



Testimony of Jonathan M. Smith¹
Committee on the Judiciary & Public Safety
Revised Criminal Code Act of 2021

November 4, 2021

The work of the Criminal Code Reform Commission is a major step to modernize the District's laws. If adopted, the recommendations will rationalize the code, eliminate antiquated crimes, clarify and make consistent essential elements of intent and mental status, and integrate the code into a coherent whole as opposed to a patchwork of laws written to meet specific needs at specific times. The proposed revisions will significantly, provides the Council with the opportunity to ensure that the penalties imposed for conviction of a crime are both proportionate to the severity of the offense and between offenses.

The District has undertaken other efforts to rationalize and modernize the criminal code. In 2000, the Sentencing Reform Amendment Act eliminated indeterminate sentences and parole, changed the Youth Act, and reduced the use of life sentences among other provision. In 2004, the District created voluntary sentencing guidelines for conviction in the Superior Court. In subsequent years, the District Council implemented reforms to marijuana prohibition and other statutes.

Many of the most recent changes have a positive impact and helped reduce the size of the prison system, but have not fully reversed the excessively punitive laws of prior periods in the District's history. The Council's decriminalization of marijuana and of Metro fare evasion, for example, both eliminated the enforcement of low-level offense where enforcement practices targeted people of color and were often used to justify pretext stops.² Proposals in the Criminal Code revisions will permit the Council to undertake an evidence-based and careful approach to reducing excessive punishment and expanding decriminalization.

Unlike many states, this is the first effort by the District to conduct a comprehensive review and redrafting of the criminal code since it was enacted more than 120 years ago. It is long overdue.

¹ Jonathan M. Smith is the Executive Director of the Washington lawyers' Committee for Civil Rights and Urban Affairs. The Washington Lawyers' Committee was founded in 1968 to address civil rights violations, racial injustice and poverty-related issues in our community through litigation and other advocacy. The Committee has a long history of working to address discrimination in housing, employment, criminal justice, education, public accommodation and against persons with disabilities. We work closely with the private bar to bring litigation and pursue policy initiatives.

²Racial Disparities in Arrests in the District of Columbia: Implications for Civil Rights and Criminal Justice in the Nation's Capital, (July 2013); https://www.washlaw.org/pdf/wlc_report_racial_disparities.PDF; A separate 2016 study confirmed this result and found that 80% of those arrested for smoking marijuana in public were African American. <https://www.washingtonpost.com/local/dc-politics/stark-racial-divide->

Page 2

Others will discuss some of the technical aspects of the statute, and how the proposal integrates the code into a coherent whole, rather than the collection of sometimes overlapping, often inconsistent, set of provisions that has emerged from Council action on one component without taking into account the impact on the whole. I will also not address whether the proposed provisions on penalties go far enough.

In my testimony, however, I will focus on the forces that led us to this point and why reform that reduces the footprint of the criminal legal system is necessary and vital to create a more just District of Columbia.

A defining characteristic of the District of Columbia is a harsh and unyielding criminal legal system that has had profound and negative consequences on Black and Brown communities. Ninety percent of the District's prison population is African American and only four per cent is white despite that the City is almost half white and half Black.³ The District has one of the highest rates of incarceration in the nation.⁴ Involvement in the criminal legal system is a driver of persistent inequality and inequity, creating barriers to opportunity in housing, employment, credit, and education. It destroys lives, families, and communities and has harmed, rather than created, public safety. While not the only factor that creates and sustains racial inequality, it is a significant one.

These harms find their source in the Criminal Code. The District's criminal laws date back to the era of Jim Crow. Much of the current code was written in pre-home rule times when the House Committee on the District of Columbia – the effective legislative body for the District – was chaired by South Carolina white supremacist and segregationist Congressman John McMillan. The cruelty and bias embedded in the criminal laws were exacerbated in the 1970's, 1980's, and 1990's, as part of the "war on drugs," and then the "war on crime." Mandatory minimum sentences and harsh penalties for drugs and guns caused the city to grow accustomed to increasingly long sentences, overcrowded prisons, and the large presence of law enforcement in Black communities to ensure social control.⁵

