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Tuesday, July 21, 2020

U.S. DEPARTMENT OF JUSTICE
President's Commission on Law Enforcement and the Administration of Justice

An Overview

Michael B. Mukasey

Former Attorney General & Judge, United States District Court, Southern District of New York

Michael B. Mukasey served as the 81st Attorney General of the United States, the nation's chief law enforcement officer, from November 2007 to January 2009. During that time, he oversaw the U.S. Justice Department and advised on critical issues of domestic and international law. From 1988 to 2006, he served as a district judge in the United States District Court for the Southern District of New York, becoming chief judge in 2000. While on the bench, he handled numerous cases, including the trial of Omar Abdel Rahman, the so-called "blind sheikh," and others, convicted of a wide-ranging conspiracy that included the 1993 bombing of the World Trade Center and a later plot to blow up New York landmarks; and the case of Jose Padilla, arrested on a material witness warrant and believed to have returned to the United States to commit terrorist acts. Judge Mukasey is currently in private practice in New York City.

MBM REMARKS TO PRESIDENT'S COMMISSION – 7/21/2

[THANK INTRODUCER/ORGANIZER]

EVEN THOUGH THIS CONFERENCE IS BEING HELD BY NECESSITY IN WHAT WE CALL A VIRTUAL ENVIRONMENT, THE SUBJECT OF THIS CONFERENCE – RESPECT FOR LAW ENFORCEMENT AND THE RULE OF LAW – AND THE CONCERNS RAISED BY CURRENT THREATS TO BOTH OF THOSE --- ARE ANYTHING BUT VIRTUAL; THEY ARE VERY REAL.

IN THE CITY WHERE I LIVE – NEW YORK – A WOMAN WHO WANTED TO SHOW HER OPPOSITION TO A MARCH IN SUPPORT OF THE POLICE STRUCK AN OFFICER OVER THE HEAD WITH A WOODEN CANE, AND WAS BAILED OUT THE NEXT DAY. SHE RETURNED TO THE ILLEGAL ENCAMPMENT OUTSIDE CITY HALL, FROM WHICH SHE HAD COME AND WHERE OTHERS HAD BEEN DISTRIBUTING BATS SO AS TO FACILITATE ACTS LIKE THE ONE FOR WHICH SHE WAS ARRESTED.

IN THAT SAME CITY, IN RESPONSE TO CALLS TO LIMIT POLICING, THE MAYOR HAS DIRECTED THAT THE PLAINCLOTHES UNIT DEVOTED PRINCIPALLY TO GETTING ILLEGAL GUNS OFF THE STREET BE DISBANDED. UNDERSTAND THAT THE EFFECT OF THE KIND OF ENFORCEMENT THIS UNIT DID WAS NOT SIMPLY THAT ILLEGAL WEAPONS

WERE SEIZED, BUT ALSO THAT THOSE WHO HAD ACCESS TO SUCH WEAPONS WERE LESS INCLINED TO CARRY THEM FOR FEAR OF ARREST, WITH THE RESULT THAT THE NUMBER OF SHOOTINGS WAS DIMINISHED SUBSTANTIALLY. NOT SURPRISINGLY, THE INCIDENCE OF SHOOTINGS HAS GONE UP BY MULTIPLES, AND OF COURSE SO HAS THE MURDER RATE.

SIMULTANEOUSLY, THE MAYOR HAS CUT THE BUDGET FOR THE POLICE DEPARTMENT, WITH THE RESULT THAT THE NEXT CLASS OF POTENTIAL RECRUITS HAS BEEN CANCELLED AT A TIME WHEN RETIREMENTS ARE SKYROCKETING AS THE RESULT OF LOW MORALE IN A DEPARTMENT WHERE OFFICERS BELIEVE – JUSTIFIABLY – THAT THE CITY'S ELECTED OFFICIALS, INCLUDING DISTRICT ATTORNEYS, DO NOT BACK THEM.

THIS AT LEAST SUGGESTS THE QUESTION – HOW LONG CAN A SOCIETY LET THAT GO ON BEFORE IT COLLAPSES?

I MUST TELL YOU THAT I HAVE MY OWN BIAS ON THIS SUBJECT, SO YOU CAN DISCOUNT MY VIEWS BY WHATEVER FACTOR YOU WISH. THAT BIAS EXPRESSED ITSELF WHEN I WAS A U-S DISTRICT JUDGE IN THE SOUTHERN DISTRICT OF NEW YORK AND I SENTENCED A DEFENDANT ON A WEAPONS CHARGE. WHEN IT CAME OUT THAT THAT DEENDANT HAD RAISED HIS HAND TO A POLICE OFFICER TRYING TO ARREST HIM, I TOLD

HIM THAT THAT RAISING HIS HAND TO A POLICE OFFICER WAS GETTING HIM A SENTENCE AT THE TOP OF THE APPLICABLE GUIDELINES RANGE, AND THAT I REGRETTED I COULD NOT TACK ON FIVE YEARS MORE. THAT IS WHERE I AM -- AS THEY SAY -- COMING FROM.

THAT SAID, HOW DID WE GET TO WHERE WE ARE, AND HOW CAN WE GET TO WHERE WE BELONG?

IT IS NOT THAT WE WEREN'T WARNED. PRESIDENT REAGAN SAID YEARS AGO THAT BECAUSE WE ARE A NATION DEFINED ENTIRELY BY A SET OF BELIEFS, IN HIS WORDS, "FREEDOM IS NEVER MORE THAN ONE GENERATION AWAY FROM EXTINCTION. WE DIDN'T PASS IT TO OUR CHILDREN IN THE BLOODSTREAM. IT MUST BE FOUGHT FOR, PROTECTED, AND HANDED ON FOR THEM TO DO THE SAME, OR ONE DAY WE WILL SPEND OUR SUNSET YEARS TELLING OUR CHILDREN AND OUR CHILDREN'S CHILDREN WHAT IT WAS ONCE LIKE IN THE UNITED STATES WHERE MEN WERE FREE." HOW DO WE FIGHT FOR, PROTECT AND HAND ON TO OUR CHILDREN THE SOCIETY IN WHICH WE WERE RAISED?

IN ORDER TO DO THAT, WE HAVE TO ASK OURSELVES WHETHER IT IS SIMPLY OUR SYSTEM OF LAWS THAT HOLDS US TOGETHER.

I BELIEVE THAT IT IS POSSIBLE EASILY TO PUT MORE EMPHASIS ON THIS BEING A NATION OF LAWS THAN IS HELPFUL FOR ANYONE, PARTICULARLY FOR THE PEOPLE OF THIS NATION.

I THINK MOST PEOPLE GO ABOUT THEIR DAILY BUSINESS, AND CONTRIBUTE TO THE GENERAL WELFARE, WITHOUT WORRYING TOO DARN MUCH ABOUT THE LAW. AND THAT IS A GOOD THING, PARTICULARLY IF YOU STOP AND CONSIDER THE PLACES WHERE PEOPLE DO HAVE TO KEEP IN MIND CONSTANTLY WHAT THE LAW IS, AND WHAT IT REQUIRES OF THEM AS THEY GO ABOUT THEIR DAILY BUSINESS, AND WHAT THE LAW CAN DO TO THEM IF THEY DON'T MEET THOSE REQUIREMENTS.

YOU MAY COME TO REALIZE THAT COUNTRIES WHERE PEOPLE GO AROUND LIKE THAT – CONSTANTLY LOOKING OVER THEIR SHOULDERS AT THE LAW -- ARE MOST TYPICALLY COUNTRIES LIKE NORTH KOREA OR CUBA, WHERE WHETHER OR NOT YOU HAVE THE LAW CONSTANTLY IN FOCUS, THE LAW HAS YOU CONSTANTLY IN FOCUS.

