D.C. Criminal Code Reform Commission

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November 3, 2021

The Honorable Charles Allen
Chairman, Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Washington DC 20004

Dear Councilmember Allen:

Below is a copy of my testimony for the November 4, 2021 hearing on the "Revised Criminal Code Act of 2021."

Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

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Introduction

Chairman Allen, Councilmembers, thank you for holding this first hearing on the "Revised Criminal Code Act of 2021" (RCCA) submitted by the D.C. Criminal Code Reform Commission (CCRC). I also want to thank the full Council and the Mayor for initiating this process five years ago, by creating the CCRC and charging it with modernizing the District's criminal code.

To start my testimony today, let me summarize the basic case for supporting this bill.

The need for the RCCA is great. I am here because the District's current criminal code has not undergone a comprehensive revision since its creation by Congress in 1901. It still uses a 19th century structure that relies heavily on past court opinions to articulate what the elements of crimes are and what the defenses are. Per this 19th century model, offenses typically have few or no penalty gradations to distinguish more serious from less serious conduct. One or two high statutory maximums are authorized for all forms of an offense, with maximums that usually far exceed what judges today ever apply.

More recently, mandatory minimum penalties were added even though research now shows they do not deter crime.[1] The right to a jury in misdemeanor cases was limited in the 90s because of concerns about court resources even though about 40 states manage to provide access to juries for any charge carrying incarceration time.[2]

In sum, the District's current criminal code fails to meet the basic legislative function of fully and specifically articulating what the laws are and is out-of-sync with current public norms and best practices. This failure requires prosecutors and judges to decide which of many overlapping charges to bring, what elements establish criminal liability, and which of the wide-ranging penalties are merited. Even with the best of intention, such vast discretion is subject to errors, arbitrariness, and bias. This failure undermines the legitimacy of the criminal law and erodes public trust and confidence in the criminal justice system.

Realizing the need to go beyond what piecemeal legislative efforts accomplished in the past, the District has invested considerable time and resources to develop a plan for comprehensive reform of the criminal code. The Council created the CCRC about five years ago and directed it to provide recommendations that improve the clarity, consistency, completeness, organization, and proportionality of criminal statutes. The CCRC was directed to examine model codes and best practices in other jurisdictions. The agency's statute also designated an Advisory Group that held years of monthly meetings with staff, gave continuous feedback on drafts, and, in the end, voted unanimously to approve submission of the CCRC recommendations to the Mayor and the Council. It has been a multi-year, transparent, research-driven process to develop the RCCA before you now.

The proposed legislation would comprehensively modernize not only individual criminal offenses but the entire design of the criminal code. It adopts the basic structural features of the American

Law Institute's Model Penal Code (MPC), the standard for contemporary criminal codes that has been adopted by most states and tested and validated for decades. For the first time in the District, the RCCA specifies all the elements that must be proven for each offense, including the required culpable mental states. For the first time, the RCCA defines common terms, codifies defenses, and implements a uniform system of penalty classes. Offenses and penalty enhancements are reorganized—sometimes combined, sometimes broken out—so the organization is logical and gaps and overlap reduced. Individual offenses are graded to distinguish more and less serious conduct of the same type. Penalties *across* all offenses now account for how multiple charges and penalties can apply to one real-life event and are updated to reflect recent survey results on how District voters rank the relative seriousness of offenses.

The RCCA is not just a broad updating of criminal statutes, it is arguably the District's first criminal code. By that, I mean that it is the first time that, like other states, the District's various criminal laws have been reviewed and redesigned to function *together* as a clear, consistent, complete, and proportionate *system* of laws.

Now, let me step back a bit and explain a bit about the state of the District's current criminal code for those who haven't spent the last five years immersed in it. I will discuss some current statutory language that exemplifies the need for the RCCA. Then I will say a bit more about the bill's development and highlight some of the legislation's main features.

Part I: The Need for the RCCA

To start, what even is a "criminal code"? When I use the term "criminal code" today I am referring to so-called "substantive criminal law"—i.e., the statutes that name, establish liability requirements, and authorize punishments for criminal acts. That substantive law has been the primary focus of the CCRC's work to-date. The CCRC has not addressed statutes about policing, the powers of the judiciary, or other criminal procedure matters except as necessary to reform the substantive law provisions.

