponsors>.

defections among Senate Democrats.<sup>420</sup> However, defections by some moderate senators were expected and the District's sole representative, Eleanor Holmes-Norton, reportedly said she was counting on Biden to step in to veto the resolutions if necessary.<sup>421</sup> On February 28, 2023, Senator Joe Manchin became the first democratic senator to state his support for the disapproval resolution, but no other Senate Democrats joined and support for the House resolution still lacked a majority.<sup>422</sup>

Then, on March 2, 2023, President Biden upended congressional expectations and effectively killed the RCCA by publicly announcing in a tweet that he was prepared to sign the disapproval motion if approved by the Senate.<sup>423</sup> The President said that he didn't support some of the changes made over the Mayor's objection, including lowering carjacking penalties in particular.<sup>424</sup>

Congressional republican messaging immediately claimed victory, describing Biden's new position as a recognition that tough criminal penalties were needed.<sup>425</sup> However some commentators noted that, given the apparent ouster of Chicago Mayor Lori Lightfoot in the February 2023 elections due to rising crime, President Biden's move appeared to be a shrewd effort to preempt soft-on-crime attacks in the upcoming 2024 elections.<sup>426</sup> Others noted President Biden's long

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420. Brice-Saddler et al., *supra* note 408.

421. *Id.*

422. Bolton, *supra* note 417.

423. President Biden (@POTUS), TWITTER (Mar. 2, 2023, 3:33 PM), <https://twitter.com/POTUS/status/1631392285182009376>.

424. *Id.* ("I support D.C. Statehood and home-rule—but I don't support some of the changes D.C. Council put forward over the Mayor's objections—such as lowering penalties for carjackings. If the Senate votes to overturn what D.C. Council did—I'll sign it.")

425. *See, e.g.*, Senator Tom Cotton (@SenTomCotton) TWITTER (Mar. 2, 2023, 4:32 PM), <https://twitter.com/SenTomCotton/status/1631407033688702976> (noting that President Biden's rejection of the RCCA "acknowledged the basic fact that soft on crime policies endanger the public").

426. *See, e.g.*, Al Weaver & Mychael Schnell, *House Democrats Blindsided as Biden Changes Tune on DC Crime Bill*, THE HILL (Mar. 2, 2023, 7:11 PM), <https://thehill.com/homenews/house/3881888-house-democrats-blindsided-as-biden-changes-tune-on-dc-crime-bill> ("Frankly, it's a clear signal to those criticizing POTUS on being soft on crime amid the increased focus on the issue going into 2024—and on the heels of Lightfoot's ouster, the aide said, referring to the Chicago mayor's re-election defeat this week.")

history of supporting tough criminal penalties and very limited efforts in criminal justice reform.<sup>427</sup>

House Democrats and supporters of District home rule were not only surprised,<sup>428</sup> but many expressed anger and betrayal.<sup>429</sup> Councilmember Charles Allen, who had negotiated the final RCCA bill said: “Defending those without power matters—past pledges of support for DC Statehood couldn’t ring more hollow . . . until the nearly 700,000 residents of DC have full statehood & autonomy, we will be seen & treated as a colony, even by those who purport to support us.”<sup>430</sup>

Senate Democratic opposition to the House disapproval resolution crumbled after the President’s statement. Senator Bob Casey announced his support for the disapproval resolution later on the same day as President Biden’s announcement and, coupled with the absence of Senator John Fetterman at the time and the position of Senator Joe Manchin, it immediately became clear that the disapproval resolution would pass and become law.<sup>431</sup>

In a last-minute effort to avoid a Senate vote, on March 6, D.C. Council Chairman Phil Mendelson formally sought to withdraw the RCCA from congressional consideration. Although the disapproval process for District laws did not specify any parliamentary process or limits, the Senate Democratic leadership continued with the scheduled

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427. See, e.g., Billy Binion, *Biden Embraces the Fearmongering, Vows to Squash D.C.’s Mild Criminal Justice Reforms*, REASON FREE MINDS & FREE MKTS. (Mar. 3, 2023), <https://reason.com/2023/03/03/biden-embraces-the-fearmongering-vows-to-squash-d-c-s-mild-criminal-justice-reforms> (“Prior to running for the presidency, Biden had a reputation as a tough-on-crime warrior, with his infamous 1994 crime bill that destroyed many lives. ‘He didn’t just go along with these trends in the 1980s and 1990s—he was the ringleader,’ [NYU Law School Professor] Barkow says. ‘And that statement about the carjacking provision shows that, in many ways, he still is.’”).

428. See Carl Hulse, *Biden Bows to Republicans on Blocking D.C. Crime Law, Avoiding Veto Fight*, N.Y. TIMES (Mar. 2, 2023), <https://www.nytimes.com/2023/03/02/us/politics/biden-no-veto-dc-criminal-code.html> (“The move blindsided members of the Congressional Black Caucus, who were holding a news conference in Baltimore about their agenda for the 118th Congress when it broke. ‘This is news to me, and I’m very disappointed,’ said a visibly surprised Eleanor Holmes Norton, the District’s nonvoting delegate.”).

429. See Weaver & Schnell, *supra* note 426 (noting the dissatisfaction some Democrats expressed in the wake of Biden’s support for opposition to the RCCA).

430. Charles Allen (@charlesallen), TWITTER (Mar. 2, 2023, 9:39 PM), <https://twitter.com/charlesallen/status/1631484381461204993?s=20>.