I THINK IT'S NOT REALLY BEING A NATION OF LAWS THAT ACTUALLY IS SUPPOSED TO HOLD US TOGETHER, AND THAT IT IS NOT SOMEHOW A FAILURE TO BE A NATION OF LAWS THAT IS PULLING US APART. IN FACT, WHEN HAVE WE EVER BEEN MORE LEGALISTIC THAN

WE HAVE BEEN IN THE PAST SEVERAL MONTHS, WHETHER WE WERE DISCUSSING THE LAWFULNESS OF THE MISSILE STRIKE BY OUR MILITARY THAT KILLED IRAN'S TOP TERRORISM ORGANIZER – QASEM SOLEIMANI -- OR WHETHER A PAYMENT TO A PORN MOVIE STAR – AND IT SEEMS ANYONE IN A PORN MOVIE IS A STAR; HAVE YOU EVER HEARD REFERENCE TO A PORN MOVIE EXTRA? -- WHETHER SUCH A PAYMENT IS A CONTRIBUTION IN KIND TO A POLITICAL CAMPAIGN IF THE PAYMENT IS IN RETURN FOR HER SILENCE ABOUT A RELATIONSHIP WITH A POLITICAL CANDIDATE, OR WHAT THE LIMITS ARE OF EXECUTIVE PRIVILEGE.

WHEN HAS OUR POLITICAL DISCUSSION EVER BEEN MORE LEGALISTIC THAN IT WAS DURING THE IMPEACHMENT PROCEEDINGS CONCLUDED IN PAST MONTHS, WHEN WE DEBATED WHAT THE NATURE WAS OF A HIGH CRIME AND MISDEMEANOR THAT WARRANTED REMOVAL FROM OFFICE, AS OPPOSED TO A LOW CRIME THAT MIGHT WARRANT SIMPLY A TERM OF CONFINEMENT WHEN THE OFFICE-HOLDER LEFT OFFICE? I DON'T THINK THAT KIND OF LEGALISM IS REALLY WHAT HOLDS US TOGETHER.

TO PUT IT IN THE FORM OF A QUESTION: IF WE ARE SIMPLY A NATION OF LAWS, DO YOU REALLY THINK THAT IF WE TOOK OUR LEGAL SYSTEM – OUR CONSTITUTION, OUR LAWS AND THE WHOLE LOT – AND

PLUNKED IT DOWN IN SOME OTHER COUNTRY AMONG OTHER PEOPLE, THAT ANOTHER UNITED STATES WOULD SPROUT UP IN THAT COUNTRY AMONG THOSE PEOPLE?

ME NEITHER.

NO, I THINK WHAT HISTORICALLY HAS HELD US TOGETHER, AND WHAT SHOULD HOLD US TOGETHER IS NOT SIMPLY THAT WE ARE A NATION OF LAWS, BUT RATHER WHAT LORD FLETCHER MOULTON, IN AN ESSAY THAT HE WROTE IN 1924, CALLED OBEDIENCE TO THE UNENFORCEABLE – THE UNENFORCEABLE BEING ONE OF THREE DOMAINS THAT HE SAID EXIST AROUND US – THE OTHER TWO BEING THE DOMAIN OF LAWS, AND THE DOMAIN OF PERSONAL WHIM – WHICH IS WHIM OTHER THAN THE WHIM OF A RULER – THAT IS THE KIND OF WHIM THAT BEARS DOWN ON US TODAY.

IN HIS 1924 ESSAY, LORD MOULTON PUT IT THIS WAY; HE SAID – AND THESE ARE HIS WORDS – HE SAID, "THE REAL GREATNESS OF A NATION, ITS TRUE CIVILIZATION, IS MEASURED BY THE EXTENT OF THIS LAND OF OBEDIENCE TO THE UNENFORCEABLE. IT IS THAT TERRITORY THAT MEASURES THE EXTENT TO WHICH THE NATION TRUSTS ITS CITIZENS, AND ITS AREA" – THAT IS, THE AREA OF THE LAND OF

OBEDIENCE TO THE UNENFORCEABLE – "TESTIFIES TO THE WAY THEY BEHAVE IN RESPONSE TO THAT TRUST."

WITH THE EXPANSION AND PROLIFERATION TODAY OF LAWS – TECHNICAL RULES – ON THE ONE HAND – AND THERE ARE CERTAINLY A LOT OF THEM, AND THE INCREASING SPACE OCCUPIED BY THE DOMAIN OF WHIM – THE DEGREE TO WHICH PERSONAL CHOICE AND TASTE IS THE DEFINING BASIS FOR WHAT WE ALLOW OURSELVES AND OTHERS TO DO, THE SPACE OCCUPIED BY WHAT LORD MOULTON SAID DEFINES THE GREATNESS OF A NATION – THE SPACE OCCUPIED BY OBEDIENCE TO THE UNENFORCEABLE -- IS GETTING SMALLER BY THE DAY IN THIS COUNTRY, IF NOT ACTUALLY BY THE MINUTE.

OF COURSE, I AM NOT THE FIRST PERSON TO TALK ABOUT THIS TENDENCY; OBVIOUSLY, LORD MOULTON DID IT IN HIS ESSAY IN 1924, AND NO DOUBT MANY OTHERS HAVE SINCE, PROBABLY INCLUDING COMMENCEMENT SPEAKERS – IT'S THE SORT OF THING THAT WOULD BE A NATURAL FOR A COMMENCEMENT SPEECH.

ONE REASON IS THAT PERSONAL TASTE AND PREFERENCE HAVE STARTED TO IMPINGE NOT ONLY ON HOW PEOPLE BEHAVE WITH RESPECT TO THEMSELVES, AND TOWARD ONE ANOTHER, BOTH IN PUBLIC AND IN PRIVATE, BUT ALSO ON HOW PEOPLE VIEW REALITY – THE DEGREE TO

WHICH THEY ARE WILLING TO ACCEPT THE FACTS OF OUR HISTORY AND THE IDEA OF OBJECTIVE TRUTH, PARTICULARLY TO THE EXTENT THAT IT MAY CONFLICT WITH A BELIEF THAT THEY CONSIDER IMPORTANT.

AND OBJECTIVE TRUTH IS SOMETHING WE HAVE TO ACCEPT IF, AMONG OTHER THINGS, OUR LEGAL SYSTEM IS TO FUNCTION AS IT SHOULD. IT IS SOMETHING I SUBMIT WE SHOULD ALSO HAVE TO ACCEPT IF WE ARE TO BE ABLE TO MAKE IMPORTANT POLITICAL DECISIONS IN A SENSIBLE WAY.

IN THE REAL WORLD, THINGS HAPPEN ONE WAY, AND ONE WAY ONLY.

BUT THERE IS AN ALTERNATIVE APPROACH THAT HAS INCREASINGLY CAUGHT HOLD, AND THAT I THINK THREATENS TO OVERWHELM EVEN HOW LEGAL DISPUTES GET DECIDED, BUT CERTAINLY HOW POLITICAL DISPUTES GET DECIDED.

THAT APPROACH MAKES FACTS SECONDARY TO NARRATIVES. WE'VE SEEN THIS NOT ONLY IN FRINGE BROADCASTS AND PUBLICATIONS, BUT ALSO IN MAINSTREAM BROADCASTS AND PUBLICATIONS, IN THE HALLS OF CONGRESS, AT TIMES EVEN IN THE WHITE HOUSE.

ONE WAY THIS TENDENCY HAS SHOWN ITSELF IS IN THE CLAIM THAT OUR LAWS, INCLUDING OUR FOUNDING DOCUMENT – THE CONSTITUTION, SHOULD BE READ, OR MADE TO BE READ, TO GUARANTEE NOT EQUAL RIGHTS IN THE SENSE OF EQUAL TREATMENT AND OPPORTUNITY, BUT EQUAL RIGHTS IN THE SENSE OF EQUAL OUTCOMES.

IN THE VARIOUS AND INCREASINGLY FREQUENT WAYS THAT THIS TENDENCY HAS BEEN SHOWING ITSELF, I THINK WE ARE IN DANGER OF CEASING TO BE A WESTERN COUNTRY, AND STARTING TO BECOME A MIDDLE EASTERN ONE -- ONETHAT IS RULED BY NARRATIVES RATHER THAN BY OBJECTIVE REALITY. IF THAT TREND CONTINUES, WE MAY EVENTUALLY BE HEARING REFERENCES TO THE AMERICAN STREET, JUST AS WE SOMETIMES HEAR REFERENCES TO THE ARAB STREET.

ALTHOUGH THE TENDENCY HAS GROWN SUBSTANTIALLY IN OUR OWN SOCIETY TO PREFER NARRATIVE TO FACT WHEN WHAT IS AT STAKE IS EITHER PERSONAL OR POLITICAL PREFERENCE, IT IS NOT INEVITABLE HERE; IT IS NOT DEEP SEATED IN THE CULTURE OF THIS COUNTRY AS IT IS IN THE CULTURES OF SOME OTHER COUNTRIES.

