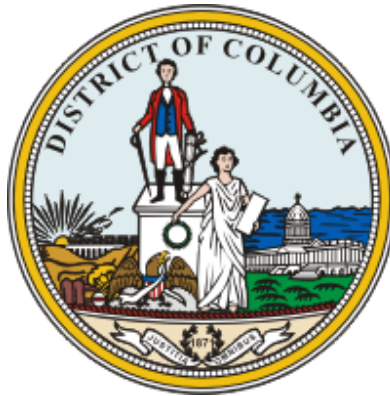




An Examination of Fine Proportionality in the District of Columbia



2011 Issues Paper Number 1

DISTRICT OF COLUMBIA SENTENCING AND CRIMINAL CODE REVISION
COMMISSION

441 FOURTH STREET, NW, SUITE 830 SOUTH
WASHINGTON, DC 20001

PHONE: (202) 727-8822 FACSIMILE: (202) 727-7929

WEBSITE: <http://sentencing.dc.gov>

MEMBERSHIP OF THE DISTRICT OF COLUMBIA SENTENCING AND CRIMINAL CODE REVISION COMMISSION

The Honorable Frederick H. Weisberg
Chairman, Associate Judge
Superior Court of the District of Columbia

The Honorable Harold L. Cushenberry
Superior Court of the District of Columbia

The Honorable J. Ramsey Johnson
Superior Court of the District of Columbia

Donald Braman, Ph.D.
George Washington University School of Law

Ronald Gainer, Esq.
Attorney, Private Practice

Laura E. Hankins, Esq.
Public Defender Service for the District of Columbia

Adele V. Harrell, Ph.D.
Urban Institute, Justice Policy Center

Cedric Hendricks, Esq.
Court Services & Offender Supervision Agency

Patricia Riley, Esq.
U.S. Attorney's Office

Michele Roberts, Esq.
Attorney, Private Practice

David Rosenthal, Esq.
Office of Attorney General, District of Columbia

Julie E. Samuels
Urban Institute, Justice Policy Center

Jennifer Seltzer-Stitt
Citizen Member

Anne Seymour
Citizen Member

Earl J. Silbert, Esq.
Attorney, Private Practice

Maria Amato**
D.C. Department of Corrections

Michael Anzallo**
D.C. Metropolitan Police Department

Stephen J. Husk**
United States Parole Commission

Thomas R. Kane, Ph.D.**
Federal Bureau of Prisons

The Honorable Phil Mendelson**
Council of the District of Columbia

** Non-voting Member

COMMISSION STAFF

Barbara Tombs-Souvey
Executive Director

Kenneth Cowgill, Esq.
Attorney Advisor

Megan E. Collins
Research Analyst

Courtney Y. Burlison, Esq.
Staff Attorney

Thurman Sanders IV
Data Management Specialist

Mia Hebb
Staff Assistant

The D.C. Sentencing and Criminal Code Revision Commission is currently tasked with conducting a comprehensive examination of the District’s criminal code and recommending revisions that create a uniform body of criminal law. In expanding the Commission’s responsibilities to criminal code reform, the Council of the District of Columbia recognized the necessity of evaluating the District’s criminal laws for proportionality, both as to imprisonment terms and fines.¹ As part of its code reform efforts, the Commission has conducted a review of criminal fines in the District of Columbia and found a number of reasons for making changes in a comprehensive fashion for both felonies and most misdemeanors.

Proportionality is an important aspect of a jurisdiction’s sentencing scheme. The concept of penalty proportionality refers to the penalty for a crime—both imprisonment terms and fines—being in balance or “proportionate” to the seriousness of the offense associated with it. The process of ensuring proportionality involves examining the actual laws that describe criminal offenses and that set their penalties so that offenses of like seriousness have like punishments.² In many jurisdictions including the District, the penalties for offenses are set one at a time when each criminal statute is enacted. Over time, it is not uncommon for fine provisions to vary widely for offenses of similar seriousness, even more so than imprisonment terms. If fines are not periodically reexamined to address concerns such as inflation, the fine structure may fail to reflect the jurisdiction’s current sentencing goals. The Commission’s evaluation of criminal fines seeks to remedy these potential unintended consequences and create a more proportional and, thus, more effective fine structure for criminal offenses.