431. Burgess Everett, Marianne Levine, Sarah Ferris & Nancy Vu, *Biden Won’t Veto GOP Effort to Repeal D.C. Crime Law*, POLITICO (Mar. 2, 2023, 1:58 PM), <https://www.politico.com/news/2023/03/02/biden-wont-veto-gop-effort-to-repeal-dc-criminal-code-00085247>.

vote.<sup>432</sup> The Council Chairman's failed effort to withdraw the bill was then itself cited by some senators as evidence that the legislation was flawed.<sup>433</sup>

On Wednesday, March 8, 2023, the Senate voted eighty-one to fourteen in support of the disapproval resolution, with thirty-three senators who caucus with Democrats joining all forty-eight present Republicans.<sup>434</sup> Appeals by some Senate Democrats to examine the bill, compare the RCCA's penalties to those in other states, and to see how the bill raised penalties for various crimes went unheeded.<sup>435</sup> Again, republican backers of the resolution claimed victory, portraying their effort against the D.C. law as part of a new, national tough-on-crime resurgence. At a signing ceremony two days later, House Speaker Kevin McCarthy said: "What today really means is we're sending a message to every city, every county, every state that no longer will Washington be soft on crime. No longer are we defunding the police. No longer are we softening sentences."<sup>436</sup>

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432. John T. Bennett, *As City Backtracks, Senate Vote on DC Criminal Changes Going Ahead, Roll Call* (Mar. 6, 2023, 12:48 PM), <https://rollcall.com/2023/03/06/as-city-backtracks-senate-vote-on-dc-criminal-changes-going-ahead> (citing a Feb. 27, 2023, Congressional Research Service report).

433. Michael Brice-Saddler, *D.C. Council Chairman Tries to Pull Crime Code Bill Before Senate Vote*, WASH. POST (Mar. 6, 2023, 7:31 PM), <https://www.washingtonpost.com/dc-md-va/2023/03/06/dc-council-criminal-legislation-withdrawn-senate/>.

434. H.J. Res. 26, 118th Cong., 169 CONG. REC. S.680 (2023) (roll call). Senator Warnock voted "present," and four Senators did not vote.

435. See, e.g., Chris Murphy (@ChrisMurphyCT), TWITTER (Mar. 6, 2023, 11:08 PM), <https://twitter.com/ChrisMurphyCT/status/1632956252744474625?s=20> ("The debate over the DC crime law has gone a bit off the rails. It lowers the carjacking maximum to 24 years, but that's IN LINE with many states. And the bill INCREASES sentences for attempted murder, attempted sexual assault, misdemeanor sexual abuse and many other crimes."); Rose Horowitch, *Biden Signs Measure to Repeal Controversial D.C. Crime Bill*, NBC NEWS (Mar. 21, 2023, 9:29 AM), <https://www.nbcnews.com/politics/joe-biden/biden-signs-measure-repeal-controversial-dc-crime-bill-rcna75875> (noting that Senator Cory Booker stated "[w]hen you actually read the bill, compare it to criminal codes of other states, it is stunning to me that somehow this has been perverted and distorted to be seen as something that is some kind of lax loosening of penalties on people doing bad things").

436. Meagan Flynn & Ellie Silverman, *D.C. Criminal Code Faces Uncertain Future as City Gears Up for New Battle*, WASH. POST (Mar. 10, 2023, 6:20 PM), <https://www.washingtonpost.com/dc-md-va/2023/03/10/dc-policing-bill-congress-criminal-code/>.

On the same day that President Biden vocally issued his first presidential veto of a bill disliked by most Democrats,<sup>437</sup> March 20, 2023, he also silently signed the resolution disapproving the RCCA. It was the first time in over thirty years—and only the fourth time ever—that the federal government passed a resolution disapproving a District law.<sup>438</sup>

#### *D. Aftermath*

Passage of the congressional disapproval resolution left the future of not only the RCCA but any MPC-based criminal code reform in the District, and even D.C. legislative autonomy uncertain. Council Chairperson Mendelson said in the following weeks that he saw no reason to think that House Republicans would engage in a good faith review of an amended form of the RCCA legislation rather than engage in “campaign demagoguery.”<sup>439</sup> The new Council Chairperson of the JPS, Brooke Pinto, called for “pausing” to develop “a long-term strategy” and focus on other upcoming legislation that would also need to go through congressional review.<sup>440</sup>

District leaders’ skepticism of a serious, fair review process for any amended RCCA and fears of new congressional attacks appear to have been well-justified. Pressed to comment on whether changes to the District’s code were needed and what would be acceptable, the disapproval resolution’s sponsor, Representative Clyde, said “I don’t know that it needs reform right now—you know, I don’t know that it does or doesn’t,” and offered just one acceptable change—reversing gun control laws to allow open carrying of firearms.<sup>441</sup>

A subsequent March 29, 2023 House Oversight hearing on the District focused on crime and criminal law, particularly the RCCA and a pending bill to reform police procedures.<sup>442</sup> The hearing sought to

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437. On March 20, 2023, the President issued the first veto of his administration to reject a congressional measure that would have overturned a Department of Labor rule making it easier for funds to consider environmental, social, and corporate governance (ESG) issues when picking investments. Clare Foran & Betsy Klein, *Biden Issues His First Veto on Retirement Investment Resolution*, CNN (Mar. 20, 2023, 1:32 PM), <https://edition.cnn.com/2023/03/20/politics/biden-first-veto/index.html>.

438. See Monyak, *supra* note 9 (noting the infrequency of resolutions disapproving D.C. laws).

439. Flynn & Silverman, *supra* note 436.

440. *Id.*

441. *Id.*

442. Meagan Flynn, *D.C. Crime in Spotlight at GOP-led Hearing Targeting Police Reform Bill*, WASH. POST (Mar. 29, 2023, 6:43 PM), [https://www.washingtonpost.com/dc-md-](https://www.washingtonpost.com/dc-md-va/)



portray the District as experiencing “unchecked” violence due to “soft-on-crime” policies,<sup>443</sup> but instead gained press attention and viral online views for a bizarre and error-ridden line of questioning about public urination by Representative Lauren Boebert.<sup>444</sup> In retrospect, that March 2023 congressional hearing (and Biden’s veto of the RCCA just days before) appears to have been the peak of the zeitgeist that brought the District’s moderate criminal code reform effort to national attention.

Shortly thereafter, two Republican-led House resolutions in the spring of 2023 that would have blocked other District laws failed—either for lack of Senate approval (in the case of a law expanding District voting rights to non-citizens),<sup>445</sup> or a veto by President Biden (in the case of the police procedure reform bill).<sup>446</sup> The pace of serious

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va/2023/03/29/house-oversight-dc-policing-bill-vote. Few particulars of the RCCA were discussed at the hearing, apart from a viral exchange by Representative Boebert regarding her mistaken belief that public urination was decriminalized under the legislation. Samaa Khullar, *Lauren Boebert Husband’s Past Comes Back to Haunt Her Amid Public Urination Fixation at Hearing*, SALON (Mar. 30, 2023, 3:19 PM), <https://www.salon.com/2023/03/30/lauren-boebert-husbands-past-comes-back-to-haunt-her-amid-public-urination-fixation-at-hearing>.