HERE IT RESULTS FROM A CHOICE, OR RATHER FROM MANY CHOICES. BUT REVERSING IT – IF WE ARE OF A MIND TO REVERSE IT -- IS GOING TO TAKE SKILLS THAT INVOLVE DRAWING DISTINCTIONS, AND

REASONING FROM FACTS TO CONCLUSIONS, RATHER THAN THE OTHER WAY AROUND – BUT IT IS ALSO GOING TO TAKE COMMITMENT TO THAT SOCIETAL QUALITY THAT LORD MOULTON THOUGHT WAS SO IMPORTANT -- OBEDIENCE TO THE UNENFORCEABLE – TO THE NECESSARY NORMS AND THE RECOGNITION OF A COMMON HISTORY THAT DEFINE A TRULY CIVILIZED NATION, NORMS AND HISTORICAL FACTS THAT ARE ACCEPTED GENERALLY, NOT PRESCRIBED, AND THAT CAN'T BE ENFORCED BUT ONLY ASSUMED, BUT WITHOUT WHICH WE MAY AT TIMES BE A NATION OF LAWS, BUT NOT A CIVILIZED ONE.

THOSE ARE THE NORMS AND THAT IS THE HISTORY THAT HAVE ALLOWED THIS COUNTRY AND ITS CITIZENS TO SUCCEED AND TO PROSPER BEYOND ANYTHING KNOWN IN THE ENTIRE HISTORY OF THE WORLD. IT IS IMPORTANT TO TEACH AND ACKNOWLEDGE THAT HISTORYAND ITS ACHIEVEMENTS, AND TO INSIST THAT THE CRITICS WHO CLAIM THAT THAT HISTORY HAS BEEN ONE OF OPPRESSION POINT TO ANOTHER COUNTRY AND SYSTEM THAT HAS GENERATED MORE FREEDOM FOR MORE PEOPLE THAN THE UNITED STATES.

HISTORICAL FACTS ARE RELEVANT IN WAYS THAT WE OFTEN DISMISS, BUT IN WAYS WHOSE IMPORTANCE HAS BECOME MORE OBVIOUS WITH EACH PASSING DAY AS PEOPLE WHO DENY HISTORY

APPEAR TO GAIN CONTROL OF THE PUBLIC AGENDA. WE SOMETIMES USE THE WORD "HISTORY" TO REFER TO SOMETHING OR SOMEONE THAT IS IRRELEVANT OR UNIMPORTANT – WHEN WE SAY "HE'S HISTORY" OR "THAT'S HISTORY" AND MEAN THAT WHATEVER OR WHOEVER WE ARE TALKING ABOUT IS WORTHLESS.

HOWEVER, FOR PEOPLE INVOLVED IN LAW ENFORCEMENT, OUR STANDARDS, AND THAT HISTORY – AND THE ORDER AND PROSPERITY THEY HAVE BROUGHT ABOUT – ARE VITAL TO OUR SURVIVAL.

I SUGGEST TO YOU THAT THAT OUR SUCCESS AND PROSPERITY EXIST BECAUSE IN A SYSTEM GOVERNED BY OBEDIENCE TO THE UNENFORCEABLE, PEOPLE ARE FREE TO RISE OR FALL IN ANY ENTERPRISE OR FIELD OF EFFORT BASED LARGELY ON THEIR ABILITIES – ON MERIT, AS RECOGNIZED BY COMMON VALUES. BUT OF COURSE, THAT ASSUMES THAT MERIT – TRUTH INSOFAR AS WE CAN DISCOVER IT -- RATHER THAN NARRATIVE, WILL CONTINUE TO SET THE DEFINING STANDARD.

IT IS NOT AT ALL CLEAR THAT TRUTH, AS OPPOSED TO NARRATIVE, WILL IN FACT SET THE PUBLIC AGENDA IN THIS COUNTRY. AND SO IT IS NOT CLEAR THAT WE WILL CONTINUE TO OBEY THE UNENFORCEABLE IN WAYS THAT MAKE IT POSSIBLE TO MAINTAIN A CIVILIZED SOCIETY.

THIS COUNTRY AS A WHOLE HAS A LOT TO LOSE IF WE GIVE UP ON OBEDIENCE TO THE UNENFORCEABLE. UNLIKE OTHER COUNTRIES, WE DO NOT DRAW OUR IDENTITY FROM BLOOD OR LAND. GERMANS, BRITONS, FRENCHMEN, SPANIARDS REMAIN GERMANS, BRITONS , FRENCHMEN AND SPANIARDS, AND DON'T HAVE TO RELY ON SOME NATIONAL CONSENSUS AT ANY GIVEN TIME ABOUT WHAT THAT MEANS.

BUT WE DRAW OUR IDENTITY NOT ONLY FROM ADHERENCE TO A SYSTEM EMBODIED IN A LAW THAT WE CALL THE CONSTITUTION, BUT ALSO FROM CONSENSUS IN GENERAL TERMS ABOUT WHAT THAT MEANS. ONCE THAT IS UP FOR GRABS, THE WHOLE POINT OF HAVING A COUNTRY AT ALL, AS OPPOSED TO JUST BEING CITIZENS OF THE WORLD AT LARGE, IS UP FOR GRABS AS WELL. IT BEARS MENTION HERE THAT THERE ARE ACTUALLY ELEMENTARY AND SECONDARY SCHOOLS IN THIS COUNTRY KNOWN GENERALLY AS ELITE ELEMENTARY AND SECONDARY SCHOOLS, THAT ANNOUNCE PROUDLY THAT THEY ARE TURNING OUT CITIZENS OF THE WORLD.

WHAT THAT MEANS IS THAT THEY ARE TURNING OUT CITIZENS OF NOWHERE IN PARTICULAR, AND PEOPLE WHO DO NOT SHARE A PARTICULAR UNDERSTANDING OF THE NORMS AND THE CULTURE THAT DEFINE THEIR NATION – THAT MAKE IT DIFFERENT FROM OTHER NATIONS

– THAT ARE THE UNENFORCEABLE BUT VERY REAL ASSUMPTIONS WE HAVE TO LIVE BY IF THIS COUNTRY IS TO SUCCEED.

THERE ARE MANY PEOPLE WHO HAVE A LOT TO LOSE WHEN AND IF WE GIVE UP ON OBEDIENCE TO THE UNENFORCEABLE. MY OWN FEELING IS THAT PEOPLE LIKE THE PEOPLE IN THIS ROOM – PEOPLE WITH A PERSONAL AND A PROFESSIONAL INTEREST, IN UPHOLDING STANDARDS OF WHAT IS TRUE AND WHAT IS NOT, WHAT ACTUALLY HAPPENED AND WHAT DIDN'T – HAVE THE MOST TO LOSE FROM THIS TENDENCY TOWARD PREFERRING NARRATIVES TO FACTS, AND THEREFORE OUGHT TO BE DOING THE MOST TO PREVENT THAT TENDENCY FROM MAKING FURTHER INROADS.

I AM NO SAYING THAT EVERY POLICE OFFICER OR PROSECUTOR HAS TO BE A HISTORIAN, BUT I AM SAYING THAT THE ACTIONS OF ALL OF US WITH A STAKE IN THE LAW OUGHT TO BE INFORMED BY A COMMON UNDERSTANDING OF WHO WE ARE AND THE GREAT PAST WE COME FROM. THAT WILL GIVE US THE CONFIDENCE TO DEFEND THE LEGAL SYSTEM IN WHICH WE FUNCTION FROM MINDLESS ATTACKS BY PEOPLE WHO ARE EITHER IGNORANT OF OUR HISTORY, OR ASSUME THEY ARE TALKING TO AN AUDIENCE THAT IS IGNORANT OF IT.

IF WE CAN HELP DO THAT, WE MAY YET HELP AVOID THE FATE DESCRIBED BY RONALD REAGAN – HAVING TO EXPLAIN TO OUR GRANDCHILDREN WHAT IT WAS LIKE TO BE FREE.

THANK YOU FOR HEARING ME TODAY..

