

The Improved Criminal Code

A Piecemeal Approach to Criminal Code Reform Will Not Work

Question: Why can't code reform be done piecemeal?

- Making piecemeal changes to the existing code is exactly how we came to have the sprawling, confusing, and inconsistent code that we have now. Our criminal code is supposed to be cohesive and consistent—the foundational document of our criminal justice system. But when just one piece of the code is “fixed,” it creates inconsistencies and imbalance with the parts of the code that remain untouched. The only way to accomplish the reforms our criminal code needs—and that the General Assembly has mandated—is to address the problems with the entire code, all at once, with a unified approach.
- In 2014, the General Assembly in the FY 2015 Budget Act (SB 255) adopted epilogue establishing the Criminal Justice Improvement Committee (CJIC). The adopted epilogue language set out the CJIC's agenda as follows:

“The Committee shall review opportunities for efficiencies in the criminal justice system, including but not limited to the following areas:

Statutes in the criminal code, identifying disproportionate, redundant, outdated, duplicative or inefficient statutes;
Crimes that should or should not constitute potential jail time . . .”

- Similar epilogue language setting forth the CJIC’s mandate was included in the FY 2016 Budget Act (HB 225), and again in the FY 2017 Budget Act (SB 285), the FY 2018 Budget Act (HS 1 for HB 275), and the FY 2019 Budget Act (SB 235).
- After the initial draft of the Improved Code was completed in 2016, it was subjected to extensive review and commentary by a wide range of criminal justice stakeholders and the public, including:
 - Three public hearings across the State.
 - Regular update meetings with the CJIC and Joint Finance Committee.
 - Four meetings with law enforcement representatives such as the Council of Police Chiefs and Union heads.
 - Five meetings with victims’ advocacy groups.
 - Four meetings with various state agencies.
 - Multiple rounds of written commentary from the Attorney General.

- The preliminary report of the drafting process and code text was made available to the public in March 2017, and has been available continuously, as updated from time to time, since then.
- To accomplish the epilogue’s mandate to address disproportionalities, redundancies, and duplications in the current code, the review and drafting process had to be comprehensive, and not piecemeal.
 - **Proportionality.** Criminal offenses are graded to determine the available range of jail time an offender can be sentenced to. Punishment is “disproportional” if an offense has a grade that is higher or lower than it should be, given the seriousness of that offense in the context of all other offenses. Because proportionality involves the relationship between offenses, it is impossible to fix disproportionalities by examining the grades of crimes in isolation. Instead, the grades of all offenses have to be evaluated together. That is exactly what the drafters of the Improved Code have done.
 - The current code uses grade aggravators for circumstances like recidivism and vulnerable/elderly victims, but applies them inconsistently to only certain offenses. If the code is genuinely to be proportionate, these factors must be given equal weight and applied uniformly. The only way to do this is through a

comprehensive, whole code review of grades and aggravators— which was done to produce the Improved Code.

- One of the most important products of the process is a comprehensive grading table that groups all offenses with the same grade together. This makes it easy to evaluate proportionality at a glance, and creates opportunities for other reforms (see below).
- **Simplicity and Practicality.** The drafters of the Improved Code strove to make the language and structure of the criminal laws much easier for readers to understand. Simplifying only pieces of the existing law leaves the rest of the law hard to understand. Portions of the code would be modern, and other portions would be left antiquated. But even worse, the conflicting approaches to structure and language coexisting in that code would create new ambiguities, courting litigation to resolve the new issues and encouraging further patchwork legislation. That would make the code in greater need to reform than if nothing at all had been changed. The result would actually undermine the legislative mandate to improve the code. The only way to fulfill the General Assembly's mandate to produce a

high-quality, clear, proportionate, non-redundant, and fair code is to reform the whole code at one time.

- **Utility to practitioners.** A major benefit of Improved Code’s holistic approach is its reforms to the General Part of the code—the part that interprets and modifies each of the code’s individual crimes. The Improved Code’s General Part is more comprehensive and coherent than current law, and the clear rules it lays down make all of the crimes easier to apply in practice. It makes the whole code more useful. Piecemeal tinkering simply could not do this.
- **Eliminate stacked charges.** The Improved Code’s epilogue mandate from the General Assembly requires the CJIC to address “duplicative” or redundant crimes. Redundancy in the current code has led to charge stacking—punishing the same conduct in multiple ways under different charges—which too often leads to cases being pled down to less serious charges without good cause. Common examples of charge stacking include charging one burglary as both a Home Invasion and a Burglary, or one car robbery as both Robbery and Carjacking. While the Improved Code retains these important charges, the code’s structure results in only one accurate charge being leveled against the defendant, not multiple, redundant charges. But

there is no way to reduce redundancies or eliminate inconsistencies without doing the hard work of a thorough, comprehensive review of the whole code.

