

The D.C. City Council Failed at Criminal Justice Reform—Congress Must Fix It

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KEY TAKEAWAYS

The problem with D.C.'s effort to rewrite its criminal code runs much deeper than its divorced-from-reality, soft-on-crime proposed sentencing plan.

The process that produced the revised code was calculated to benefit criminals at the expense of victims and public safety.

Congress should enact commonsense solutions, such as those that helped drive down crime rates in the 1990s, and adopt meaningful, proven programs that work.

The District of Columbia—the nation's capital—is in disorder. Violent crimes have been rising during the past several years and many people, including residents, tourists, small businesses, visitors, foreign diplomats, and even a Member of Congress, have been victimized by repeat violent offenders who terrorize the city. The District's local elected leaders do not seem to care. The Chairman of the District's local elected council has disingenuously claimed that “there is no crime crisis.” Even worse, these same local elected leaders have taken steps to affirmatively help criminals and harm victims.

Two of the most egregious examples include a recent effort to rewrite the District's criminal code—an effort so radical that bipartisan majorities of both houses of Congress disapproved it and President Biden signed that disapproval into law—and their recent effort to hamstring the District's local police

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force by passing a George Floyd Justice in Policing–style “reform” bill. Nonetheless, because the District is the nation’s capital, Congress retains ultimate authority over what happens there.

And Congress must step in to address this current crime crisis.

Congressional Authority and Obligation

One of the primary reasons the Framers of the Constitution called for a national capital, free from the influence and control of state or local officials, was to ensure that federal officials maintained ultimate responsibility for, and control over, the safety and security of the nation’s capital.

James Madison stated that the “indispensable necessity of complete authority at the seat of government, carries its own evidence with it.”¹ And the Framers knew this evidence all too well. In June of 1783, a group of disgruntled Continental soldiers who wanted their backpay threatened Members of the Continental Congress who were meeting in Philadelphia. These Members asked Pennsylvania’s governor to dispatch the state’s militia to protect them, but he would not do it. They were forced to flee Philadelphia and become itinerants for the next several years.²

This deeply disturbing and embarrassing episode caused the inclusion of Article I, Section 8, Clause 17 in the Constitution, which says that “The Congress shall have Power...To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.”³ Today, this “Seat of the Government of the United States” is the District of Columbia.

In 1973, Congress chose to voluntarily devolve some powers over the District, through the Home Rule Act, to a local elected city council and a local elected mayor, while still retaining its ultimate authority over the District. Periodically, Congress has had to intervene in the District’s affairs. For instance, in the 1990s, it effectively ended home rule for a period of time by creating a federal board to oversee the District’s crumbling finances after decades of local mismanagement.⁴

Congress has also previously acted through a special disapproval process explicitly contemplated in the Home Rule Act to disapprove certain measures the Council of the District of Columbia passed.⁵ Congress used this disapproval process to reject the District’s criminal code–reform effort that would have, if allowed to go into effect, exacerbated the already increasing violent crime problem in the nation’s capital.⁶ Members of Congress,⁷ foreign diplomats,⁸ District residents, and others visiting or conducting

business there have all suffered the consequences of the failed soft-on-crime policies the city's local council adopted largely at the behest of a left-wing dark money group.⁹

There is no reason to believe that either the current City Council, or the D.C. Criminal Code Reform Commission (CCRC) it established, has the motivation, ability, or judgment to pass a reasonable revised criminal code. Congress, therefore, must step in and do the job for them—especially since Congress has already disapproved their deeply flawed criminal code-reform effort that would have put many radical policies in place. Given the importance of this task, Members of Congress and their staff must understand D.C.'s unique criminal justice system that their predecessors have put into place, or have allowed to be put into place, during the past century.

Reform Effort Hijacked by Radicals

The D.C. City Council's attempt to modernize and reform its outdated criminal justice code failed miserably because the City Council created a commission to handle the task—a commission that was flawed from the beginning. The Congress and the President primarily rejected the City Council's code revision because it reduced the maximum sentences for many violent crimes and eliminated mandatory minimum sentences for all crimes except first degree murder at a time when violent crime is on the rise in the nation's capital.

Those flaws become self-evident when comparing the current sentencing scheme to the proposed sentencing scheme. But the problem with the revision effort runs much deeper than its divorced-from-reality, soft-on-crime proposed sentencing proposal. The entire process that produced the revised criminal code was designed to appear fair and impartial to outside observers, but, in reality, was designed to benefit criminals at the expense of victims and public safety. What the leaders of the City Council and other members of this effort did not factor into the equation was that Congress and the President would intervene and say “no.”

There is little reason to think that the City Council will change its attitude or approach as it regroups and attempts to re-write the crime bill. Therefore, Congress should exercise its constitutional authority, step in, and draft a modern criminal justice reform bill for the District of Columbia. To do so, Congress does not need to reinvent the wheel. It regularly legislates in the area of federal criminal law, and multiple state criminal codes can inform the debate. Even criminal codes from liberal states such as California can—surprisingly—when applied as written, protect the public, respect victims' rights, and punish the most violent criminals and recidivists appropriately.¹⁰

In the meantime, the District's current code, although far from perfect, will suffice. And if the U.S. Attorney for the District of Columbia—the District's chief prosecutor—implements the changes suggested in this *Legal Memorandum*, he can immediately reduce crime in the city while Congress does the job the City Council has proven incapable of doing: enacting meaningful reforms that hold the worst criminals accountable.

To understand where the City Council's effort went wrong, it is important to understand the genesis of the effort and some of the radical individuals the Council appointed to oversee the development of its so-called reform agenda.

The Reform Commission: Flawed from Inception

There is an old saying: "Personnel is policy." That means, in laymen's terms, whom you select for a job drives the outcomes you will likely get from that hire, and whom you select for leadership positions is a direct reflection of your policy objectives. Based on whom the City Council chose to lead its effort to revise the century-old criminal justice code, it is not difficult to see the Council's radical policy objectives.

The D.C. City Council created the CCRC to be the city agency and clear-house for its criminal code-revision effort. In 2016, when the effort began in earnest, the CCRC was headed by a former George Soros Fellow who had worked as a Public Defender in the District of Columbia. Moreover, the commission populated its full-time staff with former public defenders and liberal academics. And the CCRC Advisory Group—five appointed stakeholders who reviewed and provided information and suggestions on draft revisions—consisted of three defense-oriented attorneys (including one public defender); a liberal legislative affairs attorney from the D.C. U.S. Attorney's Office; and a liberal attorney from the D.C. Attorney General's Office. The two non-voting members of the Advisory Group consisted of two other liberals. D.C.'s Deputy Mayor designated one of them to participate, and the chairperson of the Council's Committee on the Judiciary designated the other one.

Overhauling the District's outdated criminal code should have been a nonpartisan, even-handed task, with a focus on taking commonsense, consensus-oriented actions such as eliminating elements of the 1901 code that are no longer germane and organizing the new code into a generally accepted format. Of course, the effort should also have focused on confronting violent crime unique to the District and targeting those most responsible for violent crime. Any even-handed reform commission would

have included roughly equal numbers of experienced prosecutors, defense attorneys, professional representatives from victim’s rights organizations, and perhaps a retired judge or two. The goal of a commission worthy of respect should be to modernize the criminal code in a way that seeks justice, protects the community from criminals, eliminates outdated crimes and antiquated language, provides lengthy sentences for repeat violent offenders, and adopts best practices from other jurisdictions. But that did not happen here.

It was not even close to happening: It was not the goal.

The Reform Commission Mindset: Criminals as Victims

That this was not the goal became glaringly apparent in June 2021. At the conclusion of its four-year effort to review and re-write the D.C. criminal code, the commission in charge of the effort held a two-day symposium. The symposium consisted of three panels: (1) the roots of the D.C. criminal code; (2) the reform recommendations by the CCRC; and (3) the CCRC’s recommendations and criminal justice reform.

The First Panel: Three Public Defenders, a Liberal, and a Convicted Murderer

The Executive Director of the CCRC at that time, Richard Schmechel, had the perfect resumé for the job—if the job was to push a radical criminal “reform” agenda while giving it a veneer of respectability by hosting symposiums and authoring studies. A Yale Law School graduate, Schmechel joined the D.C. Public Defender Service as a Soros Fellow in 2004 after graduation. He then served as a Special Assistant to the U.S. Commission on Civil Rights (USCCR), a Senior Policy Counsel for Third Way (a liberal policy organization that produces politically driven and easily debunked “scholarship”),¹¹ returned to the USCCR, and then joined the CCRC as a project director. The Chairman of the Council appointed him as the Executive Director in October 2016.

Not one member of the CCRC staff who did the day-to-day work of the commission had worked as a prosecutor or for a victims’ rights group. The staff consisted of:

- Rachel Redfern, the Chief Counsel for Management and Legislation, who was a public defender in Virginia;

- Michael Serota, the Chief Counsel for Policy and Planning, who is law professor at Loyola Law School and the Faculty Director of the Criminal Justice Reform Lab;
- Bryson Nitta, a University of Michigan Law School graduate who interned at the Department of Justice at both Main Justice and a U.S. Attorney's office; and
- Jinwoo Park, a Georgetown Law graduate who clerked in the D.C. Superior Court, the D.C. Court of Appeals, and was a research and policy associate for Obama advisor and former Chicago Mayor Rahm Emanuel.

To set the tone for the symposium and the revisions by the commission, Schmechel welcomed everyone and then introduced James Foreman, the moderator of the first panel, entitled, "The Roots of the D.C. Criminal Code."

James Foreman Jr. is a former criminal defense attorney for the D.C. Public Defender Service (PDS) and the J. Skelly Wright Professor of Law at Yale Law School. When the late U.S. Supreme Court Justice Sandra Day O'Connor, whom he clerked for, asked Foreman why he wanted to be a public defender, he said, that "it was the unfinished work of the Civil Rights movement."¹² The author of *Locking Up Our Own: Crime and Punishment in Black America*, which won the Pulitzer Prize for General Nonfiction, Foreman was the perfect person to moderate the first panel.

The five-person panel included three former public defenders, a convicted murderer, and a liberal law professor. In addition to Foreman, the all-star line-up of leftist racial-justice warriors included:

- Premal Dharia, the Director of the Institute to End Mass Incarceration at Harvard Law School;
- Renee Hutchins, Dean of the University of District of Columbia School of Law;
- Olinda Moyd, Adjunct Professor and Supervising Attorney, Howard University School of Law and Clinical Law Center Reentry Clinic; and
- Tyrone Walker, Director of Reentry Services, Georgetown University Prisons and Justice Initiative.