D.C. Code Title 22 is the heart of the District's criminal code and the core of the RCCA is creating a new Title 22A that replaces almost all of the current Title 22. The RCCA's Title 22A would replace the murder, assault, theft, and most of the crimes and penalties in current Title 22. The RCCA also addresses a number of major firearm, drug, and other offenses outside of Title 22, revising the language but leaving them where they are in the current D.C. Code.

When was the District's criminal code last revised? Never—at least not as a whole. The criminal code dates back to Congress's passage of the D.C. Code in 1901. Since that time there has never been a comprehensive update to District statutes. In fact, dozens of the crimes codified in 1901—complete with their references to stables, canal boats, and steamboats—have not been amended at all or have had only their penalties updated somewhat. These "1901 holdover offenses" include many of the most common and serious crimes prosecuted in the District, such as murder, manslaughter, robbery, burglary, and assault.

What's the problem with unrevised offenses? References to steamboats are not really a problem. Practically, the fact that District offenses, even some of the most common and serious, continue to

have anachronistic references to steamboats or being placed in the "Workhouse" of the 1800s doesn't matter to the extent that those referenced don't affect how the statutes can be used today.

What does matter is that the unrevised offenses are frequently unclear, inconsistent, and incomplete in ways that do affect how the statutes are used today. What does matter is that they carry disproportionate penalties and are organized in a way that artificially multiplies liability. These defects lead to a host of real problems with real consequences for those who work in and interact with the District's justice system today.

Prosecutors, judges, and defense attorneys waste hours litigating unclear District statutes. Jurors are confused at what they are being asked to decide and asked to make such consequential decisions with scant guidance. Prosecutors have to choose among a profusion of overlapping offenses that address the same behavior with sharply different penalties. Ordinary behavior and speech protected by the First Amendment appears to be criminalized. Judges must apply mandatory minimum penalties that don't suit the person before them. Convictions get overturned because the statutes leave out critical elements. These are just some of the problems.

My time is limited, but to make these defects and the problems they can cause less abstract, I want to discuss three current D.C. Code statutes.

First, the District's current "simple" assault statute states that "whoever unlawfully assaults, or threatens another in a menacing manner, shall be…[subject to a fine of $1,000 or imprisonment up to 180 days or both]."[3] The provision is called "simple" assault to distinguish it from an array of felony assault-type statutes that punish more severe types of assaults, e.g. involving a dangerous weapon or resulting in an injury that requires hospitalization.

There are several points I'd like to make here. The first is that this most foundational and most common of District offenses—constituting 11-12% of all criminal charges in recent years[4]—hasn't changed since 1901 except for the authorized imprisonment, which was lowered to be below the threshold where defendants have a right to a jury trial. The second point is that while there's a bit of content about threatening, the statute says nothing at all about what constitutes an "assault." The statute is incomplete to the point of being vacuous, giving a name and a punishment only.

Of course, we all have intuitive ideas about what an assault is, perhaps some kind of violent interaction in which one person strikes and harms another person. The problem with intuitive definitions, however, is that while they may fit some common scenarios, they leave unresolved many other variations.

Consider, is it an assault to gently but offensively touch another person in a non-sexual manner when the person has clearly said they don't want to be touched? In other words, is pain or injury necessary for an assault?

Or, is it an assault to punch another person in a backyard fight when the injured person freely consented to engaging in the fight? Rephrased, what is the role of consent in assault and can one consent to any degree of harm?
Lastly, is it an assault to accidentally knock a person down when running down a sidewalk, aware

that running in that area was likely to cause someone injury? What mental state is necessary to be guilty of an assault?

This last question bears emphasis and more explanation. For centuries in Anglo-American criminal law, two main kinds of elements have been required to be held guilty of an offense: engaging in prohibited conduct (the crime's "actus reus" in legalese), and a culpable mental state (or "mens rea"). For all but a few so-called strict liability crimes—crimes for which the legislature has said there are no culpable mental state requirements, mainly regulatory offenses that are misdemeanors—the Supreme Court historically has held there *has to be* a culpable mental state.[5] Otherwise people could be imprisoned for ordinary, reasonable mistakes.

Obviously, the District's assault statute does not say anything about the necessary mental state or any of these other issues. But, perhaps more surprisingly, while you might assume that the courts have stepped in to resolve all these matters in the more than 100 years since the statute was codified, they haven't. In fact, a recent case raised the question whether a single, non-violent, non-sexual unwanted touch constituted an assault and there was so much disagreement within the D.C. Court of Appeals that the full court took the extraordinary step of immediately throwing out a decision by a small group of its judges so that all the appellate judges could consider the even more fundamental question of what the elements of simple assault are.[6] Two years after the full court took on that case, and 120 years after the simple assault statute was codified by Congress, there's still no answer.

