

**President's Task Force on 21st Century Policing
"Building Trust and Legitimacy"
January 9, 2015
Submitted by
The Brennan Center for Justice at NYU School of Law**

Dear Executive Director Davis, Co-Chairs Ramsey and Robinson, and distinguished members of the Task Force:

Thank you for the opportunity to submit written testimony before the Task Force.

The Brennan Center for Justice at New York University School of Law¹ is a nonpartisan law and policy institute that seeks to improve the American systems of democracy and justice. The Justice Program at the Brennan Center is dedicated to ensuring a rational, effective, and fair justice system. Our priority initiative is to improve the criminal justice system so that it better protects public safety while also reducing mass incarceration. The Brennan center offers testimony on two requested topics: defining the role of police and improving procedural justice.

I. Defining the Role of the Police in a Democratic Society

A. Recommending New Priorities and Performance Measures for Police

The crime rate has fallen for the past 20 years. Violent crime has fallen almost by half since its peak in 1991, and property crime is down 43 percent.² What was once seen as a plague, especially in urban areas, is now at least manageable in most places.³ Today, the country faces very different criminal justice challenges. Fears for safety, and crises such as the crack epidemic, have largely receded into history.⁴ With 68 million Americans ensnared in at least some part of the \$260 billion criminal justice system, the time is ripe to rethink the priorities of policing so that they reflect changing times and democratic ideals.⁵

The demands for law enforcement have changed dramatically. Yet, priorities and incentives remain focused on strategies that have outlived their usefulness such as focusing on increasing numbers of arrests, amounts of drugs seized, and warrants issued. Today, more police are beginning to focus their efforts not only on enforcing the nation's criminal laws, but also on efforts to ensure that the causes of violence are directly addressed. For example, the Chicago Police Department recently implemented a program where officers visit the homes of individuals they identify as likely victims or perpetrators of crime, almost immediately after violence erupts

in their neighborhoods. Individuals visited by officers as part of the program are offered social services such as job training. Law enforcement members and leadership are calling for ways to reduce crime while also reducing unnecessary arrests, use of force, and incarceration.

This modern approach seeks to shrink the criminal justice system without compromising the country's safety. These policies encourage citations instead of arrests for petty crimes, reduce sentences for nonviolent crimes, offer treatment options instead of prison for those with drug addiction, provide non-prison sanctions for technical parole violations, and parole eligibility for elderly prisoners. Not only are these policies more efficient, they are also more effective and more just. For example, in 2009, California passed the Community Corrections Performance Incentive Act to encourage probation offices to keep people who violate supervisor rules on probation, rather than sending them back to prison – which saved the state millions after only one year.⁶ And in New York City, Police Commissioner Bill Bratton recently endorsed giving officers the discretion to write summonses rather than arrest people for possessing small amounts of marijuana in order to curb unnecessary arrests that take officers away from their patrols.

Policing could benefit from a new set of priorities and incentives – ones that align with smart, modern public policy goals, and which create a fairer criminal justice system. And, setting clear targets for success can encourage more effective and just practices. Police alone cannot control and prevent all crime and disorder. There are many factors beyond the control of criminal justice actors that contribute to changes in crime, violence, and incarceration. Yet criminal justice stakeholders recognize that well-crafted success measures can move outcomes toward priorities. As is often the case, what gets measured gets done. Setting clear, quantifiable goals for success can encourage agencies and individuals to use their discretion to achieve priorities.

In 2014, the Brennan Center created an expert advisory group of current and former federal prosecutors to inform our report, *Federal Prosecution for the 21st Century*. That report issued a new set of priorities and accompanying “success measures” that create incentives driving toward those priorities.⁷ Those priorities – reducing serious and violent crime, reducing incarceration, and reducing recidivism – can similarly apply to all parts of law enforcement, including local police.

Specifically, we recommend the following:

- *The Task Force should issue a model set of priorities.* These priorities should entail corresponding success measures that local police can use to measure whether those priorities are achieved. Though each jurisdiction faces different challenges, outcome-based success measures allow police to work toward commonly agreed upon goals while also allowing the maximum flexibility for jurisdictions to decide how to achieve those goals. Success measures for reducing serious and violent crime can include: the decrease in violent crime rate. Measures for reducing incarceration can include: the increase in percent of misdemeanor arrests issued desk appearance tickets or citations. Measures for reducing recidivism can include: the increase in arrestees screened for mental health/drug addiction within 24 hours of arrests.