Rule of Law Panel

Rafael Mangual

Fellow & Deputy Director, Legal Policy, Manhattan Institute

Rafael Mangual is a fellow and deputy director of legal policy at the Manhattan Institute and a contributing editor of *City Journal*. He has authored and coauthored a number of MI reports and op-eds on issues ranging from urban crime and jail violence to broader matters of criminal and civil justice reform. His work has been featured and mentioned in a wide array of publications, including the *Wall Street Journal*, *The Atlantic*, *New York Post*, *Boston Herald*, *Philadelphia Inquirer* and *City Journal*. Mangual has also made a number of national and local television and radio appearances on outlets such as Fox News, C-SPAN, and Bloomberg Radio.

Prior to joining MI in 2015, Rafael worked in corporate communications for the International Trademark Association. He holds a B.A. in corporate communications from the City University of New York's Baruch College and a J.D. from DePaul University in Chicago, where he was president of the Federalist Society and vice president of the Appellate Moot Court team. After graduating from law school, Mangual was inducted into the Order of the Barristers, a national honor society for excellence in oral and written advocacy.

DRAFT: Statement to the President's Commission on Law Enforcement Working Group on Respect for Law Enforcement

Hearing:

Diminishing Respect for Law Enforcement and the Rule of Law

July 21, 2020

Misleading Narratives About Incarceration, Prosecution, and Policing: Drivers of the Decline in Respect for Law Enforcement and the Rule of Law

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About the Author

Rafael A. Mangual is a fellow and deputy director of legal policy at the Manhattan Institute and a contributing editor of City Journal. He has authored and coauthored a number of MI reports and op-eds on issues ranging from urban crime and jail violence to broader matters of criminal justice reform.[1] His work has been featured and mentioned in a wide array of publications, including *The Wall Street Journal, Washington Post, The Atlantic, New York Post, Philadelphia Inquirer* and *City Journal*. Mangual has also made a number of national and local television and radio appearances on outlets such as Fox News, C-SPAN, and Bloomberg Radio. He holds a B.A. in corporate communications from the City University of New York's Baruch College and a J.D. from DePaul University's College of Law in Chicago, IL.

The Manhattan Institute for Policy Research does not take institutional positions on legislation, rules, or regulations. Although my comments draw upon my research and writing about criminal

[1] For a sampling of this work, see the following reports, essays, and columns: Rafael A. Mangual, *Police Use of Force and the Practical Limits of Popular Reform Proposals: A Response to Rizer and Mooney*, FEDERALIST SOC. REV., Vol. 21 at 128 (2020); Rafael A. Mangual, *Reforming New York's Bail Reform: A Public Safety-Minded Proposal*, Manh. Inst. For Pol'y Res. (Mar. 2020); Rafael A. Mangual, *Issues 2020: Mass Decarceration Will Increase Violent Crime*, Manh. Inst. for Pol'y Res. (Sep. 2019); Rafael A. Mangual, *"Equity" Before Security*, CITY JOURNAL (Mar. 15, 2018); Rafael A. Mangual, *Fathers, Families, and Incarceration*, CITY JOURNAL (Winter 2020); Rafael A. Mangual, *Bloomberg wants to be strong on guns and soft on crime*, WASHINGTON POST (Nov. 24, 2019); Rafael A. Mangual, *Biden Should Be Proud of His Record on Crime*, THE WALL STREET JOURNAL (Apr. 24, 2019); and Rafael A. Mangual, *No, Philly doesn't need to cure poverty to reduce crime*, PHILADELPHIA INQUIRER (June 24, 2019).

justice issues as an Institute scholar, my statement before the subcommittee is solely my own, not my employer's.

Statement

Commissioners, Attorney General Barr, and distinguished members of the Commission, I would like to thank you all for the invitation to deliver remarks here today on what is a deeply important topic. My name is Rafael A. Mangual, and I am a fellow and deputy director of legal policy at the Manhattan Institute for Policy Research, where I have worked since 2015, focusing mostly on issues relating to criminal justice. While my remarks will draw heavily on the work I have done while at the Manhattan Institute, my statement here today is solely my own, and not that of my employer.

Today's topic—the diminishing respect for law enforcement and the rule of law—is one that is dear to my heart. It's also one I have closely observed as a writer. The title of the hearing actually describes a trend. That trend seems to me to be the product of false or misleading narratives about **incarceration,** and **policing** in the United States. That those narratives are false or misleading is itself a serious problem. But that problem has been compounded by the fact that those narratives are informing meaningful political action (illustrated in part by the growth of the so-called "progressive" prosecutor movement), which has resulted in consequential changes in public policy—both through and outside the political process. The stakes involved in pulling these policy levers are high. In some cases, those stakes can be life and death.

I'd like to begin by illustrating those stakes with two brief vignettes, which I'll follow with an overview of what the prevailing narratives about American criminal justice get wrong, and how that has contributed to the diminishment in respect we're here to discuss.

The first is that of a young woman named Brittany Hill, who was gunned down on Chicago's West Side last year while shielding her one-year-old daughter. Ms. Hill's murder was captured on a security camera operated by the Chicago Police Department. That video showed her standing on the street one morning alongside two other men when a sedan slowly approached the group. Just after Ms. Hill's daughter waved to the sedan's occupants, the man in the passenger seat opened fire, wounding Hill just inches below where she was holding her daughter. Ms. Hill turned to shield the little girl, collapsing just a few feet away, still holding onto her daughter when she died.

Because of the video, police quickly apprehended the suspected shooters, both of whom, as was reported by the *Chicago Sun-Times*[2], had extensive criminal histories and active criminal justice statuses at the time: One of the alleged shooters, Michael Washington (who was on parole) reportedly had "nine felony convictions, including for a 2004 second-degree murder charge and a 2001 battery charge that was reduced from attempted murder in a plea

[2] Matthew Hendrickson and Alison Martin, *Baby waved, smiled at men right before they killed her mother, prosecutors say*, CHICAGO SUN-TIMES (May 30, 2019).

agreement." The other, Eric Adams (who was on probation for a gun charge), has a history of multiple arrests.

The second story I wanted to share is that of Robert Williams, who, in February of this year, is alleged to have shot and wounded two NYPD police officers in ambush attacks within the confines of the Department's 41st precinct. He was taken into custody at the scene of the second shooting, which was in the precinct's reception area. Williams is apparently no stranger to the justice system. The *New York Times* reported that Williams has multiple arrests dating to the mid-1990s, including a robbery charge when he was just 14.[3] After his sentencing in 1995, he was paroled twice. He subsequently returned to prison for violating his parole—twice. The Times also reported that Williams shot someone in 2002 and then carjacked a woman while fleeing. The shooting resulted in a conviction for attempted murder. Despite that conviction and the suspect's criminal history, Williams was released early from prison in 2017. Despite the leniency many would argue he had been shown, the *Times* reported that "Williams had told investigators in videotaped interviews that he carried out the attacks because 'he was tired of police officers.'"

In both of these cases, we have extremely violent repeat offenders on the street despite troubling criminal histories and convictions for serious, gun-related offenses.

Not only do these stories illustrate the stakes involved in criminal justice policymaking, they also undermine many of the claims we so often hear in debates about criminal justice reform—particularly the claim that the U.S. is a draconian police state that regularly incarcerates relatively harmless offenders for years on end.

So let's get into some of those claims, beginning with **incarceration**. Here, I'd like to make two main points:

1. The international comparisons of incarceration cited as *prima facie* evidence that the U.S. overincarcerates ignore essential differences that take the wind out of the comparison's rhetorical sails; and
2. Contrary to conventional wisdom, incarceration is a relatively rare sanction, reserved mostly for violent and chronic offenders.

Let's start with number one. One of the most repeated lines at the front end of any argument about "mass incarceration," is that the United States is home to just 5% of the world's population, but houses a whopping 25% of the world's prisoners. What those who make this point *don't* tell you is that this disparity is almost entirely a function of differences which, when controlled for, significantly cushion the rhetorical blow that the comparison is usually intended to have.

