



## **FJP Written Testimony on DC's Revised Criminal Code Act of 2021**

*December 2021*

Thank you for inviting me to speak today and for your important work and leadership. My name is Miriam Krinsky, and I am the Executive Director of [Fair and Just Prosecution](#).

Fair and Just Prosecution (FJP) brings together elected prosecutors from around the nation as part of a bipartisan network of leaders committed to change and innovation. We hope to enable a new generation of prosecutors to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. The bold and innovative leaders we work with come from around the nation. They hail from urban and rural areas — Washington D.C., California, New York, and everywhere in between — and they collectively represent around 20% of our nation's population.

We find ourselves at a pivotal moment for our criminal legal system. Communities nationwide — and particularly communities of color — are calling out for change.

I spent a decade and a half as a federal prosecutor and saw firsthand the failed “tough on crime” approaches of the 80's and the 90's. Now, leaders, researchers, and the communities most impacted by those policies are reckoning with their cost — namely, billions of taxpayer dollars spent incarcerating generations of people at the expense of public safety, public health, fairness, and justice. Those policies made the U.S. an international outlier in our rate and length of incarceration. But we can look to science, data, and the approaches of other nations to chart a course away from mass incarceration.

I encourage the Council to embrace best practices and lessons learned to advance a new vision for a criminal legal system that is less punitive, rooted in the understanding that incarceration and punishment cannot serve as our default response to every societal problem, and more aligned with community norms and values. You have the opportunity to create a criminal legal system grounded in transparency, accountability and fairness; more attuned to evidence; and informed by lessons from around the globe, including best thinking around brain science, human behavior, and the needs of the youngest individuals who come into contact with our justice system.

### **The Imperative to Act**

Over the past 50 years, the United States has spent [trillions of dollars](#) building the world's largest prison system. Tonight, [2.2 million people](#) will sleep in U.S. prisons or jails.

The American system of mass incarceration is an [international outlier](#). While we have only about 5% of the world's population, we now house about [21%](#) of its prisoners. Our [incarceration rate](#) is about twice that of Turkey, three times that of Iran, five-and-a-half times that of China, nine-and-a-half times that of Germany, and over 17 times that of Japan.

We are far past the point where we can argue that our prison or criminal legal system is necessary to address all the societal challenges that it seeks to solve. We cannot stand here, as the richest country in the world, and claim in good faith that we are somehow unable to bring our incarceration rate down to a level that reflects the needs of public safety while honoring human dignity.

We have created a system on punitive autopilot, attempting to arrest and incarcerate our way out of human conditions that are better, more effectively, and more economically solved by treatment, prevention, or simply noninterference. Mass incarceration is not necessary — it is a policy choice. And it's a choice that too often has had devastating consequences and overwhelming costs.

### **The Urgency of this Moment**

We have recently experienced a succession of crises that have underscored the need for change. The global COVID-19 pandemic has illustrated the dangers that overcrowded prisons and jails pose to public health and highlighted the pressing need to reexamine lengthy sentences and the confinement of those most at-risk: elderly individuals, people with disabilities, and people with other serious chronic health conditions. [Many](#) of the [largest](#) COVID-19 hotspots have been prisons and jails and the COVID death rate for incarcerated people is [more than double](#) that of the general U.S. population. And outbreaks in jails, prisons, and detention centers don't just threaten the people who work or are confined there; they threaten the *entire* community.

Prisons are not closed environments — staff enter and leave every day and may carry COVID-19 back to the community. The pandemic has underscored the intrinsic connection between conditions behind bars and community health. We cannot continue to ignore the conditions of our prisons and jails and expect to escape the consequences — we must finally take responsibility for the living conditions of those behind bars and those returning home.

Further, we have recently seen a long-overdue focus on the racial disparities that pervade every aspect of the criminal legal system. Today, Black Americans are imprisoned at roughly [six times the rate](#) of white people, and Hispanic Americans at three times the rate of white people. And these disparities are endemic in every part of the criminal legal system: Black defendants are offered significantly [less favorable](#) plea deals, receive [longer sentences](#), and are [far more likely](#) to be wrongfully convicted than white defendants.

### **The Toll of Over-Incarceration**

We've spent decades betting that punishment is the singular and best key to safety. We've spent trillions of dollars to incarcerate millions of people, destroying families and fracturing entire communities. And yet, despite its unimaginable costs, our system of mass incarceration has failed to follow through on its most basic promise to promote public safety. Indeed, a growing number of researchers and studies confirm the folly of these past assumptions.

