



# First Draft of Report #29: Failure to Arrest

SUBMITTED FOR ADVISORY GROUP REVIEW  
September 26, 2018

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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at [www.ccrdc.dc.gov](http://www.ccrdc.dc.gov).

This Draft Report has two parts: (1) draft statutory text for a new Title 22A of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report No. 29, *Failure to Make an Arrest*, is December 19, 2018 (twelve weeks from the date of issue). Oral comments and written comments received after December 19, 2018 will not be reflected in the Second Draft of Report No. 29. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

The Commission recommends the repeal of D.C. Code § 5-115.03 which criminalizes neglect to make an arrest for an offense committed in a law enforcement officer's presence.

## COMMENTARY

### *Explanatory Note and Relation to Current District Law*

Current D.C. Code § 5-115.03 provides:

If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District Jail or Penitentiary not exceeding 2 years, or by a fine not exceeding \$500. A member of the police force who deals with an individual in accordance with § 24-604(b) shall not be considered as having violated this section.<sup>1</sup>

The D.C. Court of Appeals (DCCA) does not appear to have published any opinions in which a criminal defendant was charged with violating this statute. However, the DCCA has referred to this statute when finding that members of the Metropolitan Police Departments are “always on duty.”<sup>2</sup> Additionally, the U.S. District Court for the District of Columbia has referred to this statute when finding that the District does not have a policy or practice of allowing officers to break the law and shielding the government from liability under 42 U.S.C. § 1983.<sup>3</sup>

There is no legislative history available as to the original intent of the statute because it is among the oldest in the D.C. Code. The crime began as part of wartime (Civil War) 1861 legislation that originally created a unified “Metropolitan Police district of the District of Columbia” out of the “corporations of Washington and Georgetown, and the county of Washington.”<sup>4</sup>

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<sup>1</sup> D.C. Code § 5-115.03.

<sup>2</sup> See D.C. Code § 22-405; *Mattis v. United States*, 995 A.2d 223, 225–26 (D.C. 2010)(finding off-duty police officers are protected by the District's assault on a police officer statute); *Lande v. Menage Ltd. Pshp.*, 702 A.2d 1259 (D.C. 1997)(finding private business not liable for the unlawful actions of the off-duty police officers they employed as security guards).

<sup>3</sup> *Gregory v. District of Columbia*, 957 F. Supp. 299 (D.D.C. 1997)

<sup>4</sup> See *Compilation of the Laws in Force in the District of Columbia, April 1, 1868*, U.S. Government Printing Office (1868) at 400, (available online at <https://books.google.com/books?id=87kWAAAAYAAJ&printsec=frontcover#v=onepage&q&f=false>) (citing Congress' August 6, 1861 Act to create a Metropolitan Police district of the District of Columbia, and to establish a police therefor, and providing in section 21 of the law: “It shall be a misdemeanor punishable by imprisonment in the county jail or penitentiary not exceeding two years, or by a fine not exceeding five hundred dollars for any person without justifiable or excusable cause to use personal violence upon any elector in said district, or upon any member of the police force thereof when in the discharge of his duty, or for any such member to neglect making any arrest for an offence against the law of the United States, committed in his presence, or for any person not a member of the police force to falsely represent himself as being such member, with a fraudulent design.”).

The scope of D.C. Code § 5-115.03 is ambiguous because it does not specify culpable mental states as to applicable criminal laws or the relevant conduct of persons. In other words, it is unclear from the statute whether police officers may be criminally liable for neglecting to arrest persons if he or she is unaware of the laws being broken or that person's conduct.<sup>5</sup>

However, even if limited to situations where an officer knows a person is breaking a criminal law in their presence, the statutory language makes no exception for the many circumstances in which safety concerns or District policy would require an officer to decline to arrest. In some situations, requiring an officer to make an arrest may compromise the officer's safety,<sup>6</sup> the arrestee's safety,<sup>7</sup> or the safety of a third party.<sup>8</sup> In some situations, Metropolitan Police Department (MPD) orders specifically direct officers to engage with people in a manner that may not result in an arrest for wrongdoing.<sup>9</sup> In still other situations, District law<sup>10</sup> conflicts with federal law<sup>11</sup> and requiring an arrest undermines the District's authority to make and enforce its own criminal laws.<sup>12</sup>

In rare circumstances,<sup>13</sup> requiring law enforcement officers to make arrests for criminal actions they know to be committed in their presence may be consistent with District policy. The CCRC will evaluate such situations in the context of its review of future offenses. However, the CCRC recommends the repeal of the broad failure to make arrest requirement in D.C. Code § 5-115.03. This change improves the consistency and proportionality of the revised offenses.