The most obvious of those differences are found in the number and rate of serious crimes most likely to lead to lengthy prison sentences that are committed in the U.S. Take homicide, for

[3] Ali Watkins, *Man Who Shot Up a Bronx Precinct Was 'Tired of Police Officers',* THE NEW YORK TIMES (Feb. 10, 2020).

instance, and consider the scope of that problem in England & Wales—one of the Western European democracies with a significantly lower incarceration rate with which the U.S. is often unfavorably compared. As I recently wrote in an essay for publication *Law & Liberty*[4]: England and Wales have a combined population of about 59 million people[5], and currently see 726 homicides a year (based on the year ending in March 2018)[6]. Compare that with four contiguous community areas (Humboldt Park, Austin, East and West Garfield Park) on Chicago's West Side, which, in 2018, saw 121 homicides (16% of the total for England and Wales) despite housing an estimated population of just 189,846 (0.3% of the population of England and Wales).[7] The murder rate of those four community areas (63.73 per 100K) is more than 50 times higher than that of England and Wales (1.23 per 100K). Adding to the mix Baltimore's Western and Southwestern police districts, which, with a combined estimated population of 103,052, and 100 homicides in 2018[8], would mean that just a few subsections of just *two* American cities see 30% of the homicides seen in the whole of England and Wales, despite those subsections having a combined population that (at 292,898) is just 0.5% of England and Wales'.

Number two: In addition to out-of-context international comparisons, the "mass incarceration" meme posits that the U.S. can be aptly described as a draconian carceral state that imprisons far too many people for far too many offenses, for far too long. Here again, the data don't support this conclusion. The first thing that often gets left out is that a prison sentence isn't exactly a given consequence of a felony conviction. Historically, only about 40% of state felony convictions result in a post-conviction prison sentence[9]; and the median prison sentence actually served is just about 16 months.[10] Second, the majority (60%) of prisoners in the U.S. are serving time primarily for one of just five serious offenses: murder (14.2%), rape or sexual assault (12.8%), robbery (13.1%), aggravated or simple assault (10.5%), and burglary (9.4%).[11]

Third is that contrary to what many believe—thanks to popular-but-misleading works like Michelle Alexander's *The New Jim Crow*[12] and Ava DuVernay's Netflix film[13], *13th*—"non-violent drug offenders" are most certainly *not* driving American incarceration. Those serving time primarily for drug offenses constitute less than 15% of state prisoners (who account for about 90% of the national prison population). Moreover, those who are primarily incarcerated for drug offenses tend not to spend much time in prison. Just under half (45%) of them are out within a year; and nearly 20% are out within six months.[14]

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[4] Rafael A. Mangual, *With Good Reason, Indeed*, LAW & LIBERTY (Mar. 17, 2020).
[5] Office for Nat'l Statistics, *Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2018*.
[6] Office for Nat'l Statistics, *Homicide in England and Wales: year ending March 2018*.
[7] See, Chicago Police Dep't, *2018 Annual Report*; and CMAP Illinois, *Community Data Snapshots*.
[8] *Baltimore Homicides*, THE BALTIMORE SUN.
[9] Bureau of Justice Statistics, *Felony Sentences in State Courts*.
[10] Danielle Kaeble, *Time Served in State Prison, 2016*, Bureau of Justice Statistics (Nov. 2018).
[11] Bronson & Carson, *Prisoners in 2017, Bureau of Justice Statistics* (Apr. 2019).
[12] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, The New Press (2010).
[13] Ava DuVernay, *13th*, Netflix (2016).
[14] Danielle Kaeble, *Time Served in State Prison, 2016*, Bureau of Justice Statistics (Nov. 2018).

There is a reason I refer to those serving time *primarily* for drug offenses. Often obfuscated in these debates is that incarceration statistics usually categorize offenders based on the most serious charge of which they were convicted, which usually translates to the one for which they received the most time. Particularly given the fact that convictions are usually the products of plea bargains that result in dropped or reduced charges, one must understand that prison population categories don't tell the whole story. Three datapoints illustrate why this is particularly true for drug-offenders: (1) According to the Bureau of Justice Statistics (BJS), more than three-quarters of released drug offenders are eventually rearrested for a *non-drug* crime[15]; (2) more than a third are rearrested for a violent crime, specifically; and (3) In Baltimore, 7 in 10 homicide suspects in 2017 had at least one prior drug arrest in their criminal histories.

So, why are all these clarifications important? One reason is that many of our most prominent lawmakers and political figures—including the presumptive Deomcratic Party nominee for president have bought in on the mass incarceration meme. Joe Biden has explicitly committed to pursuing a 50% reduction in incarceration as a result.[16] Another reason is that allowing the claims I've addressed here to stand gives American citizens a warped sense of what criminal justice actually looks like in the United States. One example of that can be found in an oft-touted ACLU poll showing that 71% of Americans believe we should reduce the prison population.[17] But when you contrast that poll's results with a 2016 Morning Consult poll, we begin to see the support for prison population reductions documented by the ACLU may be based on a misconception. It turns out that support for decarceration is significantly eroded when you ask specifically about those convicted of violent offenses, and those who pose an elevated risk of reoffending. In fact large majorities oppose measures to incarcerate *those* offenders less. As *Vox's* German Lopez put it at the time, the poll showed that, "voters overestimate how many people are in prison for nonviolent drug offenses while underestimating — or at least not knowing — that most of the growth in state prisons was driven by sentences for violent crime."[18]

But the misdirections and obfuscations I've examined so far do more than just lead voters to support misguided decarceration; they undermine respect for the very system we've designed to address serious lawbreaking by convincing the public that the system, by and large, produces results they find offensive.

When it comes to **policing**, we find much of the same. Now, it's important to recognize the context of our current moment. We are in the wake of a wave of violent protests following the extremely disturbing death of George Floyd under the knee of a former Minneapolis police

[15] Alper, Durose, and Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2004-2014),* BJS (May 2018).
[16] *See*, Taylor Pendergrass, *We Can Cut Mass Incarceration by 50 Percent*, ACLU (Jul. 12, 2019).
[17] Press Release, *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017).
[18] German Lopez, *Want to end mass incarceration? This poll should worry you.*, Vox (Sep. 7, 2016).

officer. Everyone should be disturbed by the force exerted by Derek Chauvin against George Floyd; and there is no question that police *do* sometimes engage in unjustifiable abuses. However, the fact remains that one of the most pernicious claims advanced about police is illustrated by the oft-repeated claim that black and Latino parents have to warn their children about police violence at a young age, and coach them through how to minimize their chances of being brutalized. A version of that claim was repeated on ABC's "This Week" in 2014 by New York City Mayor Bill de Blasio. So, little wonder that de Blasio's son, Dante, made the same assertion in a column for *USA Today* last year, lamenting the need for "young black people" to be taught (as he was) "to fear the people meant to protect us."[19] This idea is born out of the mistaken belief (fueled again by misrepresentations of the data) that police regularly use excessive force in their dealings with the public.

But, on the whole, police use of force is extremely rare. Rarer still are uses of force that are injurious and unwarranted. In 2018, police in the United States discharged their firearms an estimated 3,043 times.[20] This may sound like a lot; but that number must be contextualized in light of the overall volume of police activity in the U.S. In 2018, more than 686,000 full-time law enforcement officers were working across America.[21] That year, officers made more than 10.3 million arrests,[22] and had contact with more than 53 million people.[23] If we attribute each of the 3,043 estimated firearm discharges by police in 2018 to a unique officer, we can infer that, at most, 0.4% of police officers purposely discharged a firearm in 2018. If we assume that every shooting happened during the course of a separate arrest, we can infer that, at most, police applied deadly force with a firearm in 0.003% of arrests.

On the question of non-deadly use of force, a recent study published in the Journal of Trauma and Acute Care Surgery revealed that more than 99 percent of arrests by police are made without the use of physical force.[24] That study, undertaken by a team of doctors and criminologists, analyzed more than one million service calls to three midsize police departments in North Carolina, Louisiana, and Arizona. Those calls resulted in 114,064 criminal arrests. In making those arrests, police used force just 0.78 percent of the time, and when they did, they seemed to have exercised restraint, given that "among 914 suspects, 898 (98 percent) sustained no or mild injury after police UOF."