443. Press Release, House Comm. on Oversight and Accountability, Hearing Wrap Up: D.C.’s Crime Crisis Created by Soft-on-Crime Policies, Lack of Prosecutions (May 16, 2023), <https://oversight.house.gov/release/hearing-wrap-up-d-c-s-crime-crisis-created-by-soft-on-crime-policies-lack-of-prosecutions%EF%BF%BC>.

444. See, e.g., Martin Pengelly, *Wee the People: Republican Boebert Presses DC Witness on Public Urination*, GUARDIAN (Mar. 30, 2023, 1:00 PM) <https://www.theguardian.com/us-news/2023/mar/30/republican-lauren-boebert-house-hearing>.

445. H.J. Res. 24, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-joint-resolution/24>.

446. H.J. Res. 42, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-joint-resolution/42/actions>. J.D. Vance, U.S. Senator and Republican Vice Presidential candidate in the 2024 election, prominently led the Senate’s resolution against District police reform legislation. Meagan Flynn, *Senate GOP Expected to Force Vote on Measure to Block D.C. Policing Bill*, WASH. POST (May 12, 2024, 6:36 PM), <https://www.washingtonpost.com/dc-md-va/2023/05/12/dc-policing-legislation-senate-floor-vote>. The President’s May 25, 2023, veto of the congressional resolution to block District police reform coincided with the anniversary of the 2020 murder of George Floyd. District leaders praised Biden’s veto, with some seeking to characterize it as a (renewed) recognition of District autonomy. See, e.g., Michael Macagnone, *House Push to Override Biden Veto Over DC Policing Policy Falls Short*, ROLL CALL (June 13, 2023, 6:06 PM), <https://rollcall.com/2023/06/13/house-push-to-override-biden-veto-over-dc-policing-policy-falls-short> (noting Representative Eleanor Holmes-Norton’s support for Biden’s veto as an affirmation of home rule). It is unclear whether the President’s different approaches to the resolutions were part of an overarching strategy to position himself as a moderate on criminal policy issues, were due to the bills’ differing substance, or were intended to align with Mayor Bowser’s messaging. Martin

attacks on the District's legislative autonomy and criminal justice policy slackened after the defeat of the two spring 2023 resolutions. Nonetheless, with the demise of the RCCA the past presumption of District legislative autonomy was shattered and a plethora of Republican bills and appropriations riders seeking to assert federal control over District residents have since been introduced.<sup>447</sup> On public safety, Republicans' national political messaging to-date has continued to try to brand the District as a "dirty, crime ridden death trap, that must be taken over and properly run by the Federal Government."<sup>448</sup>

In fact, however, the District has now seen a sharp (if late, compared to other cities) drop in crime rates. As of August 2024, violent crime in the District was down 35% year over year and was on track to be at its lowest level in at least twenty years.<sup>449</sup> Notably, the drop in the crime rate appeared to already be well underway in the fall of 2023 and early 2024,<sup>450</sup> *preceding* a raft of criminal law changes passed in the spring of

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Austermuhle, *White House Says Biden Will Veto GOP Move to Block D.C. Police Reform Bill*, DCIST (Mar. 30, 2023, 4:54 PM), <https://dcist.com/story/23/03/30/white-house-biden-veto-gop-police-reform-bill-disapproval>.

447. Meagan Flynn, *Led by Trump, GOP Plans to 'Reassert' Control Over D.C. at Stake in Election*, WASH. POST (Jul. 19, 2024, 8:00 AM), <https://www.washingtonpost.com/dc-md-va/2024/07/19/gop-control-dc-trump> (describing sweeping bills to end the Home Rule Act that is the source of all local District lawmaking authority and proposed appropriations riders that micro-target institutions and policies such as the Mayor's Office of LGBTQ+ Affairs and right turns on red at traffic intersections).

448. Miranda Nazzaro, *Trump Says He'll Make 'Dirty' DC Part of his 'Election Platform'*, HILL (Oct. 23, 2023, 8:53 AM), <https://thehill.com/homenews/administration/4270318-trump-says-hell-make-dirty-washington-dc-part-of-his-election-platform> (quoting former President Donald Trump, speaking at a campaign rally in July 2024).

449. Press Release, U.S. Atty's Off. for D.C., *2024 DC Violent Crime Rate Decrease: A Fact Sheet* (Aug. 15, 2024), <https://www.justice.gov/usao-dc/pr/2024-dc-violent-crime-rate-decrease-fact-sheet>. These statistics reflect an approximately 31% drop in homicides and a 41% decrease in robberies. *2024 Year-to-Date Crime Comparison*, METROPOLITAN POLICE DEPARTMENT, <https://mpdc.dc.gov/page/district-crime-data-glance> (Oct. 3, 2024).

450. Mark Segraves & NBC Washington Staff, *'Passionate About Reducing Crime': DC Police Chief Speaks On Crime Drop Amid Officer Shortage*, NBC WASH., <https://www.nbcwashington.com/news/local/passionate-about-reducing-crime-dc-police-chief-speaks-on-crime-drop-amid-officer-shortage/3570469> (Mar. 19, 2024, 4:29 PM) (citing Metropolitan Police Department statistics showing a 32% drop in homicides and a 17% drop in overall violent crime in the first two-and-a-half months of 2024). At a March 2024 public briefing U.S. Attorney for the District of Columbia Matthew Graves indicated that violent crime peaked in the summer of 2023 and a decline had already started by the end of 2023. Scott Gelman, *Violent Crime In DC Is Falling, A Trend City Leaders Are Hopeful Will Continue This Summer*, WTOP NEWS (Mar.

2024 in reaction to the crime spike.<sup>451</sup> These criminal law changes included an expansion of pretrial detention, an expansion of liability for the crime of carjacking, and the revival of a 1990s law enforcement tool to create temporary drug-free zones with a lower threshold on searches.