The use of fines as criminal sanctions dates back many centuries. Fines can serve the same purposes as imprisonment: deterrence, rehabilitation and retribution. While it costs the taxpayers money to imprison a person convicted of a crime, imposing a fine on such a person can offset those costs or be used for other purposes. In the District of Columbia, for example, fines help support the crime victim compensation fund.

The Commission researched the fine structures of other states and the federal system as well as the history of fines in the District. This discussion sets forth the state of criminal fines in the District and offers a proposal for making fines proportionate throughout the criminal code.

Criminal Fines in the District of Columbia

Most criminal laws in the District of Columbia identify the conduct that is prohibited and a penalty for its violation, specifying the maximum amount of imprisonment and/or maximum fine than can be imposed. The District does not have a system of classifying offenses (e.g., Class A

¹ “[T]he Commission shall also have as its purpose the preparation of comprehensive recommendations to the Council and the Mayor that: . . . (3) Assess whether criminal penalties (including fines) for felonies are proportionate to the seriousness of the offense, and, as necessary, revise the penalties so they are proportionate.” D.C. Code § 3-101.01 (b)(3).

² In developing sentencing guidelines for the District of Columbia, the Commission incorporated principles of proportionality in how imprisonment terms are imposed for felonies. The goal was to reduce disparities in the sentencing of persons who committed similar offenses and who had similar criminal histories. The Commission’s criminal code revision responsibilities involve this approach as it relates to the actual penalties assigned to each individual crime in the criminal laws.

misdemeanors or Class 1 felonies, etc.) and of setting the penalties for violations depending upon those classifications. Instead, there are hundreds of individual statutes each with its own individual imprisonment and fine provisions.

Without a broad classification system, over the decades the proliferation of individual criminal laws has resulted in considerable disproportionality, especially related to fines. A useful way to gauge this lack of proportionality for the District’s existing fines is to examine the ratio of fine and imprisonment terms for each crime. Some examples are shown in the following table:

Offense	Maximum Imprisonment	Maximum Fine	Ratio (\$/yr.)
Animal Control Act Violations	10 days	\$300	10,950
False Report to the Police	30 days	\$300	3,650
Fire Code Violations	90 days	\$300	1,217
Second Degree Theft	180 days	\$1,000	2,030
Possession of Liquid PCP	3 years	\$3,000	1,000
Robbery (Attempt)	3 years	\$500	167
Blackmail	5 years	\$1,000	200
First Degree Theft	10 years	\$5,000	500
Assault with a Dangerous Weapon	10 years	None	0
Assault on Law Enforcement Officers (with weapon or causing serious injury)	10 years	\$10,000	1,000
Extortion	10 years	\$10,000	1,000
Robbery	15 years	None	0
Sex Abuse in the Second Degree	20 years	\$200,000	10,000
Carjacking	21 years	\$5,000	239
Burglary I	30 years	None	0
Obstructing Justice	30 years	\$10,000	333
Drug Distribution (Schedule I and Schedule II Narcotics)	30 years	\$500,000	16,666
Kidnapping	30 years	None	0
Manslaughter	30 years	None	0
Murder I	Life	None	0

As the table illustrates, District laws have wide ranges in the ratio of fines to imprisonment terms. Very high ratios exist both for some minor crimes as well as for serious offenses such as distribution of the most dangerous drugs. For these serious offenses, the table also shows that certain crimes, Drug Distribution and Sexual Abuse, for example, have large fines while others, including Murder and Kidnapping, have no fine provision at all. While any one of the fine provisions in the District’s laws could be defended as appropriate, it is difficult to reconcile them taken as a whole based on principles of proportionality.

Lack of proportionality is not the only problem with the District’s fine structure. Many laws have fine provisions that were set decades ago. As a result, the mere passage of time has made some fine provisions considerably less severe than they were when enacted. To the

Commission’s knowledge, there has been no systemic adjustment in criminal fines in the District of Columbia within memory.

The Commission’s Recommendation

One way to make fine and imprisonment terms proportional is to establish a single law that governs both types of penalties for all offenses, depending on their grade or classification. The groupings are based on the offenses’ severity in relation to each other and then a maximum prison term and fine are set for each class of offenses. The Model Penal Code³ and many states take this approach to determining criminal penalties.⁴ However, this approach is not compatible with the District’s sentencing structure as crimes are not currently classified in this fashion; fines are set forth in each individual law. An approach to creating proportionality within a similar sentencing system containing hundreds of individual fine provisions was adopted for the federal system in 1984 when it enacted 18 U.S. Code § 3571. This one federal fine statute governs fines for any federal offense, depending on whether it is a felony, any of certain grades of misdemeanors, or an infraction.