Ignoring these facts has allowed the misperception about police to persist, which has had real consequences—particularly for the populations the most vociferous police critics purport to

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[19] Dante de Blasio, *My dad gave me 'the talk.' When someone called police, I felt the fear.*, USA TODAY (Jul. 1, 2019).
[20] *See,* Rafael A. Mangual, *Police Use of Force and the Practical Limits of Popular Reform Proposals: A Response to Rizer and Mooney*, FEDERALIST SOC. REV., Vol. 21 at 129 (2020).
[21] *Crime in the United States, 2018: Table 74 (Full-time Law Enforcement Employees)*, FEDERAL BUREAU OF INVESTIGATION. Note: This number likely undercounts the total number of law enforcement officers operating within the U.S., given that in many parts of the country— particularly in rural, exurban, and suburban areas—many public safety operations use part-time and reserve officers.
[22] *Crime in the United States, 2018: Table 29 (Estimated Number of Arrests)*, FEDERAL BUREAU OF INVESTIGATION.
[23] *Contacts Between Police and the Public, 2015*, BUREAU OF JUSTICE STATISTICS (Oct. 2018).
[24] Bozeman, et al., *Injuries associated with police use of force*, J. OF TRAUMA & ACUTE CARE SURGERY (Mar. 2018).

represent. One illustration of those consequences comes from a study published in the American Sociological Review, which found that black residents in particular were significantly less likely to call 911 after a controversial police use of force went viral.[25] The authors of that study attributed at least part of that reduction to an increase in "legal cynicism"—defined as "the deep-seated belief in the incompetence, illegitimacy, and unresponsiveness of the criminal justice system"—which, in turn, threatens the public's safety. More evidence of that cynicism may be found in another Morning Consult poll in which twice as many black respondents reported worrying more about those they know becoming victims of police brutality than of gun violence[26]—a result at odds with a recent study published in the Proceedings of the National Academy of Sciences (PNAS), which put the odds of dying at the hands of police at 1 in 1,000 for black men.[27] Contrast that with the odds for *all Americans* of being killed by gun assault, which, according to the National Safety Council, are *dramatically* higher at 1 in 298.[28] With black men more than 10 times more likely than their white counterparts to be the victim of a homicide,[29] the risk of death at the hands of police is *far* lower than homicide generally.

It does not require a giant leap to conclude that such cynicism has eroded the public's respect for the policing profession and the system of laws they're sworn to uphold.

Conclusion

The perpetuation of false narratives about policing and incarceration have emboldened some of the most radical elements of the criminal justice reform movements, such that once-fringe ideas like the abolition of police and prisons are dramatically closer to the mainstream than they were just a year ago. Since the death of George Floyd, we've seen police departments around the country defanged in various ways, which has also emboldened the criminal class, whose members have taken advantage of the vacuum created by these "reforms." In my home city, we've seen a troubling uptick in shootings that portends a potential erosion of its nationally renowned success on the crime-fighting front. Through July 12, 2020, murders in New York City are up 23 percent year-to-date; shootings are up 61 percent.[30] The 28-day period ending July 12th saw 210 percent *more* shootings than the same period in 2019.[31] This is not just a short-term blip driven by the recent economic downturn. The two-year trend in shootings and

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[25] Desmond, et al., *Police Violence and Citizen Crime Reporting in the Black Community*, AMERICAN SOCIOLOGICAL REVIEW, Vol. 81(5) 857-876 (2016).
[26] Eli Yokley, *Poll: Voters More Worried by Violence Against Police Than Police Brutality*, MORNING CONSULT (Jul. 11, 2016).
[27] Edwards, Lee, and Esposito, *Risk of being killed by police use of force in the United States by age, race–ethnicity, and sex*, PNAS (2019).
[28] *Lifetime odds of death for selected causes, United States, 2018*, NSC.ORG.
[29] *See, e.g.,* Riddell, et al., *Comparison of Rates of Firearm and Nonfirearm Homicide and Suicide in Black and White Non-Hispanic Men, by U.S. State*, ANNALS OF INTERNAL MEDICINE (2018) (finding that "In 2016, non-Hispanic black men were nearly 10.4 times more likely than non-Hispanic white men to die by homicide in the United States.").
[30] *See*, *Citywide Crime Statistics*: *Compstat Report Covering the Week 7/6/2020 Through 7/12/2020* (copy on file with author).
[31] *See, Id.*

homicides shows those crimes up 70 percent and 22 percent, respectively.[32] That crime increase, like crime more generally, is *not* evenly distributed. In East Harlem's 23rd precinct, murders are up 500 percent year-to-date through July 12th; shootings have doubled. In Harlem's 25th precinct, murders are up 250 percent and shootings are up 400 percent. In the 73rd precinct, which covers Brownsville, Brooklyn, murders have more than doubled, year-to-date; shootings have increased by 215 percent. But in the Upper East Side's 19th precinct, there has only been one shooting all year. The same goes for the 78th precinct, which covers Mayor Bill de Blasio's neighborhood of Park Slope. This should serve as a reminder that, to the extent radical reforms make life more dangerous, those dangers will disproportionately fall on America's most vulnerable communities.

When I prepared the first draft of my remarks for today, our country was dealing with the beginning of the novel coronavirus pandemic that, by April 1, 2020, had claimed more than 4,400 American lives—with New York State accounting for 44% of those deaths (and 41% of all cases in the U.S.) at the time.[33] Despite New York being the epicenter of the COVID-19 pandemic in America in early April, police throughout the state continued their service, which, by definition, involved close contact with potentially infected members of the public—often with minimal protective gear. By April 1st, more than 1,000 NYPD officers had contracted the virus, with five losing their lives to it.[34] What the continued commitment of those officers showed is a deep commitment to the rule of law, which we know—from this pandemic, 9/11-related illness, and line-of-duty deaths and injuries—often comes at great personal cost to law enforcement officers. It's *that* commitment which should be painting the public image of the men and women who protect and serve communities across our great nation. That nearly a million officers across our nation have taken oaths to risk their lives in service to the rule of law should place that ideal among those most revered in our society.

People of good will can certainly disagree about the extent to which our criminal justice system—which is by no means perfect—is flawed; and they can disagree about how to go about improving that system. But the idea that our criminal justice system is fairly characterized as one that regularly brutalizes disfavored groups via overly draconian sentences and unjustifiably violent policing is nothing short of defamatory. So, to my mind, the best way to restore the respect that this group acknowledges has been lost is to fight innuendo with empiricism, obfuscation with analysis, lies with truth.

Thank you.

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[32] *Id.*

[33] Hernandez, et al., *Tracking Covid-19 cases in the US*, CNN (updated Jul. 20, 2020).

[34] WABC, *Coronavirus News: NYPD has 5,600 officers out sick, 5 deaths*, ABC7NY (Mar. 31, 2020).

Gail Heriot

Professor of Law, University of San Diego

Gail Heriot is a law professor at the University of San Diego, where she teaches Civil Rights Law & History, Employment Discrimination, Legislation, Remedies, and Torts. She is also a member of the U.S. Commission on Civil Rights.

Professor Heriot's work has appeared in legal journals like the *Michigan Law Review* and the *Texas Journal of Law & Politics*. She also writes for newspapers and magazines and blogs on Instapundit and the Volokh Conspiracy.

She is a member of the board of directors at the National Association of Scholars and Civil Rights practice group chair at the Federalist Society for Law & Public Policy.

Testimony of Gail Heriot
Professor of Law, University of San Diego
& Member, U.S. Commission on Civil Rights
Before
The Commission on Law Enforcement and the Administration of Justice
July 21, 2020

In the last two months, the nation has seen peaceful protests against police methods.

It has also seen riots.

And it has seen riots falsely labeled as peaceful protests.

It is extremely unlikely that we will ever be able to look back on the destruction and say that it was all worth it. But if we're lucky we'll at least learn a few lessons from it. We will find ways to improve actual policing methods and to increase everyone's understanding of, and respect for, the rule of law and the enforcement of the law.

What I want to caution against is precipitous action. There has been a lot of irrationality out there lately. The "defund the police" movement is surely its most prominent manifestation—though pulling down statues of Abraham Lincoln, Frederick Douglass and Ulysses Grant has to rank up there pretty high too. Some people are urging legislators to revamp radically the way the criminal justice system deals with violent crime. We all need to stop and take a deep breath. Treating over-the-top demands as serious will not enhance respect for law enforcement or for the rule of law.

It should go without saying, but let me say it just to make me feel better: Twitter mobs are not a good gauge of what Americans are thinking. The slogans of rioters aren't either. They are not even necessarily a good gauge of what the rioters themselves are thinking or will be thinking after a moment's reflection.

The first thing policymakers need to do is to refrain from making the situation worse. The easiest way to do that is to discourage the appropriate enforcement of the criminal law. Many Americans today have never lived through a period of time of high crime. They are unfamiliar with what it's like to really feel "unsafe" (which may account for why that term has been so abused in recent years). I remember almost 40 years ago advising a young French acquaintance of mine not to walk through certain neighborhoods alone in the city where I was then living. She scowled and said that in Paris there were no places she couldn't go alone. Now the tables are turned. Paris is much less safe than it was then. American cities, on the other hand, have enjoyed a 30-year period of declining crime. We've done something right. Let's not throw it away.