As of publication, District leaders have taken no direct action to revive the RCCA as previously passed or amend it, but neither has the subject of criminal code reform been forgotten.<sup>452</sup> Supporters and opponents of the RCCA have engaged in budgetary skirmishes over the continuation of the bill's principal designer, the CCRC. In 2023 and 2024 Mayor Bowser three times sought to defund the CCRC in her proposed budgets.<sup>453</sup> However, the Council each time restored its funding,<sup>454</sup> and has called on the CCRC to revisit the RCCA and,

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15, 2024, 8:19 PM), <https://wtop.com/dc/2024/03/violent-crime-in-dc-is-falling-a-trend-city-leaders-are-hopeful-will-continue-this-summer>.

451. Meagan Flynn & Emily Davies, *D.C. Council Passes Public Safety Overhaul Following Historic Crime Spike*, WASH. POST (Mar. 5, 2024, 7:07 AM), <https://www.washingtonpost.com/dc-md-va/2024/03/05/dc-council-public-safety-secure-overhaul-pinto>. Whatever the contributing factors for the spike in D.C. crime in 2023 and its turnaround in early 2024, the fact that the District's substantive criminal laws and penalties were unchanged throughout this time period (as well as the years of lower crime preceding the pandemic crime spike) indicates that criminal liability and penalty changes have not been correlated, one way or another, with the base rate of violent crime. By extension, it is hard to imagine how passage of the RCCA, which would not have gone into effect until late 2025, would have substantially affected the District's recent crime wave.

452. The Council's passage of the RCCA fueled a short-lived recall effort against Councilmember Charles Allen, the bill's shepherd through the D.C. Council. However, the recall ultimately failed to garner enough support to even make it onto the ballot after pushback from Allen who maintained his support for code reform and asserted that public safety was the Councilmember's top priority in his legislative priorities. Meagan Flynn, *Campaign to Recall D.C. lawmaker Charles Allen Fails to Qualify for Ballot*, WASH. POST (Aug. 12, 2024, 5:32 PM), <https://www.washingtonpost.com/dc-md-va/2024/08/12/dc-recall-effort-charles-allen>.

453. The Mayor omitted funding for the CCRC from her regular FY24 budget, Council of D.C. B25-0203, 25th Council Period (D.C. 2023), <https://lims.dccouncil.gov/Legislation/B25-0203>, proposed in her special supplementary FY24 budget bill (addressing a citywide spending gap) to rescind all appropriated funds from the Agency and add a sunset date for agency operation of July 1, 2025, Council of D.C. B25-0788, 25th Council Period (D.C. 2024), <https://lims.dccouncil.gov/Legislation/B25-0788>, and again zeroed out the Agency's spending in her proposed FY25 budget, Council of D.C. B25-0785, 25th Council Period (D.C. 2024), <https://lims.dccouncil.gov/Legislation/B25-0785>.

454. *See, e.g.*, B25-0785 at 50 (noting "[t]he Mayor's proposed FY 2025 budget includes no funding for the CCRC . . . . The Committee disagrees with this proposal [and] therefore extends the CCRC's funding for the remainder of FY 2024 and for all of FY 2025").

among other duties, develop “materials to explain and promote the changes to the public and our federal partners.”<sup>455</sup> To further insulate the Agency from future Mayoral efforts at controlling or defunding the CCRC, the Council even amended the Agency’s legislation to recharacterize the Agency as “an independent office *responsible to the Council*.”<sup>456</sup> The ongoing difference between the District’s current legislative and executive branches over support of the CCRC suggests that even though the gap between the RCCA and the amendments to it proposed by the Mayor in early 2023 were relatively slight,<sup>457</sup> future political compromise between the branches on criminal code reform may be difficult to obtain.

#### V. LESSONS FOR FUTURE CRIMINAL CODE REFORM EFFORTS

The District’s RCCA bill was not a Model Penal Code 2.0 that was designed to be universal or easily adapted to fit other jurisdictions. As the above history shows, the reform process and final legislation that passed in the District were painstakingly customized to fit local law, policy, and politics—and those differ significantly from other states (and the federal government).<sup>458</sup> There are, nonetheless,

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455. COUNCIL OF D.C., COMM. ON JUDICIARY & PUB. SAFETY, REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY ON THE FISCAL YEAR 2025 BUDGET FOR AGENCIES UNDER ITS PURVIEW, 25th Council Period, at 50 (2024), [https://lims.dccouncil.gov/downloads/LIMS/55149/Committee\\_Report/B25-0785-Committee\\_Report9.pdf?Id=195519](https://lims.dccouncil.gov/downloads/LIMS/55149/Committee_Report/B25-0785-Committee_Report9.pdf?Id=195519).

456. Council of D.C. B25-0784, 25th Council Period (D.C. 2024), 71 D.C. Reg. 9990, <https://lims.dccouncil.gov/Legislation/B25-0784> (emphasis added) (Title III, Subtitle B. Criminal Code Reform Commission). While this provision may have no direct legal effect, under principles of comity, the executive branch usually does not interfere with offices directly responsible to the Council.

457. H.J. Res. 26, 118th Cong., 169 CONG. REC. H784 (2023) (roll call), <https://clerk.house.gov/Votes/2023119>.

458. Apart from the District’s demographics (as a small, all-urban, heavily democratic jurisdiction with a higher percentage of Black residents than any state), its criminal justice system is still controlled and paid for in significant part by federal laws and authorities. The fact that the financial costs of District criminal justice adjudication and incarceration, born by the federal government, were largely absent from discussions of the RCCA also highlights how different the District’s criminal justice politics can be from other jurisdictions. Nationally, the most legislatively successful (albeit piecemeal) movement to reform non-marijuana substantive criminal laws in the last decade or so has been the assortment of state Justice Reinvestment Initiatives (JRIs) in which cost effectiveness is central. SAMANTHA HARVELL, JEREMY WELSH-LOVEMAN, HANNA LOVE, JULIA DURNAN, JOSH EISENSTAT, LAURA GOLLAN ET AL., REFORMING SENTENCING & CORRECTIONS. POLICY: THE EXPERIENCE OF JUSTICE REINVESTMENT INITIATIVE STATES (2017) (noting the decrease in prison populations and the corresponding averted fiscal costs in JRI states).

generalizable lessons for other jurisdictions that can be drawn from the District's criminal code reform experience; in particular, the process that D.C. followed to develop its revised code language provides a rare contemporary exemplar.