B. Shifting Federal Funding toward New Priorities

Federal dollars can play a pivotal role in assisting state and local law enforcement when moving toward new priorities. The federal government sends \$4 billion to states and cities for criminal justice purposes, largely for law enforcement. Because these dollars travel across the country, federal grants provide the federal government with an opportunity to shift law enforcement practices and outcomes nationwide. Although federal grants represent a small percentage of nationwide dollars spent on criminal justice, they retain an outsize influence on law enforcement activities and policy because state and local need for subsidized police funding has grown dramatically in the last 40 years.

We urge the Task Force to recommend that the President and executive agencies, recast these federal criminal justice grants in a model called “Success-Oriented Funding.”⁸ That model helps focus criminal justice outcomes on the twin goals of reducing crime and reducing mass incarceration.

Success-Oriented Funding ensures that government dollars are used for specific outcomes that advance these overall goals. The executive branch has authority to recast grants that it administers. Such grants include the Edward Byrne Memorial Justice Assistance Grant, the High Intensity Drug Trafficking Areas program, and the COPS Hiring Program. Depending on the authority granted to agencies, they can tie funding to goals in three ways. Conditioned funding reserves dollars for recipients that show progress toward their goals, saving dollars for agencies that achieve intended outcomes. Bonus funding gives additional dollars to recipients that show progress toward their goals, even when it is not mandatory. Indirect funding requires federal agencies to encourage recipients to achieve specific priorities by providing goals alongside funding.⁹ This indirect method can be just as powerful, as it creates strong incentives to use funding for goals. More specifics on this model are laid out in a recent report entitled, *Success-Oriented Funding: Reforming Federal Criminal Justice Grants*.¹⁰

By tying funding to big picture, outcome-based goals such as reducing serious and violent crime, reducing incarceration, or reducing recidivism, states and cities can maintain full autonomy to decide how to achieve goals while the nation can move together toward these common sense goals. Success-Oriented Funding for federal grants is supported by a large diverse coalition including: the Police Foundation, the Texas Public Policy Institute, the Police Foundation, the Justice Policy Institute, and the American Civil Liberties Union.

Specifically, we recommend the following:

- *The Task Force should recommend that the President and executive agencies ensure federal criminal justice grants align funding with policy priorities.* The Brennan Center strongly urges the Task Force to recommend that the Administration review and revamp all federal grants that support law enforcement to better focus on 21st century policing priorities. Where grants do not encourage 21st century policing practices, federal agencies should implement a Success-Oriented Funding model to the extent allowable by their executive authority.

II. Improving Procedural Justice

Another important role for the Task Force is to issue recommendations on best practice for criminal justice investigative techniques (often called improving “procedural justice”). There have been a staggering number of false convictions in the U.S.; according to the Innocence project, at least 324 post-conviction exonerations were due to DNA evidence. Since 1989, there have been tens of thousands of cases where leading suspects were identified and pursued—until DNA testing (prior to conviction) proved that they were wrongly accused. In many of these cases, eyewitness misidentification testimony and false confessions played a large role. Because many criminal cases do not involve DNA evidence, there are likely a vast amount of people wrongly convicted of crimes who will not benefit from scientific evidence to exonerate them. Not only do wrongful convictions send the wrong people to prison, they allow those who committed the crimes to remain free. Instituting procedural safeguards also helps uphold our constitutional principles and allows the public to maintain trust in the criminal justice system.

In order to stem these wrongful convictions, we recommend that the Task Force issue recommendations for best practice to increase the use of technology in investigative techniques. This use of technology can help stem these wrongful convictions and increase trust in the criminal justice system by increasing transparency about criminal investigations. Law enforcement across the nation has begun to take advantage of the advances in policing that the new technology brings. Recommendations from the Task Force can further spur practices in this direction. Specifically, we recommend the following:

- *Ensure videotaping of eyewitness identifications.* After reviewing thirty years of scientific evidence, the National Research Council recommends video recording of eyewitness identification procedures as a best practices.¹¹ Research indicates that oftentimes eyewitnesses are mistaken, and it is particularly difficult to ensure accuracy in cross-racial identifications. Videotaping identification procedures protects innocent suspects from misconduct by the person administering the procedure, provides additional context to the defendant and the jury, and assists the prosecution by showing a jury that the procedure was legitimate.
- *Ensure videotaping of custodial interrogations.* Over 600 jurisdictions across the nation have implemented the practice of videotaping custodial interrogations¹² and in July of 2014, the U.S. Department of Justice instituted a new policy establishing "a presumption" that U.S. Attorneys and federal agents will electronically record statements made by individuals in their custody. If the entire custodial interrogation process is videotaped, it provides the viewer with the full context and a truer understanding of the voluntariness of a confession. Such videotaping can safeguard against false confessions, ensures an objective record of a significant stage in the investigation of a crime, provides physical evidence that can be judiciously reviewed by all involved parties, and will serve as better context when a statement is provided. It also lessens costs associated with retrying cases.