A recent [meta-analysis](#) took a comprehensive look at 116 studies on this topic and [found](#) that prison sentences do not decrease — and, in fact, slightly increase — the risk that individuals will

re-offend. Similarly, a massive 2017 [review](#) of about 30 studies on the impact of incarceration on crime rates found that additional incarceration has no impact on crime. Other studies have reached similar conclusions. Community safety comes not from cruelty and punishment, but from [grassroots community services](#), reduced [economic inequality](#), increased access to [stable employment](#), and social supports. Crime has declined over the last [30 years](#) not because of mass incarceration, but [despite it](#).

These results aren't surprising; incarceration is often damaging to the [factors that help people desist](#) from crime, like family relationships, employment, hope and motivation, sense of social belonging, and sense of being "believed in." Incarceration, even for short periods, is destabilizing, often resulting in loss of jobs, housing, and personal relationships. Prison sentences are deeply traumatizing, [financially devastating](#), and [deleterious to long-term health](#) for both the people incarcerated and all the [loved ones](#) they leave behind. Those harms make successful reentry more difficult and deepen cycles of trauma and harm in the community.

### **Sentencing Review and Second Chances**

One of the [main drivers](#) of the U.S. mass incarceration crisis has been our reliance on extreme, decades-long sentences. About [half](#) of the 222% growth in the state prison population between 1980 and 2010 was due to lengthening sentences. The U.S.'s lifer population has nearly [quintupled](#) since 1984. Today, [one in every nine](#) people in prison is serving a life sentence.

Like the rest of the U.S. criminal legal system, this is not normal. The U.S., with 5% of the world's population, holds about [40%](#) of people sentenced to life-in-prison around the globe. As of 2014, the U.S. was imposing life sentences at more than [double the rate](#) of South Africa, six times the rate of Kenya, 41 times the rate of Russia, and 70 times the rate of France.

And, extreme sentences compound racial disparities: Black men on average are sentenced to prison terms about [20% longer](#) than those given to white men under the same circumstances. Yet, [decades of research](#) have shown us that extreme sentences are not more effective at deterring crime. While people are somewhat deterred from committing crimes when they believe they are more likely to get caught and punished, there is no evidence that the *severity* of the punishment serves as a deterrent.

Meanwhile, extreme sentences carry heavy costs to taxpayers. Mass incarceration costs the government and families of justice-involved people at least [\\$182 billion every year](#) and the annual cost of incarcerating someone over age 50 is [twice the cost](#) for the average person.

### **The Path Forward**

To begin to repair the harms of mass incarceration, we must both revisit *past* sentences and rethink our *current* sentencing practices.

Evidence shows us that we could release many people today without risking public safety. A [2016 study](#) by the Brennan Center for Justice concluded that almost 40% of people in prison could be released or have their sentences reduced with limited impact on public safety.

We can start with the many older individuals behind bars. We know that people generally age out of criminal behavior: studies show that [less than 2 percent](#) of people released from prison between age 50 and 65 are arrested for new crimes; the number drops to virtually zero by age 65. Yet, the share of people 55 or older in state prisons increased by [400%](#) from 1993 to 2014 and today an estimated [150,000](#) people aged 55 or older are behind bars.

Sentencing reviews and second chances have the potential to improve rehabilitation. [Research has shown](#) us that individuals — even those who have committed serious crimes — have immense capacity for change. Sentencing reviews replace the hopelessness of an extreme sentence with the motivation of a future opportunity for a second chance. Shorter sentences are also less disruptive to individuals’ family relationships, finances, and personal lives, which [some researchers](#) have found makes people less likely to commit new crimes after release.

The need for bold action has never been more urgent. Prisons and jails have [continually failed](#) to protect both incarcerated people and staff from the pandemic. And many of the people who, at this moment, are incarcerated in overcrowded, unsanitary, dangerous facilities could safely return to their communities.

The good news is that these common-sense reforms enjoy strong public support. Communities increasingly understand that extreme sentences do not work and are embracing calls for change — as are [many survivors and victims of crime](#). A recent [poll](#) found that 69% of voters support laws that allow for the re-examination of old sentences. This support cuts across party lines, with 69% of “very conservative” and 73% of “very liberal” voters, respectively, supporting change.

FJP has also been heartened to see so many elected prosecutors leading the charge on this issue, establishing sentencing review units and post-conviction justice mechanisms to correct past injustices. Leaders like Los Angeles County District Attorney [George Gascón](#), Kings County (Brooklyn) District Attorney [Eric Gonzalez](#), and Baltimore City State’s Attorney [Marilyn Mosby](#), [among many others](#), are advancing humane, effective sentencing practices by crafting new models for revisiting extreme sentences and are providing second chances to individuals whose ongoing incarceration serves no public interest.