Despite this fundamental legal uncertainty, in particular cases, police, prosecutors and trial judges continue decide whether to arrest, bring, or allow assault charges that turn on these types of questions. They do their best to exercise their discretion wisely and may develop their own norms on how to handle common situations. But, without clear laws, the consistency and even the legitimacy of enforcement and charging decisions can be called into question.

A second example I want to raise is the District's robbery statute.[7] Robbery, is one of the most common felony charges in the District. Here is both the 1901 and current language: "Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery...." Again, there's been no change to the elements (or maximum penalty) since 1901. Unlike assault though, the robbery statute does list many required elements that must be proven.

However, scratch the surface and similar problems emerge. For example, like assault there is no culpable mental state or "mens rea" requirement in the statute. However, unlike assault, the Court of Appeals has ruled on the matter, rejecting a government argument that there is no culpable mental state based on the plain language of the statute, requiring an "intent to steal," overturning a conviction, and declaring that "mere reading of the statute was plainly inadequate" to communicate to jurors what robbery requires.[8] Unfortunately, over fifty years after that ruling, the statute has not been changed to legislatively adopt or reject the additional elements that courts routinely read into the statute.

Yet, a different kind of flaw evident in the robbery statute is the lack of gradations. Unlike the District's assault statutes which collectively provide more severe punishments for more severe assault-type conduct, there is only one robbery statute with one penalty. Conduct as minimal as

pickpocketing or "stealthily" taking a coffee mug from a desk near the owner is subject to the same robbery charge and penalty as a brutal, violent crime leaving the victim hospitalized. The vastly different experience of victims in these cases is ignored by the robbery statute. Whether or not a 15-year maximum penalty is proportionate for the most severe forms of robbery is something reasonable minds can disagree about and depends on an array of other considerations—e.g., what other crimes and penalties apply to the most severe types of behavior in a robbery? Regardless, it seems clear that a 15-year maximum penalty for pickpocketing is disproportionate, especially when the same maximum penalty applies to robberies that result in serious injuries.

A final example I want to raise concerns the ramifications of having offenses that substantially overlap with each other—that address the same basic conduct. The District has two main threats statutes. One is a misdemeanor, unchanged from 1901, that simply states that "Whoever is convicted in the District of threats to do bodily harm…" is subject to up to 6 months imprisonment.[9] The second was created by Congress in 1968, becoming law just months after the assassination of Dr. King, and states: "Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part…" is subject to up to 20 years imprisonment.[10] In recent years the misdemeanor charge is about ten times more frequently charged as the felony charge, but both are common.[11]

Put aside the other drafting problems with these threats offenses—especially the fact that no culpable mental states are mentioned, defects that have been the subject of substantial litigation in the District and Supreme Court.[12] Also, ignore that there are other District crimes that appear to also criminalize threats or something very, very similar—such as the simple assault statute just discussed, which referred to someone who "threatens another in a menacing manner." [13] Just looking at these two threats statutes as they are, it appears that they squarely overlap. Courts examining the issue have agreed that there isn't any difference between such "injury" and "bodily harm"—they are essentially identical in this respect and either a 6 month misdemeanor or a 20 year felony, a penalty 40 times greater, can be charged.[14] Although one judge dissented from the court's analysis and called the result an "absurdity,"[15] the overlap has survived due process and equal protection court challenges and the choice of charges remains purely a matter for prosecutorial discretion.

Moreover, while ordinarily a robbery based on a threat to hit the victim would be considered just one bad act, because the threats and robbery statutes use different wording, the D.C. Court of Appeals has held that a person can be convicted of both crimes based on the same act.[16] So, beyond the overlap between the felony and misdemeanor threats, there is also overlap with other offenses involving a threat, and increased liability. A robbery that involves a threat of bodily injury but no actual bodily is thus authorized under the current D.C. Code to be sentenced to up to 35 years of imprisonment, 15 years for the robbery and 20 years for the threat if the sentences are consecutive.