When law-abiding people don't need to be constantly worrying about crime, they can spend their time achieving their own goals instead. This has benefited

everyone, but it has especially benefitted lower-income Americans living in large urban areas. Instead of staying home after dark, they can take a course in accounting at the local community college. They can earn money for a down payment on a house by working a part-time job at a local shopping mall. Instead of spending money to put bars on their windows, they can buy a used car that will get them to an out-of-the-way work site where the pay is better. They can have a picnic in the park. They can get to know their neighbors.

Whole neighborhoods blossom when crime goes down. People start to feel more comfortable coming out at night, and once they come out their presence reduces crime even further. Businesses are formed—restaurants, stores, and hair salons. It becomes a virtuous circle where things get better and better. I've seen it myself in and around the neighborhoods in which I've lived and worked—from the South Side of Chicago to Northeast Washington to City Heights in San Diego.

What caused the decline in crime? Lots of things. Some of them policymakers cannot take credit for—like the aging of our population. But others—like higher incarceration rates and concentrating police officers in areas where the crime is—are deliberate and effective policy.

I am not here to tell you that every innovation that occurred in the 1980s and 1990s is sacrosanct and cannot be re-examined. But anyone who tells you that our high incarceration rates are simply a form of racism and have nothing to do with our recent history of low crime is at best being foolish. The same thing should be said for anyone who tells you that sending more police officers into the neighborhoods that have higher crime rates is racist.

Historically, it was failing to send enough police officers into African American neighborhoods that was rightly identified as the problem. In the Jim Crow South, one of the most severe problems faced by African-American communities was that many law enforcement officers just didn't give a damn. Swedish sociologist and Nobel Laureate Gunnar Myrdal (nobody's idea of a conservative) exposed their neglect in his highly influential 1944 book, *An American Dilemma: The Negro Problem and Modern Democracy*:

> It is part of the Southern tradition to assume that Negroes are disorderly and lack elementary morals, and to show great indulgence toward Negro violence and disorderliness "when they are among themselves." … As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases. This is particularly true in minor cases which are often treated in a humorous or disdainful manner. The sentences for even major crimes are ordinarily reduced when the victim is another Negro. Attorneys are heard to plead [to] juries: "Their code of ethics is a different one from ours." …

> The leniency in punishment of Negro crime against Negroes has repeatedly been pointed out … by white Southerners as evidence of the friendliness of Southern courts toward Negroes. … Yet the Southern Negro community is not at all happy about this double standard of justice in favor of Negro offenders. … Leniency toward Negro defendants in cases involving crimes against other Negroes is thus actually a form of discrimination. (Vol. II, page 551.)

It's difficult to see how people could have thought this kind of neglect was "friendly" toward African Americans. No government function is more important than protecting citizens from violent crime. For law enforcement authorities to leave one part of the population without the full and equal protection of the law was not the least bit "friendly." It was a travesty.

With the passage of the Voting Rights Act of 1965, ignoring the victimization of African Americans was no longer something local governments could do without fear of retaliation at the ballot box. Things therefore got better. But there were still problems. In the preface to his 2015 book *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment*, Professor Michael Javen Fortner makes it clear that his interest in law enforcement in African American communities stems in part from his own experience growing up in Brownsville, Brooklyn. In response to suggestions that the dominant response to crime of African Americans of that era was "'a sense of sympathy for and empathy with the perpetrators,'" Fortner states bluntly: "[T]hat's not what I heard. … I remember black folks constantly worrying about keeping their children, homes, and property safe." (Pages x-xi.)

Fortner's book, however, is not a memoir. Rather, it meticulously documents that while African Americans were not at all unanimous on crime-related issues, large numbers of African Americans opposed liberal policies that emphasized lenience and therapy rather than prison time. As early as 1970, in a survey of 2000 urban black households, respondents were asked whether "[keeping] offenders off the Street and in jail" would help in curbing the crime problem. Over 80% indicated that it would be "very helpful" or "somewhat helpful." A near majority also agreed that "tougher police policies" would be a good thing. (Page 155.)

More important, Fortner shows that during the 1970s, African American grassroots leaders in New York pushed for more intervention from the police, not less. Fortner describes how African Americans provided crucial grassroots political support for Governor Nelson Rockefeller's get-tough drug laws, which had been vehemently opposed by white "reformers":

> Empowered by their newly won civil rights, members of the black silent majority vigorously battled King Heroin and reconfigured the politics of drug policymaking in New York State. Working- and middle-class African Americans exploited old organizational forms and founded a multitude of new committees and groups. They met,

> protested, and lobbied to combat the problems of drug addiction, drug trafficking, and crime in their neighborhoods. … With banners and bands, picket signs and bullhorns, leaders of block associations, church groups, women's groups, fraternal organizations, and Democratic clubs took to the streets to demand more police, shame addicts, call out pushers, and upbraid white and black leaders for their perceived unresponsiveness …. (Pages 212-13.)

What is interesting is how little the general public knows about this. For decades, the narrative in the media has largely been that the criminal justice system works to the disadvantage of African Americans, because incarceration rates are African American men are higher than for other races. Similarly, the narrative has been that teachers who discipline disruptive students unfairly treat African American students. But African Americans are also disproportionately victimized by crime and disorderly classrooms. That part of the story gets left out.

Paul Hermann and Clarence Williams therefore deserve some credit for the story they wrote for the *Washington Post* on July 10, 2020—entitled *On a D.C. Street Beset by Violence, Call to Fix Policing, Not Defund It*. They reported a protest in Anacostia, a mainly African American part of Southeast Washington, D.C., even though it didn't fit the narrative that enforcement of the criminal law is unwelcome in the African American community. These protesters wanted more police protection, not less. An eleven-year-old boy, Davon McNeal, had been killed there by stray bullet shot by gang members attempting to drive away members of a rival gang. Black lives mattered to these protesters. That's why they were concerned that they had not been getting enough police protection.

One mother told Hermann & Williams, "Police need more presence here. They need to step it up. They're sitting in their cars." She knew what she was talking about. According to the *Post*, homicides are up in D.C. Last year, there had been 82 by July 10; this year it's 97. Fifteen of those happened in the first 10 days of July.

So we must be careful about reforms that will have the effect of discouraging police officers from doing their jobs.

I will comment only on two of the specific reforms that I've been seeing batted about in the last few years—cameras and qualified immunity. Unlike the "defund the police" demand, these are not ridiculous on their face.

Cameras—I am enthusiastic about them. I have heard police officers discourage the idea on the ground that cameras can give police supervisors a false sense that they understand the situation. Even after considering that problem, however, I remain enthusiastic.

I am a lawyer and law professor, not a police officer, so no one has ever suggested that I should wear a camera all day. But there is a parallel phenomenon.

In law, one runs into perfectly law-abiding, play-by-the-rules attorneys who get nervous about documenting what they're doing. They like phone calls instead of emails. I'm the opposite. I have always found that documenting is my friend. I have a bad memory for some things, so sometimes I can only explain why I did something by looking back at the documents. Videos will vindicate police officers far more often than not. When they don't, the need to know is even greater. Cameras should be welcomed. As a bonus, we all behave better when on camera.

Abolishing qualified immunity is a fashionable cause these days. Under current law, as expressed in *Harlow v. Fitzgerald* (1982), police officers (and most other government officials) cannot be held personally liable in federal court for violating the rights of others if they can show that their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." (State law can be different.)

I would oppose entirely doing away with qualified immunity. Over long period of time, the law has developed various doctrines to protect public officials from personal liability in situations requiring judgment and discretion. In part, it is thought that otherwise there is a danger that public officials will protect themselves by opting for inaction. They will not do what needs to be done to protect the public. This is a greater danger for public officials than it is for private citizens. In the private sector, diligence and industry tend to have a more direct link to reward than they do for public officials. A farmer who doesn't farm won't earn any money. A salesman who doesn't sell anything won't earn a commission. But when a police officer saves a life, he doesn't get to keep it. If only his errors and not his successes affect his fortunes, a reluctance to act at all may be the result.

That doesn't mean that the doctrine of qualified immunity cannot be refined or improved upon. But I wouldn't look to those who advocate doing away with it entirely for pointers on how to improve it.