As one might expect, the conversation focused on defendants and how the existing criminal code was unfair to them. Not one panelist focused on crime in the District, victims of crime, or the challenges prosecutors face in a city rife with hostile juries, skeptical judges, an understaffed police department, and public defenders who routinely accuse prosecutors of Brady¹³ or other ethical violations.¹⁴

No one mentioned the fact that judges in the D.C. Superior Court are known to give overly lenient sentences, even to the most hardened criminals.¹⁵ And no one mentioned the extraordinarily high recidivism rates, or the fact that the average homicide defendant had *11 prior convictions* before being arrested for homicide.¹⁶

Foreman's first question to the panelists epitomized the notion that defendants are the true victims, asking, in essence, how does the existing criminal code impact people in the system, and what opportunities do you see as ripe for improvement?¹⁷ The "people" Foreman was referring to were suspects and criminals. Victims were ignored completely by this panel and, for the most part, by the commission, too. This attitude shows in the recommendations it ultimately issued.

First Speaker. Premal Dharia, who worked as a D.C. public defender for almost 15 years, was the first to speak. She said that her career was dedicated to ending the "harms of the criminal legal system to individual people, families, and their communities."¹⁸ Reading from a prepared script, Dharia lambasted the current criminal justice system, wondering how people "living their lives" in the city could even have knowledge of what is a crime under the current code—never mind that certain crimes like rape, robbery, and homicide are inherently wrongful. She decried "mass incarceration" and said that the current system casts a "large net" that scoops up people, and that "we need to shrink it," the "it" being the criminal justice system itself.

She stated the current D.C. Code has overlapping crimes, which allows for "prosecutorial over-charging." As expected, Dharia bemoaned the reality that "prosecutors can charge multiple different things that kind of relate to each other, that might have some overlaps, but are different." And because of this "overlap," she says that defendants feel pressure from the system. According to Dharia, "this is not a controversial statement to make anymore; our system is rife with coercion; people are facing multiple charges that overlap, excessive sentences that don't reflect the community's values, and all of this gets utilized to set up a system of plea bargains."¹⁹ She said she is proud that the new proposed code is "forward looking" and will get rid of the current system.

Second Speaker. Renee Hutchins stated that we need to ask ourselves why we even have a criminal code, and only then consider whether we should revise it. According to her, the current criminal code does not address the needs of defendants or victims and has outdated crimes. She then declared that the “overly expansive criminal code” is a “license to interfere with citizens’ lives. The more offenses we have on the books, the more license the police have to interfere in people’s lives.”²⁰

Hutchins said police “interfere” with people’s lives in three ways: (1) consensually, by walking up to someone and asking to talk with them; (2) under *Terry v. Ohio*,²¹ when police can temporarily detain a person; or (3) by arresting a person if there is probable cause to believe that person has committed a crime. Hutchins argued that the “more laws that are on the books, the more license we give them under [the second and third way] to interfere with a person ‘in a nonconsensual way.’” She then said, “what we know is that policing in this country is racialized. Black and brown people “are policed differently than white people, and poor people are policed differently than wealthy people.”²² Hutchins suggested that innocent people playing in the street in poor or minority neighborhoods are arrested by the police for no reason other than that they violated some arcane rule against playing in the street.

Third Speaker. Olinda Moyd began her remarks by saying “amen” to the previous speakers. She focused on the “harms” of the criminal justice system. The harms to black men in D.C. by the current criminal justice system are “multifaceted,” according to Moyd. She noted that 98 percent of the incarcerated population is black, and that when someone goes to jail, he is “taken away from his mother, he is taken away from his children, he is taken away from his family.”²³ She contrasted and lamented communities in which “generational wealth is being created” versus “our communities” where “generational harm and trauma is what we experience.” She noted that it was difficult for people to “exit the system.” The “people” she was referring to, but never named, were those charged and convicted of crimes.

Moyd repeated the factually inaccurate, but popular claim, that more than 2 million people are incarcerated in the United States. According to the latest December 2022 report from the U.S. Department of Justice, Bureau of Justice Statistics, at the end of 2021, there were 1,204,300 persons under the jurisdiction of state or federal correctional authorities.²⁴ And although 1.2 million sounds like a lot prisoners, the phrase “correctional control” includes those on supervised release, and not in prison, as discussed below.

Nonetheless, the “2 million” myth gained national attention in Michelle Alexander’s 2010 best-selling book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. Moyd, like Alexander, refused to acknowledge the 30-year tsunami of a crime wave that started in the 1960s and that peaked in 1992. Residents of Washington, D.C., experienced that crime wave in the 1980s and 1990s when violent crime, driven by wars between drug gangs, resulted in thousands of people being shot and killed.

As Professor Barry Latzer notes in his book, *The Myth of Overpunishment: A Defense of the American Justice System and a Proposal to Reduce Incarceration While Protecting the Public*, Alexander equates mass incarceration with “correctional control,” even though, as Latzer puts it, “the overwhelming majority of people under such ‘control’ are at large in the community.”²⁵ Or as Latzer bluntly states later, “incarceration, mass or otherwise, should not be inflated to include its very opposite, non-incarceration.”²⁶

As these authors wrote about in their upcoming book,²⁷ the anti-prison movement, and its natural outgrowth, the decarceration movement, equates today’s prisons and jails to slave plantations. Angela Davis, the author of *Are Prisons Obsolete?* and the most famous proponent of the movement, is a hero to many on the Left. She wrote that “prisons are racist institutions”²⁸ and encouraged her followers to “imagine a world without prisons.”²⁹

Moyd, echoing Davis, compared black men involved in the criminal justice system today with enslaved black men at the time of the Civil War. She stated that black men in D.C. who are on parole or probation must carry papers, and that those papers are “akin” to former slaves in the South who were freed after the Civil War who also had to carry papers. She stated that “it looks very much the same.”³⁰ She complained about the conditions of probation placed on people who leave prison and said that we “need to shrink the code to shrink the system. We need to shrink the way the criminal legal system operates.”

Not once did Moyd (or any of the speakers) discuss how to shrink the number of violent crimes committed by repeat offenders in the District of Columbia or how to increase the safety of the community by removing dangerous members of society. She said we need to “create more opportunities for people to get out of the system, leave the system behind.” And we need to “shrink the number of people who are sitting in jail because of parole violations,” without explaining how allowing felons to violate their parole with no consequences increases public safety. Finally, she lamented the lack of a clemency board for convicted felons in D.C., even though a law passed a few years ago created such a board.

She ended her recommendations by saying the system needs to “be torn down and rebuilt,” echoing the call by Professor Rachel Barkow, author of

Prisoner of Politics: Breaking the Cycle of Mass Incarceration and former member of the U.S. Sentencing Commission, who described the goal of the Soros-funded progressive prosecutor movement as one which aims to “reverse engineer and dismantle the criminal justice infrastructure” that currently exists.³¹

Fourth Speaker. Tyrone Walker, the convicted murderer on the panel, bemoaned the fact that the D.C. criminal code has not been updated since 1901, and that the code should be modernized to “reflect the times.” He said that he was “directly impacted by these antiquated laws,” even though murder has been a crime since the Founding, as in *all* civil societies dating back millennia. Reading from a script, Walker said that Foreman’s book “set me on fire,” he decried the “war on drugs,” and he proposed that convicted criminals like himself should know the maximum amount of time they will serve and the programs they can successfully complete to shorten their prison time. Walker never once mentioned remorse for killing the man he killed—nor did he even mention his name or the effect of his death on the victim’s family.

Foreman asked the panel about their thoughts on the length of sentences, and how lenient or severe they should be. Walker (the convicted murderer) said that 30-to-life for murder was, in essence, too long. The reforms should “reflect the modern times.”

Further Discussion. Hutchins added that we should ask the “why of it.” The question we should ask, Hutchins suggested, is “Why are we sentencing people? If we can get to the why, we can get to the what. If the point of sentencing people is to warehouse people who the system deems undesirable, then the longest sentence possible that the society can afford is the way to go.” She added, “I don’t think anyone with any reasoned rationed logic or moral compass would say that warehousing is a legitimate sentencing end. So, if we are going for retribution, deterrence, rehabilitation, we have got to peg criminal sentences to the length that optimizes and maximizes those end goals.” She neglected to mention incapacitation, which is one of the four penological goals of sentencing.

Moyd talked about the “excessive sentencing that this country, kind of, experienced in the past.” She said that we “know that excessive sentencing does not work.”³²

But that is wishful thinking, naïve at best, and factually incorrect. As discussed below, not only have long prison sentences for those convicted of violent crimes helped drive down crime rates dramatically for the past 30 years, but studies show that a three-strikes sentencing paradigm, which does not exist in the current D.C. criminal code, has been hugely successful in driving down violent crimes.

Furthermore, the longer the sentence, the lower the recidivism rate. The U.S. Sentencing Commission found that the odds of recidivism were approximately 29 percent lower for federal offenders sentenced to more than 120 months (10 years) incarceration compared to a matched group of federal offenders receiving shorter sentences.³³ They also found that the odds of recidivism were approximately 18 percent lower for offenders sentenced to more than 60 months (five years) up to 120 months (10 years) incarceration compared to a matched group of federal offenders receiving shorter sentences.

Nonetheless, Dharia picked up on the coercion theme, arguing that “studies,” which she never mentioned by name, “show that those 30-year sentences are, for the most part in some of these cases, are not actually being imposed, and so why they’re there, the result of them being there is the coercion. It is not reflecting the communities’ values. It is not reflecting what anyone wants in our city.”³⁴

The Second Panel: Group Think at Its Worst

Richard Schmechel kicked off the second panel by stating that the District adopted a “tough on crime approach” in the 1970s and 1980s and authorized higher penalties for the rise in violent crime, which included mandatory minimum sentences.³⁵ He lamented the high per capita incarceration and parole and probation rate in the District, and, predictably, said that incarceration in the District is “racialized, where virtually all those in the system are black, over 90 percent, and male; a stark disparity with the District’s overall population.” He noted that the current code has outdated language and crimes with no elements. He said that since it was last updated in 1901, it was in dire need of reform.

He noted that the structure of the new criminal code recommended by the CCRC tracks that found in the Model Penal Code, which has been adopted by a majority of states. He noted that the five commissioners of the CCRC voted unanimously to approve the reform package in March 2021.

The four panelists/commissioners who spoke were:

- Don Braman, Associate Professor of Law at George Washington University Law School;
- Laura Hankins, General Counsel of the D.C. Public Defender Service;
- Elana Suttentberg, Special Counsel for Legislative Affairs, United States Attorney’s Office for the District of Columbia; and

- Liz Wieser, Deputy Attorney General, Office of the Attorney General for the District of Columbia.

The first topic was mandatory minimum sentences. Schmechel noted that a number of groups have called for the elimination of mandatory minimums and opined that continued use of such sentences transfers sentencing discretion from judges to prosecutors, and that mandatory minimums have, in essence, not been useful.