After studying the fine structures of other jurisdictions as well as the District, the Commission elected to use the approach of the federal fine statute, Section 3571, as a model for making criminal fines proportional in the District’s sentencing scheme. The Fine Proportionality Act of 2011 (the “Act”) uses the maximum term of imprisonment as a substitute for a classification system. The fine for any offense with a term of imprisonment is then determined according to this single provision, across the board.⁵

The Commission’s proposed Fine Proportionality Act of 2011 would set maximum fines for any offense with an imprisonment term in the following amounts:

If the maximum imprisonment term is:	Then the maximum fine would be:
10 days or less	\$100
30 days or less but more than 10	\$250
90 days or less but more than 30	\$500
6 months or less but more than 90 days	\$1,000
1 year or less but more than 6 months	\$2,500
5 years or less but more than 1 year	\$12,500
10 years or less but more than 5 years	\$25,000
15 years or less but more than 10 years	\$37,500
20 years or less but more than 15 years	\$50,000
30 years or less but more than 20 years	\$75,000
More than 30 years	\$125,000
For a Class A Felony resulting in death	\$250,000

³ The Model Penal Code was developed by the American Law Institute as a standard for legislatures to consider in adopting or amending criminal laws in their local jurisdictions.

⁴ These states include Alabama, Colorado, Florida, Hawaii and Washington.

⁵ The Fine Proportionality Act of 2011 is provided at the end of this discussion. The full text of the proposed Act, including the submission letter to the Council and Mayor with relevant appendices, can be viewed at the Commission’s website at <http://sentencing.dc.gov>.

There are several important features of this proposal:

Current and Future Legislation: Under the proposed Act,

- Every law that now has an imprisonment term and no fine will have the fine set forth in this proposed Act.
- Every law that now has an imprisonment term and a disproportionately low fine will have the higher and proportionate fine set forth in this proposed Act.
- Every law that now has an imprisonment term and a disproportionately high fine will have the lower and proportionate fine set forth in this proposed Act.
- Every new or amended law added to the D.C. Code with an imprisonment term will be subject to this provision, and will automatically have a proportionate fine.

Imposing a Higher or Lower Fine: A person may be sentenced to the higher or lower fine stated in an individual statute only if that statute specifically refers to the Act and permits it.

Corporations: The proposed Act doubles the otherwise applicable fines if the defendant is an organization such as a corporation.⁶

Pecuniary Gain or Loss: The proposed Act permits an alternative fine up to twice the pecuniary gain or loss,⁷ even if that amount is larger than what the proposed Act otherwise provides. So for an offense with an imprisonment maximum of five years, if the pecuniary loss to a victim or gain to the defendant were \$20,000, the applicable fine could be up to \$40,000. There are only four D.C. laws that currently provide for a fine in this way. The Commission's proposal would make this approach applicable to every offense that involves a pecuniary gain or loss.

Exemptions: The Commission recommends excepting certain statutes from the reach of this proposal. For some offenses, imposing an unusually high fine seems appropriate in the interests of deterring violations and there are offenses with low imprisonment terms that ought to retain these relatively large fines. Many of these recommended crimes are ones designed to deter corporate entities from engaging in prohibited conduct. Laws protecting workers from unfair wage and hour practices are an example.

The Benefits of Fine Proportionality in the District of Columbia

The adoption of the Fine Proportionality Act of 2011 and its conforming amendments have many useful consequences for the District. The proposed Act will streamline criminal laws so that offenses will more consistently balance penalties with offense severity. In contrast to the current structure, this equilibrium means that the fines throughout the criminal code will be much easier for practitioners and the public to access and, most importantly, reflect rational sentencing policies across crimes. For instance, Carjacking and Second Degree Sexual Abuse, which have the same imprisonment term, will be subject to a similar fine rather than fines that differ by a factor of forty under the current structure. Offenses that currently have no fine, such as Murder, Kidnapping, and Burglary, would be subject to a substantial fine under the proposed Act.