The problems with such overlap are many, and include undue pressures to plea when facing very high penalties, and the possibility of disproportionate or inconsistent sentences being imposed. A more subtle and pernicious problem, however, is that when there are so many ways to charge overlapping crimes it creates opportunities for unintended errors, arbitrariness, and bias, conscious or unconscious, to affect criminal justice decision-making. In a criminal code with widespread overlap, even with all actors having the best of intentions, to inconsistent, unjust outcomes.

The last point I'll make about the current District criminal code is to note that while many jurisdictions have challenges keeping their criminal statutes up to date, the District really is an outlier. Some years back, Professor Paul Robinson, Michael Cahill—now Dean Cahill who will be testifying later today—and Usman Mohammed conducted a nationwide review of the District, federal, and 50 state criminal codes. The ranking was in terms of criteria very similar to the five CCRC mandates of clarity, consistency, completeness, organization, and proportionality. Their results, published in a top law journal, were particularly grim for the District. It ranked 45th among the 52 jurisdictions in the analysis.

Part II: Development of the RCCA

These problems with criminal statutes have been discussed for decades. To develop comprehensive recommendations for reforming the District's criminal code, the CCRC was created as an independent agency in late 2016. The agency's statute specifically directed that the CCRC recommendations seek to improve the clarity, consistency, completeness, organization, and proportionality of criminal offenses.[17] These are values that any criminal code can and should exhibit. They reflect the fundamental belief that the law must be accessible, fixed, and well-adapted to the behavior it seeks to address. There may be reasonable disagreement on what laws best manifest these values, but not the values themselves.

That said, I want to stress some of the things that were *not* part of the focus of the agency's work. The primary goals of the CCRC were *not* to achieve desirable outcomes such as: fewer crimes committed, reductions in financial costs, reduced incarceration levels, racial equity in the District's criminal justice system, or speedy courtroom administration. Of course these are all critical goals for the criminal justice system as a whole that the criminal code must support. And I assure you that the CCRC and its stakeholders have kept a keen eye on the potential implications of the revised statutes for these larger goals and outcomes.

In fact, there is good, though by no means definitive, reason to believe that the RCCA may improve outcomes on all of these broader goals and measures. Psychological research has shown that people are more likely to follow the law and cooperate with legal authorities when they perceive the law to be legitimate, including accurately reflecting public beliefs about what is criminal and how serious the crime is.[18] Such perceptions of legitimacy can affect behavior as much as or more than concerns about the risk of punishment.

But while good laws may be necessary for progress on these larger criminal justice goals, they are not sufficient. Success will often depend on factors that have little to do with the drafting of the criminal code. In particular, research shows that how effective police are at enforcing the law is the most important factor in deterring crime.[19]

In addition to specifying the primary goals for criminal code reform, the agency was required to consult with an Advisory Group that included Council-appointed local law school faculty, designees of the U.S. Attorney for the District of Columbia, the D.C. Attorney General for the District, and the Public Defender Service, and designees of this Committee and the Deputy Mayor for Public Safety.[20] Throughout the nearly four-and-a-half years in which the agency developed its recommendations, the agency held monthly meetings with this Advisory Group that were open to the public. Literally thousands of pages of legal research and draft documents were provided to the Advisory Group, and hundreds of pages of comments were received. All these materials were posted publicly online at the time of their exchange. Through multiple iterations, the agency's

recommendations for new statutory language and an accompanying legal commentary were eventually developed.

On March 31, 2021 the five voting members of the Advisory Group voted unanimously to provide the recommendations and commentary to the Council and Mayor. The RCCA before you today presents the statutory language from the March 31st recommendations in bill form, with only non-substantive changes to the numbering system and style.

I can't emphasize enough what a serious, sustained commitment the Advisory Group members made to this process. The District's two prosecutors, federal and local, and the Public Defender Service often took differing positions, particularly with respect to penalties. But, throughout the process there was a constructive and civil discourse. I want to take this opportunity to thank all of the Advisory Group members. Their commitment to the process and their hard work over the past five years has created this possibility for modernization and reform.

The CCRC's statute[21] specified multiple sources to consult during the revision process. The Advisory Group's comments were a major input throughout the development of the recommendations. The CCRC also examined code reforms in other jurisdictions, the Model Penal Code issued by the American Law Institute, and other best practices as directed by the agency's statute. With data provided by the Superior Court, current charging and sentencing practices were also analyzed.