Mandatory Minimums? On the contrary, mandatory minimum sentences create certainty in sentencing. When a criminal justice system removes mandatory minimum sentences, judges may sentence convicted criminals within the range set by law. The judges on the Superior Court for the District of Columbia, for the most part, give lenient sentences—even to the most violent criminals—which is one of the reasons for the high recidivism rate in the District.³⁶

Elana Suttentberg, the only felony “prosecutor” on any panel or on the CCRC, started by saying that the U.S. Attorney’s Office does support “many of the goals of the CCRC, and that they voted for the recommendations moving forward.”³⁷ She noted that the office

has some concerns regarding the recommendations as drafted, as Richard and others are aware. Most of our biggest concerns focus on the violent crimes, child sexual abuse, murder, other violent crimes, and ensuring that those who should be held accountable can be and the realities of certain resource constraints that [sic] both our office and Superior Court.³⁸

She never spelled out what those “concerns” were. As a member of the CCRC Advisory Group, Suttentberg was outnumbered and outvoted with regard to her concerns by her fellow members of the Advisory Group, but subsequently made her concerns known to Schmechel and others.

If the only person remotely representing felony prosecutors on the panel had “big concerns” about the way the commission dealt with violent crimes, child sexual abuse, and murder, that speaks volumes about the work of the commission. Any career-minded, law-and-order, experienced felony prosecutor would have spelled out, in detail, concerns as they related to the most serious crimes. Yet Suttentberg meekly and briefly mentioned her “big concerns” and fell silent.

To make matters worse, with respect to mandatory minimums, Suttentberg noted that the U.S. Attorney’s Office is part of the Department of Justice, and as such, their office’s position is “consistent with the Department’s

broader position.” She quoted Attorney General Merrick Garland from his confirmation hearing where he stated that we should consider the “elimination of mandatory minimums so that we give authority to trial judges to make determinations based on all of the sentencing factors judges normally apply to them to do justice in individual cases.”³⁹

Schmechel, Braman, and Wieser nodded approvingly as Suttentberg talked about eliminating mandatory minimum sentences, and Laura Hankins, the public defender, jumped in after Suttentberg was finished and said, while clapping her hands, “just clap my hands.” As Hankins said that, Schmechel beamed, Braman smiled, and Wieser smirked. The fix was in.

Hankins noted that PDS supports the reforms of the CCRC, but that it does not agree with all the changes. Still, she was “thrilled to hear that the U.S. Attorney’s Office” supports the elimination of mandatory minimum sentences. “We do not need them,” according to Hankins, because they have a voluntary sentencing guidelines system that judges “largely follow” that does a lot toward “reducing the goal of unwarranted disparity and even guides judges in many cases to imposing prison time.” Hankins opined that the reason prosecutors like mandatory minimums is “because it gives them a tremendous amount of power in the charging decisions.”

The Real Effects of Mandatory Minimums. It must not have occurred to Hankins—or any of the panelists—that the reason prosecutors, victims, legislators, and others like mandatory minimums is because they provide clarity and certainty when someone is convicted of a violent crime; assure victims that the criminal will serve a set period of time in jail; remove judges’ ability to give convicted violent criminals a *de minimis* sentence; and take bad guys off the street for long periods of time, thus protecting the very communities upon which they preyed.

Hankins, on the other hand, opined that “we should be against mandatory minimums” as they give prosecutors too much power of coercion.

Judicial Discretion. Wieser, from the D.C. Attorney General’s Office, said that her office “takes very seriously” public safety, and that the Attorney General is also against mandatory minimums, as he believes that judges should be able to exercise their discretion. She noted that her office had concerns about the crime of driving while intoxicated (DWI) which her office believes should include a mandatory minimum sentence. At the time of the panel, the CCRC had not made a sentencing recommendation with respect to DWI. (In 2021, at the time of the panel, the Attorney General was Karl Racine, who has since been succeeded by Brian Schwalb.)

Wieser also artfully avoided the elephant in the room: the fact that the District is experiencing an explosion of violent crime by juvenile offenders

with, apparently, no idea what to do about it. None of the other panelists touched on it, and by not talking about the topic of why so many teens are committing violent crimes, how to hold them accountable, or whether they should change the law to allow more violent juveniles to be tried as adults, the panelists appear to hope the problem will simply go away—which, of course, it will not.

The Third Panel: Slavery, Jim Crow, and White Supremacy

If the first two panels did not capture the full flavor of the CCRC’s radical shift away from reality-based criminal justice reform, the third panel certainly drove the point home.⁴⁰ Not one of the panelists was a mainstream, law-and-order prosecutor. In fact, four of the five panelists are well-known social justice warriors and advocates for decarceration, and the other was a George Soros–funded rogue prosecutor from Arlington County, Virginia. The panelists were:

- Marc Schindler, Executive Director of the Justice Policy Institute and former defense attorney;
- Paul Butler, a law professor at Georgetown University Law Center and author of *Chokehold: Policing Black Men*;
- Halim Flowers, an artist, activist, and Ambassador for Represent Justice;
- Patrice Sulton, Founder and Executive Director of the DC Justice Lab; and
- Parisa Dehghani-Tafti, the Commonwealth’s Attorney for Arlington County, Virginia.

First Speaker. Schindler moderated the discussion. He started by noting that incarceration rates “both on the youth and adult side have come down dramatically in the last 10 to 20 years, but they are far too high.” The city, according to Schindler, has “changed and diversified,” but “our justice system has not.”

Neither Schindler, nor any panelist, explained why or how the District’s justice system should change just because the city itself “changed and diversified.” He noted that “we still lock up almost exclusively black people and

poor black people.” Echoing the Soros-funded rogue prosecutor movement talking points, Schindler said that “while we need to imagine a new way and think about what can be done better, that’s the task upon us.”

The progressive prosecutor movement, which these authors labeled the “rogue prosecutor” movement three years ago,⁴¹ repeats poll-tested phrases like “reimagining prosecution,” “over-policing,” “shrink the justice system,” “mass incarceration,” “over incarceration,” “poverty penalty,” “corrections free lunch,” and other meaningless words and phrases.

Second Speaker. Schindler started with Flowers, asking him why reform is needed.⁴² Flowers started his remarks by saying we are “still charging children as adults,” and doing so “is predicated on fear.” He opined:

[We have a] criminal legal system that’s impossible to administer justice. That’s why I don’t say “criminal justice reform” because when you take the term criminal in context with the 13th Amendment, that facilitates the perpetuation of slavery, for those who’ve been duly convicted of a crime.

So once someone has been duly convicted of a crime and deemed a criminal, I think it is impossible for us to attach the word “justice” to them when we still allow such egregious slavery practices to be attached to a human being because they have been convicted of a crime. So we always begin from a space of fear, and the reason why the reforms of these laws is so important [is] because we have to begin with a place of love. You can’t protect and serve the public or anyone if you don’t love them. They’re afraid to say the word, but it’s definitely needed.

Schindler, no doubt aware of Flowers’ entire history, nodded enthusiastically as Flowers spoke about slavery.

At the age of 16, Flowers, by then an experienced drug dealer and user, robbed some men who were selling and smoking crack cocaine from a nearby apartment.⁴³ Once inside the apartment, Flowers, armed with a 9mm handgun, ordered the three men to throw the drug money on the floor. A struggle ensued, and Flowers discharged the gun, hitting no one, and fled from the apartment. He joined two other young men, Momolu Stewart and Kareem McCraney. Flowers gave the gun to Stewart, and when the three went back into the apartment to go after the men, Stewart fired three rounds, killing 51-year-old Elvern Cooper.

Flowers was arrested, charged as an adult with felony murder, convicted, and sentenced to two sentences: 40 years and 20 years to life. In 2016, the D.C. City Council passed a law that allowed D.C. residents who had served at least 15 years in prison for a crime they committed before they were 18

years old to ask the court to be resentenced. Flowers did so and was released after serving 22 years.

Third Speaker. Patrice Sulton, the Founder and Executive Director of the DC Justice Lab, spoke next.⁴⁴ A career criminal-defense attorney in the District, Sulton shut down her practice in 2018 to join the CCRC full time before leaving there to head up DC Justice Lab.⁴⁵ Schindler asked Sulton for her opinion on the most critical revisions to the code, and her expectations of what the impact of these revisions would be on this “system of injustice.” Sulton said that James Foreman was correct, that the laws on the books from 30 or 40 years ago are the “result of a lack of imagination.” Picking up on the theme embedded throughout the symposium, Sulton said that “we still have laws on the books that are the direct result of explicit racism.”⁴⁶

The larger impact of the reforms “will be felt at the misdemeanor level because that’s oftentimes where there is the greatest opportunity for civil rights violations and police abuses.”

Fourth Speaker. Paul Butler came next.⁴⁷ Butler praised the “hard work of the staff,” saying it was “good government at its best.” Butler said that he had two reactions to the code reforms: one as a “geeky law professor” and the other “as a black male citizen of the District of Columbia who many years ago was arrested for a crime I didn’t commit.”

Speaking as a law professor, Butler said “thank God” for the revisions. Butler said that he tells his law students at Georgetown University that “we have the best trial courts in the country, public defender service in the United States, [and] our U.S. Attorney’s Office is the most diverse.” Butler’s opinion is not backed up by any data.

Collectively, the authors of this *Legal Memorandum* have practiced in seven different jurisdictions, including in three states, D.C., and the U.S. military: We beg to differ. One author practiced in the District of Columbia as an Assistant United States Attorney and found the Superior Court trial courts to be barely functional compared to others before whom he practiced; he found the public defender’s office to be average compared to others against whom he litigated; and he found the U.S. Attorney’s Office to be poorly managed and lacking in viewpoint diversity.

Butler noted that as a black man, when visiting the Superior Court in D.C., one “would think that white people don’t commit crimes. White people are around 45 percent of the population of the District of Columbia. But they’re [white people] utterly absent from the criminal court. You would think white people don’t use drugs, they don’t get into fights, they don’t steal, but black people, ‘those are some bad dudes.’”⁴⁸ The recommendations “would make a dent...and they would expand jury demandability for misdemeanors.”

Butler argued that most jurisdictions require jury trials for misdemeanors, neglecting to mention that in neighboring Maryland and Virginia, many misdemeanors are tried, in the first instance, before a judge alone.⁴⁹ In Maryland, if convicted by the judge of a misdemeanor, the defendant can appeal his case, *de novo*, to the next trial level court, called the Circuit Court.

Butler finished by saying that he hopes that “some of these measures will bring not equal justice under the law to the District of Columbia because that would require even more transformation, but I’m hoping it is a step along the way to eradicating this picture of our criminal courts now. As James [Foreman] and Patrice [Sulton] and others have pointed out, we don’t even look like the new Jim Crow in D.C. at this point, we look like the old Jim Crow.”⁵⁰

Fifth Speaker and the “Rogue Prosecutor” Movement. Parisa Dehghani-Tafti was next.⁵¹ A former criminal defense attorney with the D.C. Public Defender Service, and legal director of the Mid-Atlantic Innocence Project, she does not fit the profile of someone who would be an ideal candidate for an elected prosecutor position, but she does fit the profile for those behind the “rogue prosecutor” movement. These activists recruited died-in-the-wool leftists and criminal defense attorneys to run for local district attorney races and supplied them with campaign funds to win their races.