⁶ This provision is only applicable to offenses with a penalty of six months or more.

⁷ Pecuniary gain or loss refers to the financial gains or losses associated with the commission of a crime. It may include medical expenses, the value of property damaged, or funds gained from a defendant's criminal activity.

Another virtue of this proposal is that it would set fines for every criminal offense having an imprisonment term without directly amending any of the hundreds of criminal laws to which it would apply. Therefore, this proposal would make all criminal fines proportional in a single act. New legislation will automatically conform to the District's fine structure, ensuring that fines continue to be proportionate even with the passage of time. However, this approach also gives the Council the authority to make exceptions for particular crimes and set higher or lower fine penalties where other sentencing considerations may outweigh the interests of proportionality.

The Fine Proportionality Act of 2011 is consistent with current standards for sentencing offenders in the District of Columbia. If this proposal becomes law, the District's criminal fine provisions will become proportional to the imprisonment terms for the first time in recent history. But additional efforts in code reform remain. The Commission continues its commitment to conducting a detailed review of the criminal statutes in the District of Columbia and providing the Council and Mayor with recommendations that, if enacted into law, would be a comprehensive, well-reasoned and meticulously constructed revision of the criminal code.

PROPOSED FINE PROPORTIONALITY ACT OF 2011

- (a) **In general.** A defendant who has been found guilty of an offense under the District of Columbia Code punishable by imprisonment may be sentenced to pay a fine as provided in this section.
- (b) **Fines for individuals.** Except as provided in subsection (e) of this section, an individual who has been found guilty of such an offense may be fined not more than the greatest of —
- (1) the maximum amount specified in the law setting forth the penalty for the offense if it specifies a fine that is higher than the fine otherwise applicable under this section, but only if such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section;
 - (2) \$100 if the offense is punishable by imprisonment for 10 days or less;
 - (3) \$250 if the offense is punishable by imprisonment for 30 days or less but more than 10 days;
 - (4) \$500 if the offense is punishable by imprisonment for 90 days or less but more than 30 days;
 - (5) \$1,000 if the offense is punishable by imprisonment for 6 months or less but more than 90 days;
 - (6) \$2,500 if the offense is punishable by imprisonment for 1 year or less but more than 6 months;
 - (7) \$12,500 if the offense is punishable by imprisonment for 5 years or less but more than 1 year;
 - (8) \$25,000 if the offense is punishable by imprisonment for 10 years or less but more than 5 years;
 - (9) \$37,500 if the offense is punishable by imprisonment for 15 years or less but more than 10 years;
 - (10) \$50,000 if the offense is punishable by imprisonment for 20 years or less but more than 15 years;
 - (11) \$75,000 if the offense is punishable by imprisonment for 30 years or less but more than 20 years;
 - (12) \$125,000 if the offense is punishable by imprisonment for more than 30 years;
 - (13) \$250,000 if the offense is a Class A felony and it resulted in death; or
 - (14) the applicable amount under subsection (d) of this section.
- (c) **Fines for organizations.** Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense punishable by imprisonment for six months or more may be fined not more than the greatest of—
- (1) twice the maximum amount specified in the law setting forth the penalty for the offense;
 - (2) twice the applicable amount under subsection (d) of this section; or
 - (3) twice the applicable amount under subsection (b) of this section.

(d) **Alternative fine based on gain or loss.**

- (1) **In general.** If any person derives pecuniary gain from such an offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.
- (2) **Procedure.** The Court may impose a fine under this subsection in excess of the fine provided for by subsection (b)(1) through (13) only to the extent that the pecuniary gain or loss is both alleged in the indictment or information and is proven beyond a reasonable doubt.

(e) **Special rule for lower fine specified in substantive provision.** If a law setting forth the penalty for such an offense specifies no fine or a maximum fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the maximum amount specified in the law setting forth the penalty for the offense.

(f) **Limitation.** This section shall not apply to any provision of Title 11, District of Columbia Code.

Contact Information:

District of Columbia Sentencing and Criminal Code Revision Commission

441 4th Street, N.W.

Suite 830 South

Washington, DC 20001

Office: (202) 727-8822

Fax: (202) 727-7929

Email: sccrc@dc.gov

Website: <http://sentencing.dc.gov>