This Part presents several principles for successfully structuring future MPC-based reform efforts (and other comprehensive code reform) in other jurisdictions. These principles are based on the District's recent experience and build upon scholarship by others with first-hand experience of criminal code reform that have recognized the need for long term commitments and permanent administrative bodies to facilitate such work.<sup>459</sup> Further, these principles are unavoidably tentative and skeletal. To be successful, state lawmakers, policy experts, and advocates must grapple with whether and how MPC-based reform and other comprehensive criminal code reform efforts might be accomplished in their own jurisdiction based on their own particular circumstances.

#### *A. Administrative Structure*

First, the administrative structure, including the leadership of a comprehensive criminal code reform effort, should be independent, dedicated specifically to criminal code reform, and facilitate a direct, sustained working relationship with legislators. This first principle in establishing a process for comprehensive criminal code reform recognizes that the process is most fundamentally legislative in nature and challenges the operational status quo among executive and judicial authorities. The ultimate success of the legislation will depend on the public, a broad coalition of criminal justice stakeholders, and the experience of other government branches. Yet, primary attention must be given to setting up the revision effort in a way to ensure continued support and engagement by the legislature if a multi-year statutory reform effort is even to get to the point of having serious hearings.

Policy independence from other government units, even those that may seem closely allied, is essential. The first ten years of the District's criminal code revision efforts (2007 to 2016) accomplished virtually nothing because responsibility was given to an agency that had a preexisting and conflicting mandate to maintain sentencing

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459. See Robinson et al., *supra* note 80, at 64 (advocating for “standing commissions to generate and monitor states’ criminal codes” based on the need for expertise and ongoing monitoring, but not addressing agency independence or structure in more detail).

guidelines, the Agency was controlled by executive and judicial branches representatives appointed for reasons extraneous to code reform, and a direct working relationship with legislators on code reform was not established. Clear statutory responsibilities, staff resources, and housing within an independent agency structure were necessary but insufficient.

An independent agency structure that still has strong legislative ties also may be best positioned to navigate political fluctuations among elected officials. Alternative administrative structures for a criminal code reform project potentially may facilitate a direct and sustained working relationship with the relevant legislative committee—e.g., a standing legislative subcommittee. However, the CCRC's structure as an independent agency on which the overseeing legislative committee had a designated Advisory Group member balanced well the need for distance between legislators and the staff's day-to-day work while keeping lines of communication active.<sup>460</sup> For a project spanning multiple legislative sessions, such an independent agency structure has the benefit of not becoming too closely associated with any one legislator's or Committee's immediate priorities.<sup>461</sup>

#### *B. Projected Duration*

Second, a comprehensive criminal code revision process will work more efficiently if designed at the outset with a long-term or permanent time horizon. The history of the District's various criminal code reform efforts shows repeated, gross underestimates of the time and/or resources necessary for reform legislation. An absolute minimum of six years seems a reasonable estimate for a code revision entity to engage both in drafting and legislative action (four years) and aid initial implementation (two years).<sup>462</sup> This estimate reflects the fact

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460. However, that distance could have become a fatal hindrance for the CCRC if it had continued after the development of the Agency's recommendations in March 2021. The subsequent assignment of two of the CCRC's staff to the JPS Committee arguably was critical in providing more accessible and direct technical expertise to lawmakers reviewing, amending the recommendations, and moving the final RCCA bill forward in late 2021 and 2022.

461. The history of the CCRC also indicates how independence from executive agencies and/or the judiciary may pose challenges, e.g., in obtaining relevant data (e.g., on arrests, court charges, incarceration), accessing personnel in those branches with subject matter expertise, and gaining high-level policy attention.

462. Two years for initial implementation is particularly speculative as the District did not reach this phase, and that estimate appears quite ambitious when one considers the need to update jury instructions and sentencing guidelines, modify legal

that, while it took the District six years just to develop and pass a revised code, it is conceivable that could be sped up by a larger staff, greater stakeholder participation, and speedier legislative review.<sup>463</sup> On the other hand, it should be noted that this minimum six-year timeframe does not factor in the revision of the rare and regulatory crimes that will need revision.<sup>464</sup> Moreover, there are also long-term needs for technical assistance to aid implementation and help ensure that new criminal legislation and amendments are drafted in a manner consistent with the revised criminal code. A slimmed-down but permanent institution dedicated to maintaining the criminal code appears to be the best solution to address these ongoing, long term tasks.

For planners to look beyond statutory drafting and factor in speculative legislative action and farther-off implementation work may be foreboding when trying to get a code revision initiative started; however, taking a long-term perspective from the start is crucial to set up an effective administrative structure and realistic budget. Such advance planning also may attract allies (or at least assuage antagonists) in government agencies that otherwise will bear retraining costs due to criminal code reform and have no ready pool of experts to draw upon. A long-term commitment of funding and resources to the Agency may also be critical to attracting and retaining highly qualified staff. Above all, designing a long-term or permanent institution devoted to criminal code reform may be a critical signal to criminal justice stakeholders of the commitment of the legislature that nudges those stakeholders to seriously engage in the process.

### *C. Education and Outreach*

Third, proactive education and outreach on the broad aims and methods of MPC-based criminal code reform are critical to both statutory drafting and legislative success. Particular attention is needed

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and public safety information systems, and conduct a first training of affected justice system actors—all essential steps before a comprehensively revised criminal code can go into effect.

463. *See supra* Parts III-IV. The approach of the CCRC was arguably slow. It placed a premium on trying to accommodate existing law and practice, creating a written record for transparency, and working through iterative drafts with its Advisory Group. On the other hand, it is not clear that an approach spending less time on these efforts would have been politically viable. Moreover, thanks to earlier years of efforts, the CCRC began operation with a trained staff and knowledgeable stakeholders.