In 2019, George Soros also spent nearly \$1 million to help his preferred candidates win primaries in the Washington, D.C., suburbs of Arlington and Fairfax counties in Virginia.⁵² A week before their primary elections, *The Washington Post* reported that “[t]he Justice and Public Safety PAC has donated about \$583,000 to Parisa Dehghani-Tafti, a candidate for Arlington County commonwealth’s attorney, and \$392,000 to Fairfax County commonwealth’s attorney candidate, Steve T. Descano.”⁵³ The article went on to say that the “donations represent the lion’s share of the roughly \$744,000 and \$546,000 the candidates, respectively, have raised to date.”⁵⁴

To put that in perspective, Soros’s donations accounted for approximately 78 percent of Dehghani-Tafti’s war chest at that time. For even more perspective, by that same point in the 2019 election, Dehghani-Tafti’s opponent, the incumbent Arlington County commonwealth attorney, had raised only \$191,000. As we have written elsewhere, Dehghani-Tafti won her race and is currently implementing her pro-criminal, anti-victim policies.⁵⁵

As the proverbial fox in the henhouse, Dehghani-Tafti is a hero to the decarcerationists on the Left. She started by saying that code recommendations are things that she “is steeped in.” Her approach to her job as a prosecutor, “first and foremost, is to exercise restraint and humility.” Some of the laws on the books in Virginia and D.C. “don’t really do that,” referring

to exercising restraint. Eliminating cash bail, which she adopted, “places institutional restraints” on her office. The “reason to eliminate cash bail is good because we’re eliminating our ability to jail people just because they can’t pay their way out.”⁵⁶

She applauded the elimination of mandatory minimums, saying that it eliminates “our ability to automatically condemn people, to coerce people with lengthy sentences, even if we don’t intend to. It’s [sic] still has that result. It places an institutional restraint on the office.” She said it is important to discuss the “myth of black dangerousness.”⁵⁷ Schindler asked Flowers what effect the reforms would have on currently incarcerated persons. Flowers said that a lot of convicted criminals do have remorse for their crimes, and the new reforms will give them hope.

Butler added that “the aspiration is ending systemic discrimination, ending the anti-blackness that is embedded in our law and politics. The aspiration is to get the District of Columbia from a place now where the life expectancy for a white woman is 12 years longer than the life expectancy for a black woman. The life expectancy for a white man is 17 years longer than for a black man in our small town. That’s unacceptable.”⁵⁸

What life expectancy of blacks and whites has to do with the criminal justice system—or a reform of the D.C. criminal code—was never addressed. Nor was the fact that homicide is one of the leading causes of death among black males, particularly young black males, and that the overwhelming majority of murderers of black males are other black males.⁵⁹ There is, to be blunt, a black male homicide epidemic in Washington, D.C., and across the country in major metropolitan cities.⁶⁰

Butler, of course, knows this. Nevertheless, he added that “this moment, not this revision project, but this focus on the criminal legal system, has been inspired by the movement for black lives, which suggests that mass incarceration and these extraordinary race disparities are symptoms of larger social ills, including, prominently, white supremacy and patriarchy.” He ended by saying that “we didn’t set, as much as I would have loved to, on this revision process to end white supremacy and patriarchy. We can’t do that with one whole revision, but, what we can do is to reduce the collateral consequences for misdemeanors.”⁶¹

No panelist mentioned that every Mayor of Washington, D.C., since 1975 has been black, from Mayor Walter Washington (1975–1979) to Mayor Muriel Bowser (2015–present). Nor did anyone mention that in the past 30 years, starting in 1993 with Eric Holder, eight of the 14 U.S. Attorneys for the District of Columbia have been minorities, and of those eight, six were black men.

Dehghani-Tafti ended by saying that the only thing we spend more money on in this country, besides the criminal justice system, is war. She said that “if that worked, we would be the most safe society in human history, but we’re not.” Her statements, albeit passionate, are grossly incorrect.⁶² But her statements, like that of those of all the panelists, should be instructive to Congress as it works to re-write the criminal code.

The District’s Current Criminal Justice System

Law Enforcement Agencies. Because of the District’s status as the nation’s capital, there are unique aspects to its criminal justice system. For instance, its primary local police force, the Metropolitan Police Department (MPD), usually operates under the direction and control of the District’s local mayor, but it can be federalized and placed under presidential control in certain emergency situations. Similarly, there exist a variety of specialized federal police forces, such as the Capitol Police, the Supreme Court Police, the U.S. Park Police, the U.S. Secret Service Uniformed Division, and the Smithsonian Institution police (called the Office of Protection Services), just to name a few, that patrol and have jurisdiction over various buildings and land within the District. Many private businesses also employ Special Police Officers who have arrest authority on the property they have been hired to protect. And, of course, many federal law enforcement agencies, such as the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives not only have their headquarters in the District, but also conduct a variety of law enforcement activities within the District, too.

Prosecuting Authorities. Because the District of Columbia is not a state or even a county within a state, it does not have an elected district attorney, nor should it. Instead, the U.S. Attorney’s Office for the District of Columbia (USAODC) has responsibility for prosecuting almost all felonies that are committed within the District, as well as most misdemeanor offenses, excluding traffic offenses and other minor infractions.

The U.S. Attorney’s Office for the District of Columbia is unique because, unlike the 93 other U.S. Attorney’s offices, it not only has the responsibility for prosecuting federal crimes in U.S. District Court, but it also has the responsibility for prosecuting local crimes, which are handled in D.C. Superior Court. Essentially, the U.S. Attorney’s Office functions as the District’s local prosecutor. Because of this dual responsibility, the U.S. Attorney’s Office for the District of Columbia “is the largest United States Attorney’s Office with over 330 Assistant United States Attorneys and over 330 support personnel.”⁶³

The other prosecuting agency in the District is the city attorney, called the Attorney General for the District of Columbia (OAG). This office focuses on civil litigation, has limited prosecutorial authority within the District for certain minor offenses, and has primary responsibility for handling offenses involving juveniles.⁶⁴ The OAG has plenary authority for prosecuting those under 15 years old who are accused of committing a crime within the District—even serious offenses such as rape, robbery, and murder.

For those juveniles 15 years old or older who are accused of committing a crime and who meet certain specified conditions, the OAG may (but is not required to) file a motion to have the juvenile’s case transferred in order to prosecute that individual as an adult.⁶⁵ That does not happen often enough under the current D.C. Attorney General who has said that he doesn’t “think kids should be treated as adults.... Kids are kids.”⁶⁶ But, of course, juveniles are not acting as “kids” while committing historically high rates of murder, armed robbery, theft while armed, and carjackings.

If Congress decides, as the authors believe it should, to draft a modern criminal code for the District, it should strip the OAG of the primary responsibility of prosecuting juvenile offenders and, like many other jurisdictions, require the U.S. Attorney’s Office to prosecute in Superior Court violent teenagers charged with an enumerated list of the most serious crimes. Congress should also expand the ability of the U.S. Attorney’s Office to use its discretion to prosecute a wide array of offenses committed by juveniles in appropriate circumstances.

Under current law, the U.S. Attorney’s Office for the District of Columbia can unilaterally choose to charge 16- or 17-year-old juveniles who are accused of committing “murder, first degree sexual abuse, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense,” as adults.⁶⁷ But for the reasons explained herein, the USAODC chooses not to do so in many cases, thus contributing to the current violent crime wave in the District.

Washington, D.C. Courts. The U.S. Attorney’s Office files charges related to violations of the District’s criminal code in the Superior Court of the District of Columbia, which essentially functions as the city’s local trial court. Appeals from the Superior Court are made to the District’s highest local court, the District of Columbia Court of Appeals. Congress created both of these courts. The President nominates individuals to serve as judges on them, and the Senate confirms them. However, these are Article I, rather than Article III, courts because the judges serving on them do not have life tenure and instead serve for renewable 15-year terms. Judges on these courts must retire from active service by age 74.⁶⁸

It has been the practice of Presidents to nominate individuals to serve on these courts who have first been selected and recommended by the District of Columbia Judicial Nomination Commission (JNC).⁶⁹ Congress currently requires it by statute, and, notably, the President does not even get to select all of the members of this commission.⁷⁰

This particular recommendation-before-appointment feature is controversial. Indeed, Laurence Silberman, a distinguished federal appellate judge who had previously served as Deputy Attorney General at the Justice Department, claimed that this process was unconstitutional because it violates basic separation-of-powers tenets—especially because one of the commission’s members is a sitting federal judge appointed by another federal judge, meaning that a sitting judge selected by a different sitting judge plays a part in telling the President who he can appoint to be a judge.⁷¹ This certainly appears to be a clear-cut separation-of-powers problem. Another controversial aspect of the local D.C. court system has been its federal funding; in the late 1990s, the federal government agreed to fund many aspects of the D.C. criminal justice system as part of the larger federal financial bailout of the city.⁷²

The U.S. Attorney’s Office prosecutes federal offenses in the United States District Court for the District of Columbia. Appeals from that Court can be made to the United States Court of Appeals for the District of Columbia Circuit.

Other Key Elements of the D.C. Justice System. The District has established, over the decades, pre-trial, probation, and parole services for individuals and defendants as they pass through the criminal justice system. As part of the shift from local to federal funding and management of certain aspects of the criminal justice system in the District, the federal Pretrial Services Agency for the District of Columbia was established,⁷³ and the federal Court Services and Offender Supervision Agency for the District of Columbia (CSOSA) was also established.⁷⁴ “CSOSA’s Community Supervision program constitutes the [administration of the] probation and parole system for adults in the District of Columbia.”⁷⁵

Although parole has been abolished in the federal system, the U.S. Parole Commission (USPC) continues to exist.⁷⁶ “The U.S. Parole Commission took over control of D.C.’s parole and supervision functions as part of the 1997 Revitalization Act, which transferred the vast majority of the District’s justice system to federal hands while the city was weathering a major financial crisis.... But more than 20 years later, the U.S. Parole Commission is operating as a de facto D.C. agency.”⁷⁷

Although the “federal government abolished parole in 1984 and so did D.C. in 2000,”⁷⁸ the USPC still “oversees supervised release and CSOSA

administers it”⁷⁹ for those from D.C. under either supervised release or on parole. These individuals accounted for 86 percent of the USPC’s workload, according to the most recent statistics.⁸⁰

There has been a disorganized push in recent years by the District’s local government to transfer authority from the USPC to a local commission because of a perception that the USPC has been too punitive in revoking parole or supervision for those it oversees. Nonetheless, to date, the District’s local government has been unable—despite repeated efforts—to come up with a cogent plan to do so.⁸¹

Commission Failed to Keep the City Safe

The mandate to re-write the District’s criminal code began in earnest in 2016 with the establishment of the CCRC, whose sole purpose was to “develop comprehensive recommendations for the D.C. Council and Mayor on revisions of District criminal statutes.”⁸² That was a lofty but achievable goal, especially since there are the experiences of 50 states from which to draw.