### **The Revised Criminal Code Act – and Other Recommendations**

I applaud leaders in the District of Columbia for this important and timely work to reform the criminal codes and craft a Revised Criminal Code Act (RCCA) of 2021. This sweeping undertaking gives the Council a rare opportunity to correct past injustices and align the District with new thinking taking hold around the nation in this critical moment of change.

Criminal statutes often go unchanged for decades. This kind of comprehensive reform process is often necessary to spur change — both in statute and more generally on a systemic level. If enacted, the RCCA would mark a significant step towards modernizing and reforming the District’s criminal codes. I thank all of you, as well as the Criminal Code Reform Commission, for taking on this extensive, thorough, and long-overdue project. I encourage the Council to take

this opportunity — one the District has not had since its criminal statutes were first codified in 1901 — to advance the interests of justice and equity throughout the criminal code.

FJP is particularly heartened by the RCCA's potential to significantly expand opportunities for second chances. This Council led the nation on second-chance policy with the Second Look Amendment Act. We are encouraged to see states already beginning to follow your example with bills like Washington Senate Bill 6164, which allows prosecutors to petition the court to modify sentences that no longer advance the interests of justice, and Maryland's Juvenile Restoration Act, which allows anyone who has served at least 20 years for a crime that occurred when they were juveniles to petition the court for a sentence reduction. If passed into law, the sentencing review provision in the RCCA would again make DC a nation-leading model for compassionate and effective sentencing policies. We are thrilled to see this recommendation in the draft RCCA and urge the Council to support this innovative provision.

As you complete this process, let me offer a few additional thoughts for your consideration:

1. First, while the RCC's sentencing ranges often fall slightly lower than DC's existing statutory ranges, I am concerned that the [maximum sentences](#) under this law still far exceed international norms and go beyond what is necessary to protect public safety. The Council may want to consider revising the RCC to align with robust research demonstrating the significant harms and lack of public safety benefits associated with **extreme sentences of more than 20 years** in the vast majority of cases.
2. Second, I am glad to see that the RCC finally eliminates the District's **mandatory minimum sentences**, including for repeat offenders. [Mandatory minimums](#) strip judges, prosecutors, and others of discretion; fail to account for unique individual circumstances; and often [deepen racial disparities](#), [waste resources](#), and destroy lives. I encourage you to prioritize the abolition of mandatory minimum sentencing during the revision process, including in cases where the defendant has prior convictions.
3. Third, I am heartened to see that the RCC significantly narrows the application of DC's **felony murder provision**, which holds individuals vicariously accountable for the acts of others. Felony murder provisions have a [troubled history](#) of promoting unjust sentences. I urge you to ensure, throughout the revision process, that this provision is as narrow as possible.
4. Fourth, the current draft of the RCC continues to allow the use of **sentencing enhancements against individuals with prior convictions**. There is no evidence that longer sentences, as enabled by sentencing enhancements, lead to less crime: the statutory ranges for offenses alone, without enhancements, are entirely sufficient to hold people accountable and to protect public safety. Sentencing enhancements lead to longer prison terms, which [do not](#) effectively reduce recidivism but do [disproportionately impact](#) communities of color. The Council should consider removing these enhancements from the RCC.

5. Fifth and finally, there is a [growing movement](#) around the nation to **decriminalize sex work**. I recognize that the Commission [noted](#) this as a topic to be addressed in the future. Sex work criminalization [threatens](#) the lives of sex workers and [obstructs](#) law enforcement's efforts to end human trafficking. I urge the Council to consider how to address this issue as further work continues.

## Conclusion

[Americans overwhelmingly say](#) they [want](#) a criminal justice system that rehabilitates the people it detains, does not discriminate on the basis of race, gives everyone an equal shot at justice, and makes the public safer. Because our system often falls short of those lofty objectives, people say the system is broken. But our criminal legal system, with all its failures, may well be doing exactly what it was designed to do. The modern criminal justice system was built on the premise that a person is no greater than the lowest moment of her life. And if we embrace that starting point, the best we can do is lock offenders up and throw away the key.

Until we challenge our justice system's core premise, we will see the same results: the justice system will continue to spark [cycles of violence](#) in vulnerable communities. We will continue to cement racial inequalities. And we will continue to trap families in cycles of poverty while failing to keep our communities safe.

It doesn't need to be this way.

If we want a system that works, we know how to get there. We just need to act — and to do so now.

Thank you for the opportunity to address the Council. Please don't hesitate to reach out if we can provide further information or assistance.