



WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

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Committee on the Judiciary & Public Safety
Criminal Code Reform Commission

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On June 4, 2020, we painted “Black Lives Matter” on the street in front of the White House to send a message that our city stood with Black lives around the country, and especially here in our city. The Mayor’s proposal to defund the Criminal Code Reform Commission, also sends a message, but a different one--that Black Lives do not actually matter.

As it stands, our city maintains a harsh and unyielding criminal legal system that, to this day, has profound and negative consequences on our Black (and Brown) communities. Approximately 43% percent of the people in our city are Black, and yet, more than 92% of individuals incarcerated for D.C. Code offenses—both here and at the Bureau of Prisons—are Black.² The District has one of the highest rates of incarceration in the nation.³ Involvement in the criminal legal system is a driver of persistent inequality and inequity, and creates barriers to opportunities in housing, employment, credit, and education. It destroys individual lives, families, and communities, and it harms, rather than creates, public safety.

In the 80s and 90s, the District was not addressing issues like inadequate housing, failing schools, credit discrimination, and attempted, like most of the country, to incarcerate its way out of its social welfare issues. Time and again the research has shown and continues to show that more and longer sentences will not, do not and cannot make our community safer. Today, we are taking those steps. We are investing in schools. We are creating affordable housing options. Indeed just last term the Council was considering the Stop Discrimination by Algorithms Act—a far more nuanced act of discrimination than the squeaky wheel that is our current criminal code.

While our criminal legal system is not the only factor that creates and sustains racial inequality, it is a significant one. The District’s criminal laws date back to the era of Jim

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² Emilia Calma and Yesim Sayin, A look at who is incarcerated in D.C.’s criminal justice system, (March 2023), available at <https://www.dcpolicycenter.org/publications/dc-code-offender-demographics>.

³ Emily Widra and Tiana Herring, States of Incarceration: The Global Context 2021, Appendix 1 (September 2021), https://www.prisonpolicy.org/global/appendix_states_2021.html

Crow, and were written by a (Congressional) Committee chaired by a white supremacist from South Carolina. The cruelty and bias embedded in our criminal laws were exacerbated in the 1970s, 1980s, and 1990s, disguised as efforts in the “war on drugs” and the “war on crime.” Mandatory minimum sentences and harsh penalties for drugs and guns caused the city to grow accustomed to increasingly long sentences, and with it, the suppression of the Black community.

I do not have to explain to you the overwhelming amount of work that the Criminal Code Reform Commission put into creating a code that reflects and integrates a modern, and evidence-based approach to criminal legal system reform, and that attempts to walk back, albeit in small ways, the inherent racial biases latent in almost all criminal codes. This kind of reform has become standard throughout our nation—even in states whose representatives voted in favor of the disapproval resolution.⁴

The disapproval resolution to the Revised Criminal Code Act was a disappointment of epic proportion and its as-yet-unknown ripple effects weight the seams of the very fabric of our democracy. While the Mayor’s veto of the Revised Criminal Code was frustrating, the Council’s all-but-unanimous overturn of that veto demonstrated that the city is indeed ready, and its locally elected officials recognize the need, for a new criminal code. And while the RCCA did not ultimately become law, that is no reason to stop trying. Instead, we must try harder.

While the revised code was a long-overdue follow-up to the sentencing reforms in the early 2000s, it was essential to the legitimacy of the process and the code itself, that the work was done in a non-partisan, collaborative, and measured way. However you may feel about particular aspects of the RCCA, it is the Criminal Code Reform Commission that has the institutional knowledge and expertise to make changes in a way that preserves the balance and structure of the code as a whole, and that can explain how particular changes may have unintended effects across both the criminal and the larger D.C. Code.

To defund this Commission without a fully integrated criminal code would be a waste of all that the Commission learned during the drafting process—to say nothing of the other essential work we would be losing, which I will turn to in a second. I use the term drafting process, but the Commission’s undertaking was so much more than that. This process began more than a decade ago, and before there were any words on the page, there was extensive research into what was being done in every other jurisdiction in this country, what worked, what did not, what led to confusion, and what clarified misapplications. The District’s goal with this process was to create, pass and integrate into our legal system, a

⁴ Twenty-nine states have rehabilitated their criminal codes in the same way as the RCCA. Ironically, Representatives and/or Senators from each of these states voted in favor of the disapproval resolution.

series of laws that adequately define prohibited conduct, accurately nuanced offenses where appropriate, and create standardized and proportionate penalties. We have only accomplished a small portions of these aims, and we must not lose sight of our goals now.