But replicating other criminal justice systems, or cutting and pasting from other codes, which would have been perfectly acceptable, was not the real goal. One of the individuals who worked for the CCRC, Patrice Sulton, said that when she joined the project in 2018, it “was a very good-governance, neutral, compromise kind of a project. It was law nerds in a basement, rewriting many, many statutes. This was not a decarceration agenda, it was not a racial-justice agenda.”⁸³

Yet that is exactly what it was.

When one examines who was on the CCRC, and the ideas that were rejected by the CCRC throughout its many meetings, it is clear that from the beginning it was slanted in favor of defendants at the expense of victims.

When the CCRC provided one of its earliest reports to the D.C. Council, this report focused on four non-controversial principles. The report recommended:

- Repealing “[c]learly archaic and outdated criminal statutes”;
- Striking unconstitutional and unenforced statutes;
- Replacing obsolete words and phrases with “clear and plain language”; and

- Striking or relocating “extraneous,” “noncriminal provisions in Title 22 of the D.C. Code.”⁸⁴

Unfortunately, the CCRC and the District’s Council did not stop there: they included a number of controversial provisions in the bill’s final form. Most provocatively, the final bill eliminated mandatory minimum penalties for every crime except first degree murder; lowered the penalties for most crimes (including for first degree murder); and expanded the already controversial ability of violent felons to be released from prison early.

Ms. Sulton’s claim that there was neither a “decarceration” nor “racial-justice agenda” rings hollow. As mentioned earlier, after her service on the CCRC, she went on to lead D.C. Justice Lab, an organization that “envisions” a criminal justice system in the District that “[e]nds overreliance on police, prosecutors, and prisons, in favor of solutions that maximize safety and freedom for all” and that “[t]akes dramatic measures to recognize, rectify, and reverse harm it [the criminal justice system] inflicted on poor people and Black people.”⁸⁵

While the CCRC claimed that its “recommendations were developed over four years through an exhaustive study of current criminal law and practice in the District and examination of how to better align local statutes with best practices,” it is clear this review was largely one-sided. For instance, the “CCRC staff worked with a statutorily-designated Advisory Group of seven stakeholders,” which largely included those who are sympathetic to—if not downright enthusiastic about—a decarceration agenda.⁸⁶ When the District’s Council itself held hearings on the revised criminal code, one of the individuals who testified in support of it was the executive director of a rogue prosecutor support group, Fair and Just Prosecution.⁸⁷

When the D.C. Council held its hearings on the revised criminal code, it again faced a lopsided litany of testimony from those supporting the radical rewrite.⁸⁸ Furthermore, as some noted, the Council often held the hearings on short notice and at inconvenient times for citizens of the District—those most directly affected by crime—to offer their input on the revisions.⁸⁹ One local D.C. resident noted, “I don’t think D.C. Council members did a good job of telling folks what was going on. I didn’t see flyers about it. I didn’t see Councilmember Charles Allen or At-Large Councilmembers asking us for input.”⁹⁰

Such radical revisions are particularly dangerous at a time when the District has experienced its highest number of murders in more than two decades, a year-over-year increase in carjackings during the past five years,⁹¹ and a spate of other violent crimes. This is why the District’s chief of police,

the U.S. Attorney's Office for the District of Columbia, and even Mayor Muriel Bowser strenuously objected to the passage of the CCRC's extreme rewrite of the criminal code.⁹²

The U.S. Attorney's Office, for example, said that its "most significant concerns focus[ed] on accountability for the most violent crimes (such as child sexual abuse, murder, burglary, robbery, and carjacking), and that some of the Revised Criminal Code Act of 2021 (RCCA) proposals are not integrally related to substantive criminal law and overlook the realities of certain resource constraints."⁹³ Similarly, the District's chief of police said, "Anytime we're talking about lowering penalties for violent offenders who commit crimes in our city, that's a non-starter for me.... Where's the victim in all of this? Who does this actually help? Is the victim being helped, or is it the person who victimizes?... I don't think victims win in that space. And again, that's a non-starter for me."⁹⁴

Yet the D.C. Council unanimously passed the radical rewrite of its criminal code on November 15, 2022,⁹⁵ and transmitted the bill to Mayor Bowser on December 19, 2022, for her to sign or to veto. On January 3, 2023, the Mayor vetoed the bill, saying, "This bill does not make us safer.... Anytime there's a policy that reduces penalties, I think it sends the wrong message."⁹⁶ Still not satisfied, the D.C. Council overrode the Mayor's veto on January 17, 2023, by a 12–1 vote. Only Councilman Trayon White, Sr., who represents the District's Ward 8 (one of the hardest hit by violent crime) voted against the veto override.⁹⁷

Fortunately, because of the District's unique constitutional status, Congress still retains ultimate authority over legislation enacted in the District, and had 60 days, rather than the usual shorter 30 days, to review the legislation to decide whether to override it under the specialized provisions allowing for expedited review.⁹⁸ Of course, Congress could pass a law through the normal legislative process at any time to legislate for the District.

Given the radical nature of the criminal code re-write and the surging crime problem in the District, the House of Representatives voted on a bipartisan basis by a vote of 250–173 to overturn the District's radical criminal code rewrite. Thirty-one Democratic House Members joined Republicans in voting to overturn the law.⁹⁹ This is notable because at the time, Democratic President Joe Biden had publicly opposed the efforts to overturn it.¹⁰⁰

Democratic Congresswoman Angie Craig (MN) was violently assaulted in her apartment building's elevator while heading to the Capitol to vote on the crime bill that might have contributed to this large defection.¹⁰¹ Especially

relevant was the fact that her assailant was a repeat violent offender.¹⁰² By the time the override effort reached the Senate, President Biden had changed course and signaled that he would not veto a bill overriding the District's Revised Criminal Code Act if it reached his desk. With this green light from the President, the Senate passed the disapproval resolution by an overwhelming vote of 81–14, “with 33 senators who caucus with Democrats supporting the Republican-led measure.”¹⁰³ President Biden signed the disapproval resolution into law on March 20, 2023.¹⁰⁴

California vs. D.C.: The Radical Nature of D.C.'s Proposed Revised Criminal Code

Supporters of the radical revisions to D.C.'s criminal code say that “[r]acism in the U.S. and in our criminal justice system is a systemic issue. You can't fix systemic issues with ad hoc changes, you need systemic revision, and that's what these changes will do.”¹⁰⁵

These statements, and others like them, show that many of the proposed revisions, and the so-called reforms put forward in the failed revised criminal code, are rooted in two myths about our criminal justice system: (1) that it is systemically racist; and (2) that the U.S. has a mass incarceration problem.

Both assertions are false.¹⁰⁶

To show how radical the District's proposed rewrite of its criminal code was, consider how the rejected reform measure compares to the law in California with respect to key features and maximum sentences.

The District vs. California. The criminal code in D.C. does need to be reformed. It is old, has outdated language, contains ancient crimes that are no longer applicable, and is not formatted or organized in the way modern criminal justice codes in many states are organized. The exercise of modernizing most aspects of the code is not—or should not have been—controversial.

The serious business of re-writing the criminal code should start with addressing the realities on the ground in the city and analyzing its justice system compared to model jurisdictions around the country. Such an analysis should, at the very least, take into considering the following things:

- **Evaluate** the numbers of violent crimes across the city.
- **Assess** whether those violent crimes are being perpetrated by recidivists.

- **Examine** how and why recidivism rates are what they are in the District.
- **Scrutinize** the actual sentences imposed by Superior Court judges and compare those sentences to the actual time served to make sure defendants are actually serving their sentences, or at least a substantial portion of them.
- **Analyze** the U.S. Attorney's Office charging policies and high declination rate and see how they compare to professionally led large district attorney's offices around the country.
- **Delve** into the current alternatives to incarceration, including diversionary programs and specialty courts (such as veteran's courts, substance abuse courts, mental health courts, etc.) and see whether they are successful compared to best-in-class programs and courts across the country.
- **Develop** a sentencing scheme that punishes the worst offenders convicted of the most violent crimes with life sentences or similarly long periods of time.
- **Include** mandatory minimum sentences with tiers for the most serious crimes based on the offenders' criminal histories.
- **Study** the current funding mechanisms to see if any alternatives are appropriate.

The District has a major crime problem, a fact that the CCRC glossed over. This problem should be obvious to anyone except, it seems, the CCRC and the D.C. City Council. The District (if it were a state) would have the highest murder rate of all 50 states in the United States at 19.46 per 100,000 residents.¹⁰⁷ That, and that alone, is telling, and suggests that something major must change.


But it is not just murders. Compared just to last year, when the crime rate topped the previous year, homicides are up 17 percent, sex abuse is up 53 percent, robberies are up 12 percent, motor vehicle theft is up 108 percent, theft is up 4 percent, arson is up 300 percent, property crime is up 29 percent, and overall crime is up 26 percent.¹⁰⁸

TABLE 1

Criminal Sentencing, District of Columbia vs. California

Crime	MANDATORY MINIMUM (IF ANY) TO STATUATORY MAXIMUM	
	District of Columbia	California
1st Degree Murder	24–40 years	25 years to life
2nd Degree Murder	0–24 years	15 years to life
1st Degree Robbery	0–14 years	5, 7, or 9 years
1st Degree Carjacking	0–18 years	7, 9, or 11 years
1st Degree Sexual Assault	0–24 years	8, 11, or 13 years

SOURCE: Authors' research.

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But did the CCRC or panelists at the two-day symposium discuss these rates, why they are elevated, how to lower them, who is committing these crimes, or how their new proposed reforms would address the rising crime rate? No. Why not? Because their goal, obviously, was not to tackle crime rates or protect the residents of the District: Their goal was to “shrink” the system.

Although the purpose of this *Legal Memorandum* is not to provide a comprehensive set of recommendations for a new criminal justice system for the District, the authors thought it helpful for Congress to see a comparison of just a few crimes and sentences in the reform bill and current California law as a way of gauging how out-of-step the CCRC was.

The sentences in Table 1 start with the mandatory minimum (if any) and list the statutory maximum sentences. Under California law, trial judges have *no discretion* to deviate from mandatory minimum sentences, which produces uniformity and certainty in sentencing.

