

## **President's Commission on Law Enforcement and the Administration of Justice**

*Comment by Fair and Just Prosecution Executive Director Miriam Krinsky*

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Fair and Just Prosecution (FJP) is a national non-partisan, nonprofit organization that works with elected prosecutors around the nation promoting a vision for the justice system grounded in fairness, equity, fiscal responsibility and compassion. FJP assists these leaders in implementing smart evidence-based strategies that ensure the safety and well-being of the entire community. I offer the comments below based on the work of our organization, as well as my decades in the criminal justice arena. Prior to serving as FJP's Executive Director, I spent 15 years as a federal prosecutor and five years working on law enforcement issues – including as the Special Advisor to the Los Angeles County Sheriff, one of the nation's largest law enforcement Departments. What has become abundantly clear to me throughout my years in law enforcement is that justice and fairness are integral to public safety. Moreover, any efforts to improve the criminal justice system and enhance the work of law enforcement must build on the critical work of prior experts, most notably the [Task Force on 21st Century Policing](#). Any retreat from the progress achieved by that work would be detrimental to the service of justice in this country.

### **1. Justice, Fairness, and Trust in Law Enforcement are Essential to Public Safety**

Public safety is inextricably tied to public trust, which in turn is rooted in perceptions of justice and fairness. Crime rates are at a [historic low](#) in the U.S., and [fortifying trust](#) in the justice system is critical to continued efforts to promote public safety. Research has shown that when people perceive the justice system to be fair, they are [more likely](#) to believe the legal process is legitimate, comply with court orders, cooperate with police, and follow the law in the future, regardless of whether they “win” or “lose” their case. Also, community members need to know that accusations of misconduct against law enforcement officers will be fully, fairly and independently investigated. As the Task Force on 21st Century Policing [aptly observed](#): “Law enforcement agencies should establish a culture of transparency and accountability in order to build public trust and legitimacy.” This sentiment applies to both police departments and prosecutors' offices. In short, safety is furthered by – and never needs to be at the expense of – justice and fairness.

There is a growing recognition that justice, fairness, and public safety require shrinking the footprint of the justice system and making smarter use of scarce resources. The U.S. has the highest incarceration rate in the world. Despite comprising 4% of the global population, the U.S. has about [22%](#) of the world's prison population. Moreover, racial disparities are [deeply entrenched](#) in our justice system. Across the U.S., Black and Hispanic adults are respectively [5.9 and 3.1 times](#) as likely to be incarcerated as white adults. [One in four](#) Black children will have their father incarcerated before they turn 14, versus just 4 percent of white children. Studies have [shown](#) historical and present day discrimination where children and adults of color are arrested more often and prosecuted more severely than whites for the same conduct. This is manifestly unjust.

Other inequities intersect with and deepen these disparities. [Fines and fees](#) and [cash bail systems](#) perpetuate cycles of poverty that increase crime and socio-economic disparities. Individuals with mental illness are [vastly overrepresented](#) at every stage of the criminal justice system, and as a result, jails and prisons have become the largest mental health treatment facilities in the country. Meanwhile, rising overdose rates are a symptom of the [inefficacy](#) of treating public health problems with criminal justice

responses. These concerns underscore the need for new paradigms.

Since 2008, thirty-five states have [seen decreases](#) in *both* incarceration and crime – and the decreases in crime were *greater* in states with the largest reductions in imprisonment. Indeed, evidence increasingly shows that incarcerating people pretrial and for low-level offenses can [increase](#) recidivism and harm the community more broadly. And spending massive sums on unnecessary incarceration means less money available for crime-prevention strategies, ranging from targeted community-based interventions to other programs proven to reduce crime. Recently, in response to the COVID-19 crisis, numerous prisons and jails have [released](#) significant numbers of people with minimal public safety impact. In short, a wealth of evidence and the [majority of the public](#) support incarcerating far fewer people.

We can address racial inequities, reduce the footprint of the justice system, and promote public trust and safety by implementing evidence-based reforms, including:

- Ending the criminalization of poverty by abolishing cash bail and limiting fines and fees;
- Deflecting and diverting more people away from the criminal justice system and incarceration through public health responses, treatment, violence prevention, and restorative interventions;
- Refocusing limited criminal justice resources on serious threats to public safety;
- Providing effective reentry supports that disrupt cycles of reincarceration; and
- Addressing injustices via conviction integrity review; revisiting past excessive sentences and supporting second chances; promoting transparency and accountability in the justice system; and continuously monitoring and working to correct racial disparities.