464. Hundreds of these crimes exist in the D.C. Code but were not part of the RCCA legislation. Often highly technical or specialized, reform of these offenses poses a substantial “last mile” problem for criminal code revision to be truly comprehensive.

to describe the rationales for actual or apparent penalty changes for serious crimes and other changes that impose significant costs on other agencies.

At the drafting phase, education of stakeholders engaged in the criminal code reform process is an indispensable (and easily overlooked) precursor to action. Leaders with deep experience in the existing criminal code must be among the chief participants in any reform effort, yet because they are so entrenched in the current system they are among those most in need of education on the goals and methods of MPC-based reform. Academic legal experts are likely to have such perspective (though some will lack familiarity with state-level substantive law) and can play a critical role in helping educate other stakeholders about the code reform process, especially at the outset.

Still, the problems in effectively communicating how an MPC-based code works—including its new organization, definitions, complete statements of offense elements and defenses, and new grading and penalty classifications—is at least as great an obstacle to progress in code revision as institutional and status quo bias. Reviewers repeatedly opposed CCRC-proposed changes to sentencing statutes because they failed to consider the changes in context. In particular, they tended to criticize a reduction in sentencing for a crime without considering how the behavior associated with that crime also entails liability for another revised crime and thus the new code as a whole authorizes a similar penalty level to that which already exists. Earlier, better efforts to provide stakeholders with concise educational materials on the overall design and effects of an MPC-based revision may have helped build consensus and almost surely would have sped up stakeholder deliberations.<sup>465</sup>

When a criminal code reform bill approaches consideration by the legislature, the centralization of working knowledge about the revision bill poses a major obstacle to effective education and outreach. The granularity and vast scope of such legislation mean that few will

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465. The CCRC was fortunate to have such highly dedicated and experienced Advisory Group members working with it. However, as noted in the above history, the members representing government institutions repeatedly had the difficult task of communicating with their in-house colleagues about the meaning and import of draft code revision changes under consideration. That time-pressured, formidable task constituted a second layer of communication challenges that the CCRC staff was only peripherally aware of but appeared to be responsible for significant delay, confusion, and opposition to the project. Despite the profusion of detailed explanatory material produced by the CCRC, it appears, in retrospect, that additional educational information of a more summary nature may have been helpful to institutional stakeholders' internal review during the drafting process.



participate in the drafting process, and few will attempt an independent analysis who are not participants in the drafting process or otherwise required to review the legislation for fiscal or compliance purposes. Consequently, almost no one is likely to be knowledgeable about the whole bill who did not participate in its drafting. When the criminal code reform bill moves, interested parties may independently identify and evaluate the few topics of most interest to them, though such a narrow analysis will often mislead without consideration of the effect of broader changes to the code's general part (especially definitions, culpable mental state requirements, defenses, and penalty classes). More likely, interested parties will simply ask the opinions of allies who were among the very few participants in the drafting process. Robust debate and identification of possible errors require a diverse array of knowledgeable reviewers, however. Decentralizing information about the contents of reform and presenting that information in an accessible form therefore must be a responsibility of the government agency that assembles the recommended reforms.

Unfortunately, education and outreach on comprehensive criminal code reform is technically difficult even for those with a sophisticated legal understanding of the changes at issue. Even though criminal code reform legislation largely reorganizes existing practice into a simpler and more coherent framework, it is highly vulnerable to misunderstanding and intentional misrepresentation from piecemeal reading or analysis. In part, this is because of the sheer scale of additions and subtractions to existing statutes. But scale aside, MPC-based reform is a reorganization, merging, division, and systematization of criminal statutes that disrupts the usual legal categories and ways of navigating statutes. Such reform can appear to be a massive change in liability and penalties for those who are not aware of how the new set of offenses, defenses, penalties, and other rule changes interrelate.

Consideration should be given to the creation of an outreach and education sub-unit within the governmental reform entity responsible for criminal code reform. While the legal experts—government staff and stakeholders—engaged throughout the drafting process may be best-positioned to understand these technical matters, they are unlikely to be trained in public relations or communications. Conversely, public relations experts and outside contractors may be experienced in education and outreach but lack substantive expertise and risk falling into an advocacy (rather than an explanatory) role. A dedicated in-house staff member or team responsible for education and outreach may be the best combination of legal and communications expertise.

Effectively communicating about changes to maximum penalties stands out as potentially the most difficult aspect of outreach and education about comprehensive criminal code reform—certainly it was for the RCCA in the District’s legislative process.<sup>466</sup> The explanatory problem went beyond the fact that there were multiple data sources, from historical court sentences to public opinion surveys, grounding the RCCA penalty changes. It went beyond the fact that existing statutory maximums for most crimes were far higher than even the most serious penalties imposed in the last decade, such that a massive reduction in these paper-tiger<sup>467</sup> statutory penalties would not require any actual lowering of prison time as compared to the sentences actually being imposed in District courtrooms. Explanation also was complicated by the new arrangement of offenses in the RCCA and the fact that the RCCA used a “whole-code” analysis which factored in overlapping crimes and enhancements that could be co-charged to provide a greater and proportionate penalty range for the targeted behavior.<sup>468</sup> Comparing just the maximum for one crime in the RCCA to court penalties for its most-direct counterpart in the current D.C. Code, as those unfamiliar with the new statutes would often do, wrongly made it seem as if the total penalties under the RCCA required lower sentences.

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466. The CCRC issued detailed tables aligning the existing D.C. offenses with comparable crimes under the new RCCA and engaged in lengthy conversations and written exchanges with its Advisory Group members and lawmakers about these changes. MARCH 2021 RECOMMENDATIONS FOR THE COUNCIL & MAYOR, *supra* note 12. However, further summary materials on penalty changes were not readily available to the public.