California also has attributes in its criminal justice system that, when used appropriately and with proper discretion, have resulted in curbing violent crime and incapacitating the most violent criminals, all while giving deserving defendants reasonable opportunities to learn the error of their ways, rehabilitate themselves, and hopefully become productive members of society. When applied as written by law-and-order prosecutors, these laws work.

There are, sadly, notable exceptions. Los Angeles County elected George Gascón, who has implemented sweeping, radical pro-criminal policies that have resulted in skyrocketing crime rates.¹⁰⁹ Similarly, in the City and County of San Francisco, while District Attorney Chesa Boudin was in office,

the city and its residents suffered a tsunami of commercial thefts, robberies, car thefts, drug crimes, and more.¹¹⁰ Boudin, who was recalled by the voters in June 2022, was replaced by Brooke Jenkins, a more traditional law-and-order prosecutor.¹¹¹

Under California law, prosecutors can add sentence enhancements to certain violent crimes. Crimes for which a sentence enhancement is available include crimes committed with the use of a firearm; an offender with a prior felony conviction; crimes that result in injury to more than one person; and crimes in which the victim falls within a special class, such as an elderly person, a child, a teacher, or a law enforcement officer, public defender, judge, or prosecutor.

If convicted, and the jury finds that the government also proved the enhancement beyond a reasonable doubt, the offender must first serve the time from his sentencing enhancement and then serve his underlying sentence for the main offense. Under the law, the two sentences can (and often times must) run consecutively. The most common sentencing enhancements used by prosecutors in California are prior serious felony, use of a firearm or other deadly weapon, membership in a gang, and three-strikes laws.

Virtually none of these features of the California system appeared in the CCRC's reforms.

Use-of-a-Firearm Enhancements. For example, under California P.C. § 12022, anyone who carries a loaded or unloaded firearm on his person in the commission of a felony or attempted felony shall be punished by an additional year that must run consecutively to the underlying sentence. If the weapon is an “assault weapon” as defined by statute, the additional and consecutive sentence is three years. Under § 12022.2, any person who, while armed with a firearm in the commission or attempted commission of any felony, has ammunition designed to penetrate metal or armor shall serve an additional term of three, four, or 10 years.

Given the extraordinary number of criminals in the District who are found in possession of firearms during the commission of felonies, any reformed criminal code would be wise to look to add a provision like California P.C. § 12022.5, which says that any person who uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment for three, four, or 10 years, unless use of a firearm is an element of the offense.

Given the number of shootings from occupants of vehicles (often stolen vehicles), the new code could copy California P.C. § 12022.55 that states that anyone who, with the intent to inflict great bodily injury or death, inflicts great bodily injury or death of a person other than the occupant

of the vehicle as a result of discharging a weapon from a motor vehicle in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment of five, six, or 10 years.

There are many other firearms enhancements under California law. The D.C. reform bill ignores firearms enhancements, despite all the rhetoric about the need to reduce “gun crimes.”

Three-Strikes Laws. California was the first state to pass a three-strikes-and-you’re-out law. The law went into effect on March 7, 1994, and has been very successful in providing not only a deterrent, but has been cost-effective, according to several studies mentioned below. Nonetheless, to the CCRC and D.C. City Council, a three-strikes law was out of the question, because, as decarcerationists and racial apologists, they want shorter sentences and a smaller system—even if that means keeping violent criminals on the streets of the District.

The three-strikes law is complicated and grossly misunderstood by most people, including some people in California. Surprisingly, it has a lot of wiggle room and is not the draconian hammer that the Left portrays it to be, in large part because judges and prosecutors can “strike” a prior from a career felon’s record, thus making the person ineligible for the 25-to-life sentence that a person who gets sentenced under the full weight of the three-strikes sentencing scheme receives. In essence, it is designed to punish the most dangerous and violent career felons with 25-to-life sentences, but does not touch most felons, for the reasons explained herein.

To qualify for the three-strikes law, a felon must be convicted of a serious or violent felony, as defined by California Penal Code § 667.5(c) and § 1192.7(c). Those include serious crimes like rape, child molestation, murder, most sex offenses, residential burglary, robbery, kidnapping and offenses in which a weapon was used, any offense in which great bodily injury was inflicted, arson, or attempts to commit any of the crimes listed above.

A “serious” or “violent” felony is known as a “strike prior.” A defendant who is convicted of any new felony who has one “strike prior” is required to go to prison for twice the sentence otherwise listed for the new offense. He must also serve at least 80 percent of the sentence imposed, compared to non-strike prisoners who receive one-third to one-half off their sentences for good time credits.

However, a defendant who has two or more “strike priors” faces a mandatory minimum sentence of 25-years-to-life, and under the law, cannot earn any time off for good behavior or working in prison. Prosecutors or judges, on their own volition, can remove (called “striking a strike”) a strike from a felon’s record when negotiating with the defense attorney.

Liberals and decarcerationists hate the three-strikes law, in large part because they do not think it works and believe it results in overly punitive sentences. They also contend the law has no deterrent effect and is not cost-effective. But thoroughly researched studies have found just the opposite—that California’s three-strikes law has a large deterrent effect and may indeed be cost-effective.

Professors Daniel Kessler of Stanford University and Steven Levitt of the University of Chicago tested a research model using California’s Proposition 8, which imposed sentence enhancements for a select group of crimes. They found that in “the year following its passage, crimes covered by [three-strikes] fell by more than 10 percent relative to similar crimes not affected by the law, suggesting a large deterrent effect.”¹¹² More strikingly, they found that “three years after the law comes [sic] into effect, eligible crimes have fallen roughly 20–40 percent compared to non-eligible crimes.”¹¹³ They concluded that California sentence enhancements had a large deterrent effect and “may be more cost-effective than is generally thought.”¹¹⁴

As is clear from this brief review of California’s criminal code, the CCRC could have included sensible criminal justice reforms from other jurisdictions that are effective, sensible, and act to address the most violent felons on the street, protect victims of crime, and provide incentives to obey the law.

Whether the members of the CCRC had a national viewpoint or a limited parochial viewpoint and experience with only local criminal justice systems, they chose not to write a criminal code worthy of adoption. They ignored rising crime rates, turned a blind eye to recidivists, and treated prison like a four-letter word. In short, they failed miserably in their effort to reform the criminal code.

But they were not yet done.

The District’s Radical Anti-Policing Legislation

As part and parcel of the District’s efforts to systemically change its criminal justice system, the local D.C. Council has also made a concerted effort to defund and to demoralize local police. As previously reported:

In July 2020, the D.C. Council cut \$15 million from the local police force’s budget as part of “grappling with the undoing of centuries of layered systemic racism and its permutations throughout our society.” The cut was even more severe than it looks. It lowered the police budget baseline to the point that

the D.C. Metropolitan Police Department started its 2021 fiscal year (on Oct. 1, 2020) with \$33 million less than the previous year.

Charles Allen, the D.C. Council member who spearheaded the effort, candidly acknowledged that his “strategy is to reduce our [police] force size in a responsible way by turning off the spigot, plus adding in natural attrition.”

...

Allen anticipated that with his budget cuts, “force numbers will start to drop by about 200 officers...” He proudly proclaimed, “This is the biggest reduction to MPD I’ve ever seen—but I know racial justice won’t be achieved in a single budget.”¹¹⁵

As has been previously noted, “[W]hat does so-called racial justice have to do with keeping people safe?”¹¹⁶ In fact, because a disproportionate share of young black men are the victims of violent crimes (including in the District), when violent crime increases, it will undoubtedly mean that more young black men will be harmed and victimized.¹¹⁷

In 2012, the District experienced a 20-year low in the number of homicides. That year, the District’s homicide rate was “13.9 per 100,000, with a relatively low 88 homicides for that year.”¹¹⁸ In 2012, the Metropolitan Police Department had about 4,000 sworn officers, and it had around that number for several years before.¹¹⁹ Yet “[b]y the end of fiscal year 2021, the D.C. Metropolitan Police Department had only 3,580 officers. A year later, that number had dropped to 3,460. And it’s still falling today.”¹²⁰ The District’s police chief noted that this is the fewest number of sworn officers on the force since the 1970s and that it will likely take at least a decade to restore appropriate staffing levels.

But it is not just attempts to defund the police in the District that have been so destructive, it is also the attempts to demoralize them and to prohibit them from effectively doing their jobs. There was an effort at the federal level to pass the deeply flawed George Floyd Justice in Policing Act,¹²¹ as well as a Biden executive order,¹²² which attempts to implement via executive fiat some of the policies contained in that flawed bill that failed to get through the legislative process.

Unfortunately, the D.C. Council enacted a number of “emergency” police reforms in the wake of George Floyd’s death in 2020. Last year, the Council enacted a permanent version of these reforms through the Comprehensive Policing and Justice Reform Amendment.¹²³ The House

voted on a bipartisan basis to disapprove this measure by a vote of 229 to 189. Fourteen Democratic Members of the House voted with Republicans to disapprove it.¹²⁴ The Senate also voted on a bipartisan basis to disapprove the measure, but on May 25, 2023, President Biden vetoed the disapprovals.¹²⁵

Recommendations

What should policymakers do to combat the surge in violent crime currently plaguing the nation’s capital and reform the criminal justice system in the District of Columbia? They can embrace the commonsense solutions that helped drive down violent crime rates in the District (and elsewhere) in the 1990s and adopt meaningful, proven programs that work in other jurisdictions around the country.

Addressing the General D.C. Criminal Justice System

Policing. Authorities can make sure that police staffing levels are adequate to meet the challenges officers face. Police “reforms” that make officers’ jobs more dangerous and difficult should be rejected. To that end, Congress should override the District’s most recent policing “reform” bill, pass legislation to override President Biden’s Executive Order on Policing,¹²⁶ and decline to pass a bill containing provisions that are similar to many of the provisions in the George Floyd Justice in Policing Act.¹²⁷

Prosecuting. The U.S. Attorney’s Office for the District of Columbia should make prosecuting offenders a priority. It sounds laughable that a prosecutor’s office needs to emphasize prosecuting criminals, but the U.S. Attorney’s Office current declination rate—or refusal-to-prosecute rate—of “67 percent of those arrested by police officers in cases that would have been tried in D.C. Superior Court” is ludicrously high.¹²⁸ The declination rate has “nearly doubled from 2015, when prosecutors in the U.S. Attorney’s office declined to prosecute 35 percent of such cases.”¹²⁹

There exists a perception among local law enforcement that Assistant United States Attorneys will not agree to prosecute a case unless it is trial-ready hours after an arrest. That standard is completely unreasonable, and results in many meritorious cases being dismissed outright the day after arrest. To be sure, the well-documented problems with the District’s crime lab need to be addressed and rectified as soon as possible.¹³⁰ But this alone cannot account for the exceedingly high declination rate.

Congress should conduct oversight hearings specifically focused on the U.S. Attorney's Office for the District of Columbia to see why the declination rate is so high compared to professionally run district attorney's offices around the country of a similar size.