[remains-in-pot-arrests-in-dc/2016/04/05/775594b0-fa7f-11e5-80e4-c381214de1a3_story.html](https://www.washlaw.org/wp-content/uploads/2018/12/2018_09_13_unfair_disparity_fair_evasion_enforcement_report.pdf); Unfair: Disparities in Fare Evasion Enforcement by Metro Police; https://www.washlaw.org/wp-content/uploads/2018/12/2018_09_13_unfair_disparity_fair_evasion_enforcement_report.pdf

³ Council for Court Excellence, Analysis of BOP Data Snapshot from July 4, 2020 for the District Task Force on Jails & Justice (September 30, 2020) [Analysis of BOP Data Snapshot from 7420.pdf](https://www.courtexcellence.org/analysis-of-bop-data-snapshot-from-7420.pdf) ([courtexcellence.org](https://www.courtexcellence.org))

⁴ Bureau of Justice Statistics, Correctional Populations in the United States. <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5177>

⁵ For a history of the legislative and policy activity during this period that created the District's unique form of mass incarceration, see, James Forman's book "Locking up Our Own, Crime and Punishment in Black America."

Page 3

Rather than address the crisis of unfit housing, failing schools, and a lack of opportunity, the District tried to incarcerate its way out of public safety crisis after public safety crisis through the use of longer and longer sentences. The District sent generations of Black men to prison with all of the negative consequences that it had on their families and communities. The trauma of the incarceration epidemic left deep marks on the City.

I have had the honor to represent prisoners and others caught up in the District's criminal legal system for more than 30 years. I helped open the D.C. Prisoners' Legal Services Project in 1989, which has since merged with the Washington Lawyers' Committee. We litigated dozens of cases against the Lorton prisons and the D.C. Jail.⁶ I was a frequent witness in the 1980s and 1990s before this Council testifying both about the conditions in the District's prisons but also against amendments to the city's criminal laws that increased penalties, diminished public safety, and destroyed Black lives. Not only were the negative consequences of the Council's proposed actions predicable – they were predicted.

In preparing for this hearing I reviewed some of those testimonies and testimony that I provided before committees of Congress. I was struck by one passage in testimony that I gave before the House Sub-Committee on the District of Columbia in July of 1994.

The District of Columbia has the highest per capita incarceration rate of any jurisdiction in the United States. Two percent of the District's citizens are behind bars. During the late 1980's, the local prison population rose dramatically as a result of the institution of mandatory minimum sentences for certain crimes, increased rates of re-incarceration for violations of parole, and a trend toward longer sentences in general. Approximately 10,600 men and women are currently incarcerated in District of Columbia correctional facilities. Although we have enjoyed some stabilization of the prison population over the last few years, recent initiatives by the Council of the District of Columbia will likely cause a new rise in the prison population.

⁶See, J Smith, Enforcing Corrections Related Court Orders in the District of Columbia, 2 Dist. Col. L. Rev. 237 (Spring 1994); J. Smith, The District of Columbia Revitalization Act and Criminal Justice: The Federal Government's Assault on Local Authority, 4 Dist. Col. L. Rev. 77 (Spring 1998); J. Smith, Overview of the Crisis in the District of Columbia's Correctional System, in Cold, Harsh, and Unending Resistance: The District of Columbia Government's Hidden War Against its Poor and its Homeless, Washington Legal Clinic for the Homeless (1993); A. Pemberton & M. Beder, Criminal Justice in the courts of Law and Public Opinion, 62 Howard Law Journal 126 (Fall 2018).

Page 4

When I delivered that testimony, the District had enacted a raft of mandatory minimum sentencing laws, placed restrictions on the ability of prisoners to earn good time, and was actively considering “three strikes.” legislation.

As the Council embarks on its review of this important set of recommendations from the Criminal Code Reform Commission, I hope that it keeps this history in mind. I urge that, its consideration be guided by principles of lenity and proportionality, that it be reminded of the humanity of every person who is caught up in the system, and that public safety is created by equitable investments in people and communities and not by exiling neighbors to the cruelty of prison. I urge that your touchstone be whether the changes you enact will exacerbate or heal the legacy of racial injustice wrought by the current laws.