If the Council decides that re-passing the current RCCA over and over until Congress keeps their hands off our city, you will hear no objection from me on that approach. But however the Council decides to advance a new criminal code, it will need the guidance of the Criminal Code Reform Commission to do it. Certainly, for functional ways to pass the legislation in a piece-meal fashion, the Commission would be the place to start. None of us has the institutional knowledge that this Commission has, and to discard it—especially now—is reckless at best.

Every single word in the RCCA was reviewed by every member of the Advisory Group—and for good reason. Because, as we know very clearly from the shortcomings of our current code, the words matter. It would be a great disservice to our community, and to the Black lives that we say matter, to simply make haphazard changes to appeal to largely uninformed criticisms of the current RCCA—if that’s what the Council chooses to do—without the guidance of the Commission. No one here, and perhaps not even individual members of the Advisory Group, has the comprehensive wisdom base to advise the Council on any proposed changes.

And what is more, allowing the current iteration of the Commission to use their reservoir of knowledge to form the foundation of reforms to Titles 23, 24 and 50 will save a significant undertaking in re-absorbing and digesting all of the multi-dimensional and multi-jurisdictional knowledge that helped to frame the Title 22 revisions. We cannot say that we have accomplished the modernization of our criminal legal system unless we also undertake to reform these titles as well. And these revisions, as I am sure you all recognize, do not exist in a vacuum. They will affect the Sentencing Guidelines, as a result, the work of the Sentencing Commission; they change jury instructions and thus necessitate coordination with the Redbook Jury Instructions Committee.

As a 10-year veteran of the Criminal Justice Act panel and who has tried nearly 20 jury and 50 bench trials, I have seen first-hand how poorly written statutes result in disparate and different interpretations regarding requisite mental states. I have struggled mid-trial to re-write jury instructions as recent case law from the Court of Appeals attempts to clarify elements of the very offense at issue. I have seen judges struggle with mandatory minimum sentences when the circumstances beg for their discretion. I have seen prosecutors use that time to all but force individuals to give up their right to a trial.

To say nothing of the need for reform—when there finally is reform, it needs to be implemented in a comprehensive and detailed way to protect the integrity of our robust

public defense system. The 200 plus members of the Criminal Justice Act panel—a vast majority of whom are solo practitioners—will benefit considerably from having the Code’s drafters—the legislative history, if you will—at their fingertips. To be able to call on this Commission like we can call on the Sentencing Commission will make us all better advocates for our clients—the Black lives that do matter.

And I would be remiss if I did not mention the loss of all that could be learned from the Commission’s proposed data analysis work. The value of that work—especially when coupled with the data collection undertaken by the Sentencing Commission—cannot be overstated. To be able to look at the functioning of our criminal legal system in an impartial, data-driven way is absolutely essential to our legal system’s evolution into the impartial, even-handed, and equitable system that we hope it can be. More than once, and perhaps most pointedly for this discussion, with the passage of the NEAR Act, this Council has recognized that the only way to take a real, hard look at the way our city operates is by taking the noise out of the room, and letting the data speak for itself. But unlike with the NEAR Act, in the context of the criminal legal system, we already have in place an agency that can analyze the data we collect and tell us what it is saying. To forgo the opportunity to look at this data and continue to challenge ourselves to be better would be to do the very same thing the RCCA’s critics have done—to make decisions based on race-rooted rhetoric, impressions and perceptions, instead of actual facts. To defund the Commission now is to say, you were right, Congress, we do not need this. Black lives do not matter. But, we painted the street three years ago for a reason. Because they do matter. And because they do, we cannot give up on the restoration of our criminal legal system—and that necessitates today—as it did six years ago—the funding of the Criminal Code Revision Commission.