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<sup>5</sup> For example, it is unclear if an officer would be liable for failure to arrest when he or she observes a group of people playing outside without knowing that the game they are playing is shindy or that there is a law against playing shindy, D.C. Code § 22-1308.

<sup>6</sup> E.g., the officer is undercover, the officer is outnumbered, the officer is unarmed or physically outmatched,

<sup>7</sup> E.g., a person in need of immediate medical care for an injury, illness, or psychiatric condition. *See* D.C. Code § 21-521.

<sup>8</sup> E.g., a hostage.

<sup>9</sup> *See, e.g.*, Metropolitan Police Department, General Order 201.26(V)(D)(2)(f), April 6, 2011; Metropolitan Police Department, General Order 303.01(I)(B)(2)-(3), April 30, 1992; Metropolitan Police Department, Special Order 96-10, July 10, 1996; Metropolitan Police Department, General Order 502.04, April 24, 2018;

<sup>10</sup> D.C. Code § 48-1201 (providing a civil penalty for possession of marijuana, one ounce or less).

<sup>11</sup> 21 U.S. Code § 844 (criminalizing possession of a controlled substance, including marijuana).

<sup>12</sup> Notably, the District recently adopted a policy of non-custodial arrests for public consumption of marijuana. *See* Martin Weil and Clarence Williams, *D.C. arrests for marijuana use to result in citation, not custody, officials say*, Washington Post, September 21, 2018, available at [https://wapo.st/2OJBEZo?tid=ss\\_mail&utm\\_term=.9078c3261301](https://wapo.st/2OJBEZo?tid=ss_mail&utm_term=.9078c3261301).

<sup>13</sup> *See, e.g.*, D.C. Code § 16-1031 (requiring police officers to make an arrest in domestic violence, but without a criminal penalty for failure to comply). Another situation where a mandatory arrest policy may be considered is when a law enforcement officer is present during a criminal act by another officer. For example, Officer A witnesses Officer B steal narcotics from the evidence control branch and, although A did not consciously desire B to steal and was not an accomplice or accessory after-the-fact, he fails to arrest B to protect B's job. In such situations, the officer's failure to arrest may be conduct sufficiently harmful to be criminalized. This situation will be reviewed when the CCRC examines the District's obstruction of justice statutory provisions.

*Relation to National Legal Trends*

No other state has a similar criminal provision concerning a failure to make an arrest. Nevada and Oklahoma criminalize willfully refusing to arrest a person after being “lawfully commanded” to do so.<sup>14</sup> New Jersey punishes a public servant’s refraining from performing a duty when it is done “with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit.”<sup>15</sup> Twenty-five states explicitly allow law enforcement officers to issue a citation instead of arrest for some or all offenses, by statute or in the rules of criminal procedure.<sup>16</sup> Eleven additional states appear to allow officers to issue a citation instead of arrest (that is, the code has a citation procedure and does not explicitly require an arrest).<sup>17</sup> Ten states enforce a presumption that officers will issue a citation instead of arrest for certain offenses.<sup>18</sup>

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<sup>14</sup> Nev. Rev. Stat. Ann. § 199.270; Okla. Stat. Ann. tit. 21, § 537.

<sup>15</sup> N.J. Stat. Ann. § 2C:30-2.

<sup>16</sup> Alaska, Arkansas, California, Colorado, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, and Vermont. See National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, available at <http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx>.

<sup>17</sup> Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Montana, North Carolina, Oregon, Texas, and Wyoming. See National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, available at <http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx>.

<sup>18</sup> Alaska, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, Ohio, Pennsylvania, Rhode Island, and Vermont. See National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, available at <http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx>.