While discussing these reforms at length is beyond the scope of this statement, they share a common grounding in research and fiscal responsibility – and also offer a route to restoring trust in law enforcement and the justice system. (See [“21 Principles for 21st Century Prosecutors”](#) for more.)

## **2. Thoughtful Use of Discretion Promotes Smart Justice and Community-Driven Strategies**

At the core of effective policing and prosecution, and many of the reforms referenced above, is the responsible use of discretion to reduce crime while holding people accountable, rather than resorting to punitive responses in all instances. While the Commission has been [encouraged to study](#) “refusals by State and local prosecutors to enforce laws or prosecute categories of crimes” – no prosecutor has the resources and ability to prosecute *every* case and *every* violation of the law. For as long as they have been elected or appointed, prosecutors have made decisions about where and how limited resources are best used and which cases merit entry into the justice system. Prosecution of all low-level offenses necessarily comes at the cost of using limited resources to prevent and prosecute crimes that pose a far greater threat to the community, and sacrifices the ability to resolve cold cases, successfully prosecute criminal organizations, or promote programs that interrupt cycles of violence and prevent future misconduct. Strategic prosecution is smart prosecution.

A new generation of leaders on both sides of the aisle agree that these reforms are critical and are collaborating to implement them across the country. Improving fairness and reducing incarceration is a matter of evidence-based strategies and fiscal responsibility, not politics. That is why organizations spanning the spectrum, from [Right on Crime](#) and [American Conservative Union](#) to the [ACLU](#), agree that police and prosecutors should work together toward reform. But even while collaboration between prosecutors and law enforcement leaders is vital, it is also important to remember that elected prosecutors have an *independent* role to play in their exercise of discretion; they are ethically bound to promote the interest of justice and are accountable first and foremost to their own community.

Furthermore, the use of discretion is a means of fulfilling the will of voters and responding to the needs of communities that are increasingly electing criminal justice leaders with the mandate of improving fairness and reducing incarceration. Ensuring that prosecutors are responsive to the unique problems facing local communities is precisely the purpose of electing local prosecutors, rather than centralizing authority in state or federal hands.

### 3. Ensuring that the Work of the Commission is Transparent and Inclusive of all Perspectives

Any national effort to study and address important criminal justice and law enforcement issues should be transparent, accessible, and inclusive of all stakeholders and perspectives. Yet, it appears that certain aspects of this Commission's work are at odds with these objectives.

The Commission [was asked](#) to “study crime...and how we can restore the public confidence in law enforcement to its rightful place.” These are worthy and important endeavors. Instead of acknowledging tensions and erosion of trust in law enforcement within communities of color, however, the “Respect for Law Enforcement” working group was charged with [examining](#) the impact of “under-enforcement of the criminal law in certain jurisdictions” – with no recognition of concerns around *over*-enforcement in certain communities. Entirely absent from the working groups' charge is any mention of constitutional or civil rights, police accountability, or racial disparities. These omissions will undoubtedly be viewed as driving a preordained agenda, rather than embracing an open and thoughtful process. Indeed, President Trump's [own remarks](#) – the Commissioners will “have [the recommendations] soon because *most of them know many of the answers before they begin*” – seem to suggest that the recommendations have already been decided and that the fact finding process is merely for show.

The makeup of the Commission and its working groups exacerbates these concerns; members were not selected through a bipartisan process, and civil rights experts, defense lawyers, formerly-incarcerated individuals, researchers, and scholars are glaringly absent from the Commission and its working groups. These gaps will rightfully call into question whether the groups have the appropriate makeup to advise on the future of law enforcement across America. While the working groups are [intended](#) to contain “subject matter experts across the federal and state government,” their members are [overwhelming law enforcement officials](#) and, as with the Commission, do not come close to representing the diversity of this country or its criminal justice system. Of the over 100 working group members, few are from major cities and a majority of the witnesses also appear to have been law enforcement professionals.

Finally, the Commission does not appear to be in compliance with the Federal Advisory Committee Act (FACA), which [requires](#) that meetings be open, the public be permitted to present their views, minutes and reports be available for public access, and public notice of meetings be in *The Federal Register*. By contrast, the Task Force on 21<sup>st</sup> Century Policing recognized and abided by FACA requirements.

It is our hope that the Commission's work will address timely issues in a thoughtful and thorough manner and promote the safety and well-being of all members of our community. Please do not hesitate to contact us if we can assist in advancing this endeavor.

Respectfully,



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Commission Topics: Social Problems, Respect for Law Enforcement, Reduction of Crime