- **A better approach to mandatory minimum sentences.** The Improved Code does not eliminate mandatory minimum sentences. However, it does create a consistent, principled scheme for applying minimum sentences—unlike the contradictory ad hoc approach in the current code. Continuing to “reform” mandatory minimums ad hoc would just perpetuate the problem we have now. The only way to create a better approach to mandatory minimums is the approach of the Improved Code—to look at all mandatory minimums together, find their common features, and establish consistent rules. This addresses minimums in a cohesive, rational manner focusing on the very worst crimes—crimes of violence, sexual offenses, and weapons offenses.
- **Efficiency.** If all of the current criminal code needs to be reformed, a piecemeal approach would take an extremely long time to complete the work. And, in the meantime, a host of new legislation would have piled onto this conflicting framework, creating a bigger problem that

ad hoc tinkering will never be able to catch up with. The only efficient and timely way to reform the code is as a whole.

- The Improved Code’s approach will also help enable a number of future criminal justice reforms. The bill calls for an implementation period that will allow these to take shape. For example:
 - **Sentencing guidelines.** Wholesale criminal code reform creates the necessary, but welcome, opportunity for new sentencing guidelines. The comprehensive grading table discussed above will make it possible to create consistent and credible: (1) sentencing ranges for each felony grade, (2) approaches to aggravators like recidivism and vulnerable victims. This credibility means that the guidelines can be given real “teeth” without the concern that unjust sentences will result.
 - The current code’s wildly inconsistent approach to mandatory minimums creates many different sentencing ranges within a single felony grade. At least ten Class B felonies in current law have sentencing ranges outside of the 2 to 25 year range provided for Class B felonies generally. For example, the sentence for possession of a deadly weapon by a person prohibited due to a prior violent felony conviction is 4 to 25

years; and the sentence for home invasion is 6 to 25 years.

These same problems plague other felony classes as well. With a principled, rational approach to mandatory minimums, the sentencing ranges of felonies in the Improved Code can likewise be principled and rational.

- Many felonies in current law can have their grades increased if aggravating factors, such as repeat offending or vulnerable/elderly victims, are present. But the determinations of what aggravators to apply to which felonies have been done ad hoc, resulting in widespread inconsistency and disproportionate punishment. For instance, some provisions in current law provide an upward adjustment for a third offense (for example, 11 Del. C. § 841B(c)), while others are for the second or subsequent offenses (for example, 11 Del. C. § 1455). These offense-specific provisions are unnecessarily inflexible, because they only apply to offenders who repeat the same offense. In contrast, the Improved Code provides increases the grade of an offense for repeated commission of felonies—but they can be different felonies. The Improved Code takes a unified approach to these important aggravators,

making *every* felony eligible for increased punishment if the right circumstances are present. This makes the sentencing ranges for felonies, and their attending sentencing guidelines, much more defensible.

- **Model jury instructions.** New jury instructions will be, like the sentencing guidelines, a necessary follow-on to the Improved Code. The structure of each crime in the new code makes their individual elements so clear that the jury instructions will be much easier to write, and with much greater precision, than under the current system. Additionally, the improved General Part of the code (discussed above) fixes ambiguities in current law about how the burdens of proof are allocated between the prosecution and defense. Jury instructions attempting to interpret these ambiguities can create hazards because they are not grounded in the code itself. In addition, many of the ad hoc offenses in the current code were created with their own unique procedural provisions. *See, e.g.*, 11 Del. C. § 850 (Use, possession, manufacture, distribution and sale of unlawful telecommunication and access devices). This makes it difficult to draft and use general jury instructions, and requires the creation of lengthier offense-specific jury instructions. As much as possible, the Improved Code attempts

to subject all offenses to the same procedural rules, which will encourage useful general jury instructions and require fewer instructions to be drafted.

- Trying to better the code in a patchwork manner, as some have suggested, did not work in the past. It will not work now. There is no principled way to grade crimes on the basis of proportionality without benchmarking all of them against each other. There is no way to unify and rationalize mandatory minimum sentences without considering the sentences of all offenses simultaneously. There is no way to have clear and credible sentencing guidelines and jury instructions if the offenses to which they apply are not in good order.