Finally, it's worth stating explicitly that the agency's recommendations are based *primarily* on existing District law. This was not a matter of starting with a blank slate or adopting and tweaking the Model Penal Code or some other jurisdiction's law. The foundation of the RCCA is the existing District statutory and case law. Changes to existing statutes were recommended only in furtherance of the agency's statutory mandate and the commentary accompanying the CCRC March 31st recommendations describes these changes, and the rationale behind them, in detail.

Let me now turn to discussing the main features of the legislation that arose out of this multi-year process.

Part III: Main Features of the RCCA

The RCCA adopts the basic structural features of the American Law Institute's Model Penal Code (MPC), the standard for contemporary American criminal codes. Since its creation, the MPC's main features have been adopted by most states and been tested and validated for decades.

Most of the bill concerns a new, proposed Title 22A that would replace nearly all of the current Title 22. The new Title 22A is divided into two main parts: a "General Part" and a "Special Part." As in the dozens of jurisdictions that follow the MPC, the General Part (Chapter 1 of the Title) provides basic definitions, rules of liability, defenses, and penalty classes applicable to most or all crimes. In contrast, the Special Part (Chapters 2-5) codifies particular offenses, arranged by the social harm implicated (e.g., crimes against persons, property crimes, etc.). The RCCA separately provides revised language for various offenses located in other titles of the D.C. Code (e.g., controlled substance crimes), specifically incorporating, by reference in each revised offense, the General Part provisions in Title 22A.

The provisions of the General Part are nearly all new to District criminal law, so I will focus my attention on them.

Among the most important innovations is the codification of extensive, standardized definitions that are used throughout all the revised statutes. These include standardized culpable mental state definitions that hew closely to the definitions recommended in the MPC—ones that have been adopted by most jurisdictions and frequently referenced in D.C. Court of Appeals decisions. New rules of construction ensure that a culpable mental state or strict liability apply to every element of an offense, consistent with the MPC. Complex case law on accomplice liability, intoxication, accidents, mistakes, solicitation of crimes, conspiracy liability, and attempted crimes is codified for the first time too.

The RCCA general part also codifies for the first time common defenses, including: self-defense; defense of others; defense of property; execution of public duty; exercise of parental duty of care; duress; entrapment; and excusing mental disability. The fact that, to-date, neither Congress nor the Council has ever addressed these fundamental matters leaves the District as an outlier nationally. The proposed language is largely consistent with current District case law and the modern approaches in other jurisdictions.

Another major change in the RCCA is the adoption of a new, standardized system of penalty classes. The RCCA provides for nine felony classes (numbered 1-9) and 5 misdemeanor classes (labeled A-E). Every revised offense and offense gradation in the RCCA is assigned to one of these 14 classes, with their corresponding authorized maximum imprisonment terms and fines. The RCCA proposes elimination of indefinite "life" and "life without parole" sentences in favor of a set terms-of years.

The most severe felony penalty classes in the RCCA, classes 1 and 2, are recommended to carry maximum imprisonment sentences of 45 and 40 years, respectively. Given the District's lack of parole and a maximum sentence reduction of 15% for "good-time credit" while in prison, such lengthy terms-of-years for any single charge roughly approximate a sentence of life *with a meaningful possibility of release*. This approach is in line with the recent MPC Sentencing recommendation for a jurisdiction's most severe penalty. While these maximum numbers are lower than some in the current criminal code, they more realistically take into account the realities of life expectancy and how public safety concerns sharply drop as people age.[22] Given that the average age of offenders committing homicides (the only offense in classes 1 and 2) is in their early or mid-20s and that about 90% of those convicted are black men,[23] and the grim reality that life expectancy for non-Hispanic black men in the District is under 69 years,[24] these new penalty classes just about match the life expectancy of those sentenced under them.

Authorities vary, but recent case law from state high courts indicates that a term of 50 years is an effective life *without* the possibility of release sentence for *juvenile* offenders.[25] As adult offenders are older at the time of entry into incarceration, a sentence of life with the possibility of release for adults logically would be shorter than 50 years. In fact, the federal Bureau of Prisons (BOP) considers persons incarcerated for a "life" sentence, including District persons in BOP custody, as those serving a 470-month (39 years and two months) sentence.[26]