Respectfully submitted,

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¹ This letter does not represent the opinions of NYU School of Law.

² In the twenty years from its peak in 1991, the violent crime rate has fallen from an annual 759 crimes per 100,000 people to 387 crimes per 100,000 people. Property crime has fallen from 5140 to 2905 crimes per 100,000 people. *See UCR Data Online*, Uniform Crime Reporting Statistics, <http://www.ucrdatatool.gov/index.cfm> (providing crime statistics from 1960 to 2012).

³ Some cities continue to struggle with crime problems. For example, cities with high and increasing violent crime rates in 2012 include: Flint City, Mich.; Oakland, Calif.; Memphis, Tenn.; and Stockton, Calif. *See UCR Data Online*, Uniform Crime Reporting Statistics, <http://www.ucrdatatool.gov/index.cfm>.

⁴ Between 1993 and 2011, the national homicide rate declined by forty-eight percent. Jennifer Truman, Lynn Langton, & Michael Planty, Bureau of Justice Statistics, *Criminal Victimization, 2012* 3 (2013). The crime rate today is comparable to the low levels achieved in the 1960s. *See* Federal Bureau of Investigations, Uniform Crime Reporting Statistics, <http://www.ucrdatatool.gov/Search/Crime/Crime.cfm> (last visited Nov. 5, 2013) (noting, for example, that the 1969 violent crime rate (per 100,000 people) was 328.7 and property crime rate was 3,351.3, while the 2012 violent crime rate was 386.9 and the property crime rate was 2,859.2). In 2011 and 2012, there was a small increase in serious violent crime and property crime victimization; however, neither were statistically significant. Truman et al., *supra* note 3, at 1.

⁵ INIMAI CHETTIAR ET AL., BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION 49 n.5 (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/REFORM_FUND_MASS_INCARC_web_0.pdf (updating the 2011 calculation of 65 million Americans with criminal records from the National Employment Law Project cited in *infra* note 134); *see also* TRACEY KYCKELHAHN & TARA MARTIN, U.S. BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT SERIES, NCJ 237912, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2010 — PRELIMINARY, *available at* <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4679> (showing that the correctional costs amount to \$79 billion). Total criminal justice system spending, federal and state, is \$260,533,129,000. This number is the sum of judicial and legal costs (\$56.1 billion), police protection costs (\$124.2 billion), and corrections costs (\$80.24 billion).

⁶ In its first year alone, California probation officers sent 23 percent fewer felony offenders back to prison, which saved the state nearly \$180 million. CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, SB 678 YEAR 1 REPORT: IMPLEMENTATION OF THE CALIFORNIA COMMUNITY CORRECTIONS PERFORMANCE INCENTIVES ACT 2 (2011), *available at* <http://www.courts.ca.gov/documents/SB678-Year-1-Report-FINAL.pdf>.

⁷ Success measures are clear, concrete data points about performance outcomes that quantify progress toward goals.

⁸ *See* INIMAI CHETTIAR ET AL., BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION app. A (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/REFORM_FUND_MASS_IN-CARC_web_0.pdf; *see also* NICOLE FORTIER & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, SUCCESS-ORIENTED FUNDING: REFORMING FEDERAL CRIMINAL JUSTICE GRANTS (2014), *available at* http://www.brennancenter.org/sites/default/files/publications/SuccessOrientedFunding_ReformingFederalCriminalJusticeGrants.pdf.

⁹ Research shows that goals (often in the form of performance measures) act as signposts in setting policy and ultimately affect the behavior of actors. Indirect suggestions and positive reinforcement can influence the decisions of individuals just as effectively as requirements. Practical, legal, fiscal, and political considerations can drive which form may be most appropriate for specific funding streams.

¹⁰ NICOLE FORTIER & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, SUCCESS-ORIENTED FUNDING: REFORMING FEDERAL CRIMINAL JUSTICE GRANTS (2014), *available at* http://www.brennancenter.org/sites/default/files/publications/SuccessOrientedFunding_ReformingFederalCriminalJusticeGrants.pdf.

¹¹ Nat'l Res. Council, et al., *Identifying the Culprit: Assessing Eyewitness Identification* (2014), p.74.

¹² See Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 Am. Crim. L. Rev. 1297, 1305-10 (2008).