467. See SUMMARY OF THE RCCA app. g, *supra* note 264 (citing all current District offenses for which there was a conviction in recent years, these crimes’ statutory maxima and minima, actual court-imposed sentences for adults convicted of these crimes, and the penalties recommended for the most comparable in the initial RCCA legislation, prior to increases by the D.C. Council Committee process and without accounting for overlapping crimes that could add further penalties for criminal acts under the RCCA). Except where defendants have committed multiple crimes of violence, District judges have rarely imposed life and other very long sentences to the full extent authorized by current statutory maxima. See D.C. CRIM. CODE REFORM COMM’N, ANALYSIS OF LIFE, LIFE-EQUIVALENT, AND LONG-TERM SENTENCES IN THE DISTRICT OF COLUMBIA 2010-2019 (2021) at 6, <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC-Analysis-of-District-Life-Life-Equivalent-and-Long-Term-Sentences-9-10-21.pdf> (analyzing a decade of D.C. cases with life, life-equivalent, and over fifteen-year sentences, as well as individual charges that received sentences over twenty-four years, and finding that just ten cases in which one or more life sentences were imposed but that those ten cases were of people convicted of two hundred crimes).

468. See *supra* text accompanying notes 267–69.

While there may be reasonable disagreements about the appropriate amount of punishment and other policy matters, and about how to interpret ambiguous text, misunderstanding of the RCCA because of its different (MPC-based) drafting style and reorganization of statutes was too often a source of opposition. Both general and highly detailed educational materials concisely explaining the impact of sentencing changes for major felonies and comparing those penalties to other jurisdictions may have helped diminish opposition to the changes. Providing accurate, easily digestible public information cannot stop false narratives from taking root, but it may limit them.

#### *D. Political Timing*

Finally, while MPC-based criminal code reform can be achieved as a moderate, good governance initiative, the District's experience indicates that the legislative phase of reform is unlikely to be successful in a time of significant crime increases, even if the bill includes a balanced set of more and less punitive changes. Because comprehensive criminal code reform does not directly respond to the political need to show short-term action on crime reduction, a large reform bill likely will either be sidelined or rejected during a crime spike. A lack of immediacy is characteristic of any comprehensive criminal code reform legislation, and it means that higher priority legislation and urgent public safety issues can overtake the impetus for code reform.

The RCCA was an instance of complex, collaborative, transparent, data-driven legislative drafting with non-controversial aims. It passed the D.C. Council unanimously.<sup>469</sup> However, the broad support for the bill did not translate into a sense of urgency and it may well have been postponed had the District's crime increase been just a few months further along. While accelerating crime rates in the District in 2022 and 2023 did not eclipse the Council's review of the RCCA,<sup>470</sup> they did dominate media narratives and congressional review of the bill in early 2024.

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469. See *Council Overwhelmingly Overrides Veto, Sustains Substantive Criminal Code Revision*, *supra* note 398.

470. A strikingly similar crossroads between MPC-based reform and rising crime rates occurred in 1980 when the District held hearings on the revised Basic Criminal Code developed by the D.C. Law Revision Commission that was never enacted. Janet Cooke, *Rising Crime Keeps Police Busy in D.C.*, WASH. POST (Oct. 19, 1980), <https://www.washingtonpost.com/archive/local/1980/10/19/rising-crime-keeps-police-busy-in-dc/1284b8d4-86e1-4742-8b56-07c82ea67392> (reporting on the rise in crime in D.C. in 1980).

Enacting MPC-based or other comprehensive code reform in the face of rising crime may be good policy.<sup>471</sup> Criminological research firmly establishes that swift, accurate policing and judicial resolution—both of which comprehensive criminal code reform facilitates—is what the justice system should do to effectively deter crime.<sup>472</sup> Nonetheless, the trope that any reduction of penalties (or even the appearance of such) will increase crime continues to be highly salient in political discussions of crime. Ironically, it was precisely the political pressure for legislators to “do something” new and quick to address rising crime rates or to respond to a particular case that got the District into its current morass of duplicative offenses and artificially high authorized penalties. If there are real or perceived penalty reductions as part of criminal code reform, legislators at the very least should expect reform legislation to be opposed as “send[ing] the wrong message,”<sup>473</sup> or face baseless claims that it will “lead to violent crime rates exploding.”<sup>474</sup> Such narratives dovetail naturally with any opposition to reform from institutional actors in the criminal justice system who wish to retain the broad discretion that is the hallmark of criminal codes that have not undergone modern, comprehensive reform.<sup>475</sup>

Fortunately, the administrative structure of criminal code reform institutions can help alleviate the vulnerability of legislation to unforeseeable crime trends and false messaging that would equate any change in maximum penalties to an acceptance of such crime. MPC-

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471. Besides advancing fundamental rule of law and justice interests, moderate criminal code reform also yields public safety benefits. Criminal laws that do not align with the public’s moral intuitions undermine compliance. See generally PAUL H. ROBINSON, *INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT* (2013) (conducting an empirical analysis on different types of criminal justice reforms). See also Paul H. Robinson & John Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 49–50 (2007) (advocating for a reform in line with similar principals to those of the MPC).

472. See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199 (2013) (highlighting the importance of the certainty of punishment in effective deterrence).

473. Mark Seagraves, *DC Mayor Bowser Vetoes Criminal Code Overhaul*, NBC4 WASH. (Jan. 4, 2023), <https://www.nbcwashington.com/news/local/dc-mayor-bowser-vetoes-criminal-code-overhaul/3247124>.

474. Cami Mondeaux, *DC Police Union Criticizes Criminal Code Overhaul and Warns of ‘Exploding’ Crime Rates*, WASH. EXAMINER (Jan. 18, 2023, 9:47 AM), <https://www.washingtonexaminer.com/restoring-america/fairness-justice/dc-police-union-criticizes-criminal-code-overhaul>.

475. Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 289 (2012); Robinson, Kussmaul & Sarahne, *supra* note 248, at 93.

based reform requires a multi-year drafting effort.<sup>476</sup> Beyond the creation of an MPC-based general part and coverage of major felonies, there are no self-evident cut-off points for when the scope of reform should be deemed appropriate for legislative action (versus continued work on the long tail of minor offenses in a criminal code). If, at the outset, a legislative body creates an administrative structure for code reform that will carry work forward in the long-term (or permanently), there remains a large window for legislative action on reforms of varying scope. Such a window can better accommodate the vicissitudes of legislative opportunities to move a large criminal justice reform bill that is not primarily directed at public safety concerns. In fact, the possibility of adjusting the timing of legislative introduction is a unique, unseen benefit of the long time horizon for MPC-based reform that less massive types of criminal justice reform efforts lack.