The RCCA penalty classes also eliminate mandatory minimum sentences for all revised offenses, consistent with the recent MPC Sentencing recommendations[27] and the long-standing positions of the Judicial Conference of the United States[28] and the American Bar Association.[29] Mandatory minimum sentences are antithetical to principles of individualized sentencing and, due to variance in charging, can result in inconsistencies and disproportionality in penalties. As Attorney General Merrick Garland stated at his confirmation hearing: "We should do as, as President Biden has suggested, seek the elimination of mandatory minimum. So that we once again give authority to district judges and trial judges to make determinations based on all of the sentencing factors that judges normally apply."[30]

Lastly, the RCCA General Part codifies revised penalty enhancements, including narrower and less severe repeat offender enhancements. While rarely charged and even more rarely affecting judges' sentences, the District currently authorizes repeat offender enhancements that double, triple or even provide life imprisonment penalties similar to other jurisdictions' three-strikes statutes.[31]

The RCCA changes to particular offenses in the Special Part of Title 22A are numerous, diverse in kind, and not easily summarized. However, let me summarize some of the updates to the simple assault, robbery, and threats statutes that I mentioned earlier.

The most prominent changes are to the organization, grading, and penalties of these statutes. For example, under the RCCA simple assault is no longer a separate offense. Instead, simple assault is the lowest gradation in a new assault statute that addresses the whole spectrum of bodily injuries that involve some degree of pain or physical harm. Nonsexual, unwanted touching that doesn't cause pain or bodily harm is criminalized as a new "offensive physical contact" offense rather than "assault." In contrast to the current criminal code's complete lack of grading for robbery, in the RCCA there are three grades of robbery, and non-violent pickpocketing is criminalized as a type of theft instead of robbery. The different degrees of robbery depend primarily on what harm the victim suffered—a threat, a minor bodily injury, or major bodily harm—and whether a dangerous weapon was involved. Regarding the overlap in the current threats statutes, in the RCCA there is just one threats offense which has gradations depending on whether the threat is of death, serious bodily injury, a sexual act, or confinement (first degree), any bodily injury (second degree), or property damage (third degree).

Penalties were updated using the standardized penalty classes of the RCCA. The proposed penalties are based chiefly on current law, the CCRC's review of current court sentencing practices, a survey of District voters' views of the relative seriousness of offenses, and the availability of other charges and penalties in the RCCA.

Once reorganization and grading are accounted for, the RCCA does very little to change the scope of what is criminal under the current assault, robbery, and threats statutes—i.e, there are very few *clear* changes to what is criminalized by these statutes under existing District law. However, as described above, there are many aspects of these offenses that simply are undefined or unsettled in current District law and the RCCA *does* fill in those missing elements and defenses and *in that sense* changes law considerably. Culpable mental state requirements are specified using the new,

standardized definitions. Consent defenses to bodily injury are codified for the first time, drawing a line at serious bodily injuries which cannot be consented to except for healthcare reasons.

More generally, there are places in the RCCA where new criminal liability is imposed or existing liability is decriminalized. For example, the public nuisance law is expanded to include interference with a person's quiet enjoyment of their home by lights, smells, and other means, not just by sound.[32] Conversely, asking persons for money at a public bus, train, or subway station or stop—the so called "panhandling" offense[33]—is decriminalized under the RCCA to the extent there is no threat or otherwise criminal behavior involved.

Notably, the RCCA does not propose decriminalization of prostitution or personal possession of controlled substances, although the penalties for these offenses are reduced. Decriminalization of these offenses merits further review but would require more time for research and consultation with a different set of stakeholders (especially social service providers) than the CCRC was able to manage under its statutory timeframe.

The RCCA proposes two other notable changes to statutes outside Title 22A. First, the bill would restore and expand the right to a jury trial for persons accused of committing misdemeanors. In 1992, the District restricted the right to a jury trial up to the constitutionally permitted limit in an effort to free more court resources for the spike in crime then. That restriction continues today even though the number of court cases is a fraction of those in the 1990s. The District is a national outlier in this policy—only 9 other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[34] The issue is not just a matter of procedural justice and bringing more community voices into the courtroom. For decades, whether an offense is jury demandable or not has had dramatic effects on charging, incentivizing choices based on whether the right to a jury will be exercised or available instead of the nature of the alleged crime.

Second, the RCCA provides an expansion of eligibility for the judicial review process in D.C. Code § 24-403.03. The RCCA would provide a judicial sentence review to any person after they have served at least 15 years of their sentence, regardless of their age at the time of the offense. Identical to the current procedure, the review would consider whether the person presents a danger to the safety of any person or the community and whether the interests of justice warrant a sentence modification. Such a judicial review process, accessible to all defendants, is recommended by the recent Model Penal Code Sentencing update and other expert recommendations.