Criminal Code and Sentencing Reform. The criminal code needs to be modernized and reformed. Special attention should be given to the effectiveness of mandatory minimum sentences, sentencing allegation and special circumstances enhancements, and a three-strikes law for career criminals. Congress should examine state criminal codes and sentencing schemes and adopt the best practices from each to create a tough, but fair, criminal justice code.

New Office Building Needed. Congress should provide the funds for a new U.S. Attorney's Office building to be located between and connect to the D.C. Superior Court and the U.S. District Court. There is ample room for such a building. Currently, that open space is located where the John Marshall Park exists. For decades, the D.C. U.S. Attorney's office was located at 555 4th Street NW, a two-block walk to D.C. Superior Court or U.S. District Court. In that building, the Attorney's Office occupied the entire structure, even though it was a 10-minute walk to the courthouses.

Last year, the U.S. Attorney's Office was moved to the Patrick Henry Building at 601 D Street NW, a block-and-a-half from the courthouses. Prosecutors are required to walk—in rain, snow, sleet or hail, whether cold or hot and humid—with their litigation bag, exhibits, charts and evidence to Superior Court and wait in line with members of the public to enter Superior Court. Unlike prosecutors in most jurisdictions, D.C. Assistant United States Attorneys have no special access to the courthouse and must go through screening like defendants and members of the public.

Furthermore, they have no offices in the Superior Court and during trial breaks, must walk back to their offices. There are no secure bathrooms in D.C. Superior Court, so prosecutors often find themselves sharing public facilities with the defendants they are prosecuting. This is dangerous and unacceptable. Congress routinely appropriates funds for new federal courthouses including dedicated office space for U.S. Attorney's Offices.

Last year, the U.S. General Services Administration approved a design concept for a new federal courthouse in Fort Lauderdale, Florida. Once completed, the new 252,000 gross square feet building will include 12 courtrooms, 17 judges' chambers, and workspace for the U.S. Court of Appeals, U.S. Bankruptcy Court, U.S. Marshall's Service, and the U.S. Attorney's Office.¹³¹ Congress should also ensure that the public defender services in the District have adequate facilities and the same courthouse privileges as those accorded to attorneys in the U.S. Attorney's office.

Use § 922(g) to Tackle Gun Crimes. The U.S. Attorney’s office should focus on federally prosecuting—in the United States District Court for the District of Columbia—cases involving felons in possession of guns under 18 U.S.C. § 922(g). These crimes are relatively easy to prove (in many instances), and the mandatory federal penalty of five years ensures that prosecutors can effectively use them to take the most dangerous repeat violent offenders off the street. According to the Chairman of the D.C. Police Union, taking felon-in-possession cases to federal district court would have the most immediate impact on crime in the District of Columbia, as most felons who are caught are found with a weapon. The five-year mandatory minimum penalty in federal prison would send a loud and clear message: Do not carry guns in the city if you are a felon.

Prosecute Violent Juveniles as Adults. Congress should take the lead to ensure that juveniles who commit violent crimes are held appropriately accountable in adult court—regardless of their age. The U.S. Attorney should have the ability to charge as an adult any juvenile who commits a crime of violence, and Congress should consider requiring the U.S. Attorney to do so in certain instances—such as when a juvenile is a repeat offender or is accused of particularly heinous crimes such as murder, carjacking, rape, and armed robbery. The District’s Attorney General should likewise be given the discretion—even though the current Attorney General is unlikely to use it—to move to transfer any juvenile case to adult court if he can show good cause to do so.

Parole/Supervised Release. Congress should prohibit any transfer of the current functions of the U.S. Parole Commission to another agency or body without explicit congressional approval.

Addressing the D.C. Court System Specifically

Congress should abolish the District’s Judicial Nominating Commission. At a minimum, it should abolish the statutory requirements that the President can only nominate individuals to serve on the District’s courts who have been approved and referred to him by the JNC. Furthermore, if Congress chooses to continue to allow D.C. Superior Court judges to be appointed for 15-year renewable terms, it should require that the Senate’s consent be required before any re-appointment or term renewal takes place. Currently, such consent is not required in most instances.¹³²

The Senate should also transfer the vetting-and-confirmation process for these local District judges from the Committee on Homeland Security and Governmental Affairs to the Judiciary Committee, which handles the vetting-and-confirmation process for other federal judges needing Senate approval.

Revise/Clarify Disapproval Process. Congress should streamline and clarify the disapproval process in both the House and the Senate and should consider expanding the time it has to review D.C. Council legislation to at least 90 or 120 legislative days. Experience has shown that the current disapproval process of 30 days (or even 60 days in the case of crime bills) to review and pass a disapproval resolution is an extremely tight turnaround—especially given the other pressing business that Congress and the nation face. The D.C. Council has also shown a willingness to engage in brazen gamesmanship with regard to its authority to submit—and, absurdly, withdraw—legislation.¹³³ Additional time and clarity will help avoid these problems in the future.

Establish Family Justice Center, Drug, and Domestic Violence Courts. In 1989, the idea of establishing a family justice center was born in San Diego. Created by the local district attorney and city attorney, the idea was simple: create a one-stop shop where victims of family violence could get all the services they needed. After two years of thoughtful planning, stakeholders were able to convince the City of San Diego to approve the nation's first Family Justice Center, which opened in 2002. Victims of domestic violence could go to one location “to talk to an advocate, get a restraining order, plan for their safety, talk to a police officer, meet with a prosecutor, receive medical assistance, counsel with a chaplain, get help with transportation, and obtain nutrition and pregnancy services counseling.”¹³⁴

What started as a good governance, new way of tackling difficult issues in the criminal justice system gained national attention in 2003 when President George W. Bush announced the creation of the President's Family Justice Center Initiative, citing San Diego's Family Justice Center as the model. The \$20 million initiative had a modest goal of opening 15 family justice centers across the country.

In 2005, Congress “recognized the importance of the family justice center model in Title I of the Violence Against Women's Act. Today, the best family justice centers provide confidential, comprehensive “services to anyone who has experienced domestic violence, family violence, elder abuse, sexual assault, or sex trafficking.”¹³⁵

Unfortunately, despite the proven utility of family justice centers across the country, Washington, D.C., does not have one. To make matters worse, Washington, D.C., does not even have a stand-alone domestic violence court program. While the D.C. Superior Court has a domestic violence division in which victims of domestic violence can apply for a civil protection order or an anti-stalking order, that is a far cry from fully functioning, full-service domestic violence specialty courts, which have proven to be hugely successful around the country.

Conclusion

The District of Columbia’s City Council and the CCRC failed in their duties to enact a sensible, safety-based, modern criminal code. They failed because they were, and continue to be, convinced that those charged with crimes and those convicted of crimes in the District are victims of “the system.” If given another chance to re-write the code, they will fail because their mentality has not changed.

As famed *Washington Post* columnist Colbert I. King recently opined, arrestees in the District of Columbia “leave a long trail of victims in their wake,” noting that the average person arrested for homicide in D.C. has been arrested 11 times previously.¹³⁶ King slammed the Court Services and Offender Supervision Agency, pointing out that at least 76 percent “of homicide suspects had active or prior supervision.”¹³⁷ Clearly, the “system” is benefitting criminals, contrary to what the City Council and CCRC bemoan.

Congress has the right and the duty to fix this problem once and for all and should design a criminal justice system that protects the residents of the District, respects victims, provides meaningful opportunities for deserving defendants to get on the right track, and punishes the worst offenders with serious prison time.

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Endnotes

1. THE FEDERALIST NO. 43 (James Madison).
2. See Zack Smith, *Does D.C. Statehood Require a Constitutional Amendment?: You Better Believe It*, 83 OHIO ST. L.J. ONLINE 17 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4034744.
3. U.S. CONST. art. I, § 8, cl. 17.
4. Michael Janofsky, *Congress Creates Board to Oversee Washington, D.C.*, N.Y. TIMES (Apr. 8, 1995), <https://www.nytimes.com/1995/04/08/us/congress-creates-board-to-oversee-washington-dc.html>; *Clinton Signs Measure Establishing Board to Oversee D.C. Government*, L.A. TIMES (Apr. 18, 1995), <https://www.latimes.com/archives/la-xpm-1995-04-18-mn-55976-story.html>.
5. CHRISTOPHER M. DAVIS, CONG. RSCH. SERV. IN 12119, CONGRESSIONAL DISAPPROVAL OF DISTRICT OF COLUMBIA LAWS UNDER THE HOME RULE ACT (updated Apr. 17, 2023), <https://crsreports.congress.gov/product/pdf/IN/IN12119>. This process has changed slightly over time in response to decisions by the U.S. Supreme Court, such as *INS v. Chadha*, 462 U.S. 919 (1983), which declared the legislative veto unconstitutional. See *Gary v. United States*, 499 A.2d 815 (D.C. Cir. 1985) (finding the Home Rule Act's one-house legislative veto provision unconstitutional in light of the U.S. Supreme Court's decision in *Chadha*).
6. Zack Smith & Cully Stimson, *DC's Radical Criminal Code "Reform" Would Make City Even Less Safe. Congress Is Right to Rebuke It.*, THE DAILY SIGNAL (Mar. 7, 2023), <https://www.dailysignal.com/2023/03/07/d-c-s-radical-criminal-code-reform-would-make-city-even-less-safe-congress-is-right-rebuke-it/>.
7. Luke Barr, *Suspect in Rep. Angie Craig Assault Has Long Criminal Record, Including 25 Bench Warrants*, ABC NEWS (Feb. 14, 2023, 4:26 PM), <https://abcnews.go.com/Politics/suspect-rep-angie-craig-assault-long-criminal-record/story?id=97199330>.
8. See @alanhenney, TWITTER (Mar. 2, 2023, 11:30 AM), <https://twitter.com/alanhenney/status/1631331263368896514?s=20> ("Diplomat Victim of Robbery"); see also Evan Lambert, *Sources: Diplomat From the UAE Carjacked at Gunpoint in NW DC Monday*, FOX 5 DC (updated July 14, 2021, 2:06 AM), <https://web.archive.org/web/20230307082141/https://www.fox5dc.com/news/sources-diplomat-from-the-uae-carjacked-at-gunpoint-in-nw-dc-monday>.
9. Parker Thayer, *Zuckerberg Cash and Left-Wing Dark Money Groups Behind Soft-on-Crime DC Bill*, CAP. RSCH. CTR. (Feb. 21, 2023), <https://capitalresearch.org/article/zuckerberg-cash-and-left-wing-dark-money-groups-behind-soft-on-crime-dc-bill/>.
10. Of course, California currently faces an effort similar to the one in the District to repeal many of its commonsense criminal code provisions in favor of radical ones that favor criminals, harm victims, and wreak havoc on public safety.
11. See, e.g., CHARLES STIMSON ET AL., *The Blue City Murder Problem*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 315 (Nov. 4, 2022), <http://report.heritage.org/lm315> (debunking a "report" by Third Way).
12. See Just. Pol'y Inst., *DC CRCC: The Roots of the DC Criminal Code*, YOUTUBE (June 16, 2021), <https://www.youtube.com/watch?v=hrRdnkjqkA>.
13. See *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring the government to turn over any evidence to the defense that is potentially exculpatory).
14. This comment is based on the personal observations of one of the co-authors (Stimson) who worked in the United States Attorney's Office for the District of Columbia from 2002–2005 and from conversations with current Assistant U.S. Attorneys, as well as those who have recently left the office.
15. See comments by Gregg Pemberton, Chairman of the D.C. Police Union, at The Heritage Foundation event entitled *The District of Disorder: Crime and the District of Columbia*, March 23, 2023, at 51:10, <https://www.heritage.org/crime-and-justice/event/the-district-disorder-crime-and-the-district-columbia>. See also *supra* note 14.
16. Bryce Robinson, *VERIFY: Do Homicide Suspects in DC Have an Average of 11 Prior Arrests?* WUSA 9 (updated Mar. 13, 2023, 12:05 PM EDT), <https://www.wusa9.com/article/news/verify/verify-homicide-suspects-prior-arrests/65-a66c3b04-a303-4b33-90b1-f94f698e1492> (finding that the claim is true).
17. Just. Pol'y Inst., *supra* note 12, at 31:35.
18. *Id.* at 32:40.
19. *Id.* at 36:05.
20. *Id.* at 41:11. Hutchins was not arguing that the D.C. criminal code as it is currently constituted is suffering from overcriminalization *per se*, that is, the unfortunate trend of overuse and abuse of the criminal law to address every societal problem and punish every mistake. As Heritage Foundation scholars have argued, the criminal law should be used *only* to redress morally blameworthy conduct, actions that truly deserve the greatest punishment and moral sanction. See *generally Overcriminalization*, HERITAGE FOUND. REP., <https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization> (last visited June 1, 2023). Rather, Hutchins argued that garden variety crimes such as trespassing, minor thefts, and the like should not be crimes at all.
21. See *Terry v. Ohio*, 392 U.S. 1 (1968), which held that under the Fourth Amendment, a police officer may stop a suspect on the street and frisk him if the police officer has a reasonable suspicion that the person committed, is committing, or is about to commit a crime.
22. Just. Pol'y Inst., *supra* note 12, at 42:10.
23. *Id.* at 46:30.