Of course, additional flexibility in timing the release of MPC-based reform legislation only aids, but does not solve, the fateful problem of timing political action. The CCRC was a permanent, independent agency by the time it submitted its bill.<sup>477</sup> Yet, the timing of the bill turned out to be horrific, encountering a perfect storm of opposition.<sup>478</sup>

#### CONCLUSION

The District's need for comprehensive criminal code reform persists and the costs of developing new legislation from scratch are high. Consequently, it is reasonable to expect that an amended version of the RCCA or similar MPC-based reform legislation will be revisited in

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476. See *supra* text accompanying notes 457–58 (estimating an absolute minimum of four years for MPC-based code reform drafting and enactment).

477. Council of D.C. B25-0784, 25th Council Period (D.C. 2024), 71 D.C. Reg. 9990, <https://lms.dccouncil.gov/Legislation/B25-0784>.

478. Some inside D.C. politics retrospectively blamed the delayed movement of the RCCA bill for its congressional demise. See, e.g., Martin Austermuhle, *How a D.C. Crime Bill Sparked a Political Firestorm and Ended Up Blocked by Congress*, WAMU 88.5 (Mar. 15, 2023), <https://wamu.org/story/23/03/15/dc-criminal-code-blocked-congress>. But it bears emphasis that national politics and messaging regarding crime, criminal justice reform, and the rule of law shifted greatly over the years it took the District to develop its code revision legislation (2007 to 2023). See, e.g., *supra* note 324 (highlighting the influence of the 2020 murder of George Floyd and the 2022 Capitol insurrection). As noted throughout this Article, there were multiple factors that slowed the District's code reform effort, most significantly the leadership and administrative structure problems that plagued the SCCRC during its decade-long (2007 to 2016) responsibility to issue reform recommendations. More minor delays experienced by the CCRC, whether due to COVID-19 or otherwise, also slowed that agency's works by crucial months.

the District in the near future. There simply is no alternative if District lawmakers are to begin to gain control of the criminal justice system.<sup>479</sup>

The District's passage of the RCCA was an effort to reject the "nonsystem" of criminal laws that had evolved piecemeal over the past century and an acceptance of responsibility for a new, modern, cohesive set of laws.<sup>480</sup> Following the example of comprehensive, MPC-based reforms in other jurisdictions, the District sought to make the entirety of its criminal code function as a single clear, consistent, complete, proportionate whole. It was a unique effort in modern times to reevaluate the front-edge of the criminal justice system: the articulation of crimes and punishments that guides so many downstream actions by police, prosecutors, sentencing judges, corrections officers, and other criminal justice system actors.

The failure of the RCCA to survive the national politics of crime in early 2023 should not detract from its success as the first comprehensive criminal code reform legislation to be passed by a state-level legislature in over thirty years.<sup>481</sup> Other jurisdictions seeking to develop and pass similarly comprehensive criminal code revision will need to tailor their reform process to match their own history, politics, and moral intuitions. Yet, the RCCA shows that comprehensive criminal code reform is still possible, and it provides guidance on the process that can be used for future MPC-based reform efforts, both in the District and nationally.

Just as Professor Forman found no simple explanation for the dysfunction of the District's criminal justice system, he similarly prescribed no single solution. He noted that the unwinding of mass incarceration would involve many actors and be a gradual process.<sup>482</sup> Comprehensive criminal code reform, with its attention to reestablishing systemwide clarity, consistency, completeness, and

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479. *Cardozo v. United States*, 315 A.3d 658, 680 (D.C. 2024) (en banc) (Easterly, J., concurring) ("This case demonstrates that the District still needs a new criminal code. Until one is enacted, judges will fill the breach, to the extent we are able. But in a representative democracy, fundamental and elemental questions about the boundaries of criminal law and the appropriate punishment for its violation are best addressed, in the first instance, by the Council as the District's legislative body." (citation omitted)).

480. See FORMAN, *supra* note 1.

481. See Holley, *supra* note 67, at 234 (noting that states have failed to implement comprehensive reform despite the publication of the MPC).

482. FORMAN, *supra* note 1, at 229, 238.

proportionality in criminal laws is a prerequisite for, and must be part of, any such change of the justice system.<sup>483</sup>

Comprehensive criminal code reform, particularly the kind of moderate reform in the RCCA, is no panacea for the criminal justice system. Powerful as they are, criminal codes are just one part of the institutional architecture that make up the nation's justice systems. Major executive and judicial reforms are needed too. Moreover, as criminal code reforms will not succeed if they get too far ahead of societal norms, such legal reforms should not be expected to end mass incarceration, advance restorative justice, or otherwise fundamentally reorient criminal justice policy without accompanying cultural change.<sup>484</sup> Yet, comprehensive criminal code reform can at least help contain the excesses endemic to older bodies of law that continue to use overlapping, ambiguous statutes that over rely on prosecutorial and judicial discretion.

Comprehensive criminal code reform can begin to restore public trust by reflecting contemporary norms in a rational, consistent way. The District's example should reopen consideration of comprehensive criminal code reform as both a necessary and *viable* part of the nation's criminal justice reform agenda.

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483. To date, comprehensive criminal code reform has not been a central part of recent scholarly or advocacy conversations about ending the United States' overreliance on incarceration. *See, e.g.*, PREMAL DHARIA, JAMES FORMAN JR. & MARIA HAWILO, *DISMANTLING MASS INCARCERATION, A HANDBOOK FOR CHANGE* xvii-xix (2024) (conceptualizing the criminal justice system as a "series of largely disconnected actors, structures, and bureaucracies, each following their own incentives and logics," declining to offer "concise solutions" because "mass incarceration is not a concise problem," and organizing its analysis of solutions around "each portion of the criminal system" (police, prosecutors, etc.) without directly addressing the criminal codes that establish criminal liability and authorize punishment).

484. *But see* Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CALIF. L. REV. 1967, 1968-72 (2019) (voicing skepticism that a cultural change framework for dismantling mass incarceration will succeed because long-term policies succumb to short-term fear when crime rates are on an upcycle).