There are many other aspects of the RCCA that I do not have time to describe today. However, as noted earlier, the CCRC and its Advisory Group developed and delivered on March 31st an extensive commentary describing the changes the revised statutes would make to current District law. This commentary is publicly available on our website to anyone who would like to learn more.

Closing

In closing, let me say a few words about what I hope will happen as this bill is considered by this Committee and the public in the hours and months ahead.

While the vast majority of the bill's changes to the current law are common sense, uncontroversial,

and frankly boring to most everyone who hasn't chosen to work on code reform, some of the RCCA changes reflect policy choices where there will be disagreement. That is as it must be and should be. On a matter in which so many institutions and money are involved—nearly 2 billion dollars are spent each year on the District's criminal justice system—vested, professional interests on all sides may have something to say about how power and money are affected, even if only slightly. More importantly, on matters in which so many individuals are personally involved, any changes in criminal liability, punishment, or the labels used for crimes, there will be strong opinions based on deeply personal experiences.

I have no doubt that these manifold voices and perspectives will be heard and there may be some significant changes to the RCCA going forward. It is a foundational premise of the RCCA that it should be the Council, the District's current elected law-makers, that establish current criminal laws. Not institutional special interests, not the Executive, not the Courts, not Congress, and not the CCRC. Per our statutory responsibilities, the CCRC has created a comprehensive, deeply-researched and evidence-informed, blueprint for updating the District's criminal code. And, given the sheer scope of the work needed, there was no way to do it, but to have an independent agency draft the revised code. Now it is up to the Council to weigh the bill's language, make necessary amendments, and take action.

My hope is that going forward the Council and the public keep in mind this legislation's overarching purpose of improving the clarity, consistency, completeness, organization, and proportionality of criminal offenses. Whatever particular disagreements may arise about a proposed provision or policy choice, please do not let those discrete issues overshadow broader points of agreement on the bill. To facilitate resolving differences of opinion, I would encourage reviewers of the RCCA to identify their concerns as precisely as possible, asking if the concern is one of liability (whether conduct should be criminal or not), labeling (whether the name of a crime is apt), or punishment (whether the penalty for an action is right).

Lastly, I would repeat the common wisdom that two District judges said to me at the start of our work and that I have repeated to myself continually: be careful not to let the perfect be the enemy of the good. I suspect what they meant is that there simply may not be perfect solutions to some of the issues addressed by the RCCA. There are limits to the precision of language and the ability of the law to set up rules covering future scenarios. There are aspects of criminal law that are extremely complicated. There also are fundamentally different values and perspectives on criminal justice that are often in tension. For many of the most consequential questions that criminal laws pose—what behavior is so unacceptable as to be deemed criminal, how much punishment is fair, and what will improve public safety—there is no social science or other evidence that can provide a definitive answer when differences arise. But, those difficulties must not stop change from happening.

While modernizing the criminal code alone is not sufficient to improve public safety or create a fairer and more equitable justice system, it is a necessary step forward. Thank you for your consideration of the Revised Criminal Code Act of 2021. I look forward to your questions.