24. See E. ANN CARSON, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2021 (Dec. 2022), <https://bjs.ojp.gov/library/publications/prisoners-2021-statistical-tables>. At no point between 2011 and 2021 were there 2 million people in prison in the United States. In 2011, there were 1,538,847 prisoners in state and federal facilities. That number has declined over the decade to a 10-year low of 1,163,665 in 2021 under correctional control, according to the report.
25. See BARRY LATZER, THE MYTH OF OVERPUNISHMENT: A DEFENSE OF THE AMERICAN JUSTICE SYSTEM AND A PROPOSAL TO REDUCE INCARCERATION WHILE PROTECTING THE PUBLIC 88 (2022).
26. *Id.* at 89.
27. See *Chapter 1: Their Origins, Beliefs, and Playbook*, in ZACK SMITH & CHARLES D. STIMSON, ROGUE PROSECUTORS: HOW RADICAL SOROS LAWYERS ARE DESTROYING AMERICA'S COMMUNITIES (forthcoming June 2023).
28. See ANGELA DAVIS, ARE PRISONS OBSOLETE? 25 (2003).
29. *Id.* at 8.
30. Just. Pol'y Inst., *supra* note 12, at 50:30.
31. See Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CAL. L. REV. 1967, 1968 (2019).
32. Just. Pol'y Inst., *supra* note 12, at 1:16:55.
33. See U.S. SENTENCING COMM'N, LENGTH OF INCARCERATION AND RECIDIVISM 4 (2022).
34. See generally William J. Sabol et al., *Truth-in-Sentencing Reforms on Changes in States' Sentencing Practices and Prison Populations*, URBAN INST. (2002).
35. See Just. Pol'y Inst., *DC CCRC: The CCRC Recommendations*, YouTube (June 17, 2021), <https://www.youtube.com/watch?v=8Z2XniWMK3k>.
36. See Pemberton, *supra* note 15.
37. Just. Pol'y Inst., *supra* note 35, at 23:25.
38. *Id.* at 23:50.
39. *Id.* at 24:13.
40. See Just. Pol'y Inst., *DC CCRC: The CCRC Recommendations & Criminal Justice Reform*, YouTube (June 17, 2021) <https://www.youtube.com/watch?v=LlaUGlfQSJQ&t=71s>.
41. See CHARLES D. STIMSON & ZACK SMITH, "PROGRESSIVE" PROSECUTORS SABOTAGE THE RULE OF LAW, RAISE CRIME RATES, AND IGNORE VICTIMS (Oct. 29, 2020), <http://report.heritage.org/lm275>. See also Charles D. Stimson & Zack Smith, *George Gascón: A Rogue Prosecutor Whose Extreme Policies Undermine the Rule of Law and Make Los Angeles Less Safe*, HERITAGE FOUND. LEGAL MEMORANDUM No. 278, 11 (Jan. 28, 2021), <http://report.heritage.org/lm278>.
42. See Just. Pol'y Inst., *supra* note 40, at 10:22.
43. See Elliot C. Williams, *Halim Flowers Was Given Two Life Sentences at 17. Now, His Art Is Shown Worldwide.*, NPR WAMU 88.5 (Dec. 3, 2021), <https://www.npr.org/local/305/2021/12/03/1061183998/halim-flowers-was-given-two-life-sentences-at-17-now-his-art-is-shown-worldwide>.
44. See Just. Pol'y Inst., *supra* note 40, at 13:55.
45. See Sylvie McNamara, *What Everyone Is Getting Wrong About DC's Controversial Crime Bill*, WASHINGTONIAN MAGAZINE (Mar. 6, 2023), <https://www.washingtonian.com/2023/03/06/dc-criminal-code-overhaul-interview-with-patrice-sulton/>.
46. Just. Pol'y Inst., *supra* note 40, at 14:10.
47. *Id.* at 16:40.
48. *Id.* at 18:50.
49. See VA. STAT. ANN. § 19.2–258; see also MD. STAT. ANN. §§ 1–502, 4–301, 6–101, and 12–401.
50. Just. Pol'y Inst., *supra* note 40, at 20:40.
51. *Id.* at 21:54.
52. See Justin Jouvenal & Rachel Weiner, *PAC Funded by George Soros Pumps Nearly \$1 Million into Local Races for Prosecutor*, WASH. POST (June 4, 2019, 8:47 PM), https://www.washingtonpost.com/local/legal-issues/pac-funded-by-george-soros-pumps-nearly-1-million-into-local-races-for-prosecutor/2019/06/04/c2df1b08-86f0-11e9-a491-25df61c78dc4_story.html.
53. *Id.*
54. *Id.*
55. See, e.g., Zack Smith & Cully Stimson, *Rogue Prosecutors Flout Rule of Law, Deny Justice to Victims' Families*, THE DAILY SIGNAL (Mar. 22, 2020), <https://www.dailysignal.com/2020/03/22/rogue-prosecutors-flout-rule-of-law-deny-justice-to-victims-families/>.
56. Just. Pol'y Inst., *supra* note 40, at 23:25.

57. *Id.* at 25:32.
58. *Id.* at 34:50.
59. See *Leading Causes of Death—Males—Non-Hispanic Black, United States 2017*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/minorityhealth/lcod/men/2017/nonhispanic-black/index.htm> (last visited June 1, 2023); see also *2019 Crime in the United States, Expanded Homicide Data Table 6, Race of Victim*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/expanded-homicide-data-table-6.xls> (last visited May 23, 2023).
60. See Tacuma Roeback, *One Big Thing: The Leading Cause of Death in Young Black Males*, BLACK MEN'S HEALTH (Nov. 9, 2022), <https://www.blackmenshealth.com/one-big-thing-the-leading-cause-of-death-in-young-black-males/>.
61. Just. Pol'y Inst., *supra* note 40, at 36:15.
62. At the federal level, major entitlement programs, such as Social Security, Medicare, Medicaid, Obamacare, and other health programs, consumed 46 percent of all federal spending as a percentage of the 2022 federal budget. Income security consumed 18 percent. National defense accounted for 12 percent. Net interest accounted for 8 percent, and all other accounted for 16 percent. See *Federal Budget in Pictures*, HERITAGE FOUNDATION, <https://federalbudgetinpictures.com/where-does-all-the-money-go/> (last visited June 1, 2023). At the state level, in the year 2020, state and local governments spent \$3.5 trillion on direct general government expenditures. States spent \$1.7 trillion directly on local governments, such as cities, townships, counties, and school districts. Contrary to what Dehghani-Tafti stated, public welfare consumed 22.6 percent of all state spending, followed by elementary and secondary education at 21.6 percent, health and hospitals at 9.9 percent, higher education at 9.2 percent, highways and roads at 5.8 percent, police at 3.7 percent, corrections at 2.5 percent, housing at 1.7 percent, and courts at 1.5 percent. See *State and Local Backgrounders: State and Local Expenditures*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures> (last visited May 11, 2023).
63. See U.S. Atty's Off. for the Dist. of Columbia, *About Us*, U.S. DEP'T OF JUST., <https://www.justice.gov/usao-dc/about-us> (last visited Apr. 18, 2023).
64. This office functions primarily as the District's city attorney. In fact, that was historically the name for the position within the District (as well as corporation counsel or some variation). The position was not renamed as the Attorney General until 2004, and it was not an elected position until 2014. See Editor's Notes to D.C. CODE § 1-301.111 (repealed).
65. D.C. CODE § 16-2307 (2023), <https://code.dccouncil.gov/us/dc/council/code/sections/16-2307>.
66. Sierra Fox, *DC AG on Prosecuting Juveniles as Adults: 'Kids are Kids'*, FOX5 WASHINGTON DC (updated Apr. 26, 2023, 10:26 AM), <https://www.fox5dc.com/news/dc-ag-on-prosecuting-juveniles-as-adults-kids-are-kids>.
67. D.C. CODE § 16-2301 (2023), <https://code.dccouncil.gov/us/dc/council/code/sections/16-2301>.
68. Jud. Serv. in the Dist. of Columbia Cts., *Frequently Asked Questions*, JUD. NOMINATING COMM'N, <https://jnc.dc.gov/page/judicial-service-district-columbia-courts-frequently-asked-questions> (last visited May 1, 2023). Senate approval is not required for reappointment if the District's Commission on Judicial Disabilities and Tenure finds the judge who wishes to be reappointed to be well-qualified. *Id.*
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