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[1] *See, e.g.,* National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016).
[2] *See, e.g., Bado v. United States*, 186 A.3d 1243, 1264-1265 (D.C. 2018) (J. Washington, concurring) ("Alternatively, the Council could reconsider its decision to value judicial economy above the right to a jury trial. 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. This may be an important message to send at this time because many communities, especially communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise of police powers by the state… And, while the D.C. Council complied with the letter of the law when it reduced the potential sentences for misdemeanor crimes to a level that made them non-jury demandable, that decision made us one of the few state court jurisdictions in the country that does not guarantee a right to a jury trial for those charged with criminal misdemeanors.1 Most states recognize that a jury trial in criminal cases is critically important because of the stigma that accompanies a criminal conviction and many of those states accept the fact that any period of incarceration, no matter how short, can have a devastating impact on one's life and livelihood").
[3] D.C. Code § 22-404(a)(1).
[4] https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-40-Statistics-on-District-Adult-Criminal-Charges-and-Convictions.pdf.
[5] *Elonis v. United States*, 575 U.S. 723, 734 (2015).
[6] *Perez Hernandez v. United States*, 207 A.3d 605, 606 (D.C. 2019).
[7] D.C. Code § 22–2801.
[8] *Byrd v. United States*, 342 F.2d 939, 940-41 (D.C. Cir. 1965).
[9] D.C. Code § 22-407.
[10] D.C. Code § 22–1810.
[11] https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-40-Statistics-on-District-Adult-Criminal-Charges-and-Convictions.pdf.
[12] *Carrell v. United States*, 165 A.3d 314, 317 (D.C. 2017); *Elonis v. United States*, 575 U.S. 723, 726, 135 S. Ct. 2001, 2004, 192 L. Ed. 2d 1 (2015).
[13] D.C. Code § 22-404(a)(1).
[14] *See United States v. Young*, 376 A.2d 809, 812 (D.C. 1977).
[15] *Holt v. United States*, 565 A.2d 970, 976 (D.C. 1989).
[16] *See In re Z.B.,* 131 A.3d 351 (D.C. 2016).
[17] D.C. Code § 3–152.
[18] *See, e.g.,* Tom R. Tyler et al., The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement, *Psychological Science in the Public Interest*, 16, 75-109. (Available at http://dx.doi.org/10.1177/1529100615617791.)
[19] *See, e.g.,* National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016).
[20] The voting members of the Advisory Group were:

(i) Don Braman, Associate Professor of Law, George Washington University School of Law (Council Appointee);
(ii) Paul Butler, Professor of Law, Georgetown University Law Center (Council Appointee);
(iii) Laura Hankins, General Counsel, Public Defender Service for the District of Columbia (Designee of the Director of the Public Defender Service for the District of Columbia);
(iv) Dave Rosenthal, Senior Assistant Attorney General, Office of the Attorney General (Designee of the Attorney General for the District of Columbia); and
(v) Elana Suttenberg, Special Counsel for Legislative Affairs, United States Attorney's Office for the District of Columbia (Designee of the United States Attorney for the District of Columbia).

The non-voting members of the Advisory Group were:

(i) Helder Gil, Chief of Staff, Office of the Deputy Mayor for Public Safety and Justice (Designee of the Deputy Mayor for Public Safety and Justice); and

(ii) Kevin Whitfield, Policy Advisor, Committee on the Judiciary and Public Safety (Designee of the Chairperson of the Committee on the Judiciary and Public Safety).

[21] D.C. Code § 3–152.

[22] *See, e.g.,* Sarah Rakes, Stephanie Grace Prost & Stephen J Tripodi, *Recidivism among Older Adults: Correlates of Prison Re-entry*, 15 Justice Policy J. (2018).

[23] CCRC analysis of the D.C. Sentencing Commission's dataset "Homicides sentenced between 2010 and 2019." This and other breakdowns of District sentencing practices from 2010 to 2019 can be found online at https://scdc.dc.gov/node/1467606.

[24] *See* D.C. Department of Health, *District Of Columbia Community Health Needs Assessment, Volume 1* (March 15, 2013) at 16; Roberts, M., Reither, E.N. & Lim, S. *Contributors to the black-white life expectancy gap in Washington D.C.*, Sci Rep 10, 13416 (2020).

[25] *See People v. Contreras*, 4 Cal. 5th 349, 369, 411 P.3d 445, 455 (2018), as modified (Apr. 11, 2018) ("[O]ur conclusion that a sentence of 50 years to life is functionally equivalent to LWOP is consistent with the decisions of other state high courts.").

[26] See United States Sentencing Commission, Sourcebook 2017 Appendix A, at S-166 ("[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.").

[27] American Law Institute, *Model Penal Code: Sentencing* (April 10, 2017) at 149 (available online at https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf).

[28] Judicial Conference of the United States *Letter to the U.S. Sentencing Commission dated July 31, 2017* (as approved by the Executive Committee, effective March 14, 2017) (https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/CLC.pdf).

[29] ABA House of Delegates Resolution 10B on Mandatory Minimums (2017), at 4.

[30] https://www.reuters.com/article/us-usa-senate-garland-hearing-quotes/key-quotes-from-u-s-attorney-general-nominee-garland-on-criminal-justice-policies-idUSKBN2AM2HT.

[31] D.C. Code §§ 22–1804; 22–1804a.

[32] *Compare to* D.C. Code § 22–1321(d).

[33] D.C. Code § 22–2302.

[34] Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island.