I don't have the space here to discuss civil forfeiture reform or reforming municipal over-reliance on fines for fiscal needs, but I believe these are also areas worth exploring in connection with increasing the public's respect for law enforcement.

FURTHER READING (in addition to Myrdal and Fortner, cited above):

1. Dissenting Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices* (2018).
2. Gail Heriot & Alison Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong For Students and Teachers, Wrong on the Law*, 22 Tex. Rev. L. & Politics 471 (2018).
3. Dissenting Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connection to School to Prison Pipeline for Students of Color with Disabilities* (2019).
4. Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Communities of Color: Civil Rights and Constitutional Implications* (2018).

Jonathan Turley

J.B. & Maurice C. Shapiro Professor of Public Interest Law, George Washington University Law School

Professor Jonathan Turley is a nationally recognized legal scholar who has written extensively in areas ranging from constitutional law to legal theory to tort law. He has written over three dozen academic artic les that have appeared in a variety of leading la w journals at Cornell, Duke, Georgetown, Harvard, Northwestern. University of Chicago, and other schools.

After a stint at Tulane Law School. Professor Turley joined the George Washington faculty in 1990 and, in 1998, was given the prestigious Shapiro Chair for Public Interest Law, the youngest chaired professor in the school's history. In addition to his extensive publications. Professor Turley has served as counsel in some of the most notable cases in the last two decades including the representation of whistleblowers, military personnel, former cabinet members, judges, members of Congress, and a wide range of other clients. He is also one of the few attorneys to success fully challenge both a federal and a state law.

In 2010, Professor Turley represented Judge G. Thomas Porteous in his impeachment trial. The trial before all 100 U.S. Senators was only the 14th time in history of the country that such a trial of a judge has reached the Senate floor. In November 2014, Turley served as lead counsel to the United States House of Representatives in its successful constitutional challenge to changes ordered by President Obama to the Affordable Care Act. He has also represented four former attorneys general and high-ranking members of all three branches of government. He has also served as lead counsel in some of the most famous espionage and national security cases in the last two decades, including the Area 51 litigation and the Daniel King espionage case. He was also lead counsel in the World Bank protest case leading to the largest settlements in history for the one-day arrests of journalists and observers.

Professor Turley is a frequent witness before the House and Senate on constitutional and statutory issues as well as tort reform legislation, including the Senate confirmation hearings of cabinet members and jurists like Justice Neil Gorsuch. He appeared as an expert witness in both the impeachment hearings of President Bill Clinton and Donald Trump. In the Trump impeachment, he was the only witness called by the Republicans. In the hearing, Professor Turley opposed the proposed articles of impeachments on bribery, extortion, campaign finance violations or obstruction of justice as legally flawed. The committee ultimately rejected those articles and adopted the only two articles that Professor Turley said could be legitimately advanced: abuse of power, obstruction of Congress. Chairman Jerrold Nadler ended the hearing by quoting his position on abuse of power. However, Turley opposed impeachment on this record as incomplete and insufficient for submission to the Senate. He encouraged the Committee to wait to vote on impeachment until March or April to secure needed

testimony and supportive court orders. Professor Turley's scholarship was cited by both the House Managers and the White House counsel in their Senate trial, including the showing or videotaped remarks on the interpretation of the constitutional standard.

Professor Turley is also a nationally recognized legal commentator. Professor Turley was ranked as 38th in the top 100 most cited "public intellectuals" (and second most cited law professor) in the study by Judge Richard Posner. He has been repeatedly ranked in the nation's top 500 lawyers in annual surveys. In prior years, he was ranked as one of the nation's top ten lawyers in military law cases. He has been ranking among the top lawyers and legal experts in the world on various international surveys as well one of the 100 most best known law professors in history. Professor Turley's articles on legal and policy issues appear regularly in national publications with hundreds of articles in such newspapers as the New York Times, Washington Post, USA Today. Los Angeles Times and Wall Street Journal. He is a columnist for USA Today, the Washington Post and The Hill newspapers. He is currently the legal analyst for CBS and BBC. He has previously worked as a legal analyst for NBC, CBS, and Fox News. His award-winning blog is routinely ranked as one or the most popular legal blogs. His blog was received various awards and, in 2013, the ABA Journal inducted the Turley Blog (Reslpsa) into its Hall of Fame.

Professor Turley received his B.A. at the University of Chicago and his J.D. at Northwestern. In 2008, he was given an honorary Doctorate of Law from John Marshall Law School for his contributions to civil liberties and the public interest.

Written Statement
Jonathan Turley,
Shapiro Professor of Public Interest Law
The George Washington University Law School

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

"*Privacy in the Age of Biometrics*"

Tampa, Florida (Remote)
July 21, 2020

I. INTRODUCTION

Chairman Keith, and Commissioners, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.[1] It is an honor to appear before you today to discuss the implications of biometric technology and privacy in law enforcement.

The recent controversies surrounding the defacing and destruction of statues and memorials has led to national debate over the rise of mob action. While there are valid arguments for the removal of some statues, the rule of law demands that these decisions are made collectively by society, not capriciously by rioters. Some incidents in Washington and Baltimore involved the destruction of statues as police made the "tactical decision" not to intervene.[2] The federal government launched an extensive effort to identify the leaders. The same type of effort has unfolded in cities like

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[1] I appear today on my own behalf and my views do not reflect those of my law school, my colleagues, CBS News, the BBC, or the newspapers for which I write as a columnist.

[2] Jonathan Turley, *People Will Do What People Will Do*, Res Ipsa Blog (www.jonathanturley.org), July 10, 2020 available at https://jonathanturley.org/2020/07/10/people-will-do-what-they-do-pelosi-refuses-to-condemn-statue-destruction/

[3] N'dea Yancey-Bragg, Kristine Phillips & Lindsay Schnell, *"Secret Police Force":*

[2] Jonathan Turley, *People Will Do What People Will Do*, Res Ipsa Blog (www.jonathanturley.org), July 10, 2020 available at https://jonathanturley.org/2020/07/10/people-will-do-what-they-do-pelosi-refuses-to-condemn-statue-destruction/

Portland where federal officers have reportedly attempted to identify protesters who have attacked federal officers or destroyed federal property, including a controversial case where the suspect was detained and then released by officers in an unmarked vehicle.[3]

The recent arrests may or may not have used facial recognition technology (FRT) but they highlight the value and the concerns over the use of biometrics. On one side, there are organized groups who seek to conceal their identity as they engage in mob violence and attacks on police. On the other side, there is the concern over police identifying people who are engaging in protests against their government. Defending the rule of law in stopping such mob action can be as deterring the exercise of rights guaranteed under the rule.

From *1984*[4] to *Total Recall*,[5] fictitious dystopian futures all have a common feature: continual, omnipresent surveillance of every citizen. The fear of living in a fishbowl society is a shared phobia of all free people. The technology that was merely fiction when Orwell penned *1984* now exists to make his dystopian vision a reality. That technology – and that future – has arrived with recent breakthroughs in biometric technology. Biometric technology now inundates society in a myriad of products, including the ubiquitous cellphones with FRT unlocking systems. Billions use and enjoy such products. Governments around the world are incorporating biometric technology at an accelerating pace with widespread deployment of FRT and other systems to identify and track movements of individuals in public.

The exponential growth of this industry has presented an unprecedented tool for law enforcement and an equally unprecedented threat to privacy interests. I have been working on the issue of biometrics and privacy for a number of years. That work is partially reflected in a forthcoming work, *Anonymity, Obscurity, and Technology: Reconsidering Privacy in the Age of Biometrics*.[7] I have a second article titled *From Here*

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[3] N'dea Yancey-Bragg, Kristine Phillips & Lindsay Schnell, *"Secret Police Force": Police Reportedly Pull Portland Protesters Into Unmarked Vehicles,* USA Today, July 17, 2020.

[4] *Id*.

[5] TOTAL RECALL (Tristar Pictures 1990) (Prior to taking a space bridge to the planet Mars, Douglas Quaid, played by actor Arnold Schwarzenegger, proceeds through a full body x-ray scanning machine to detect contraband.).

[7] Jonathan Turley, *Anonymity, Obscurity, and Technology: Reconsidering Privacy in the Age of Biometrics* Jonathan Turley, *Anonymity, Obscurity, and Technology:*

To Obscurity: Conceiving A Biometric Privacy Act for an Anonymous Society that outlines a possible legislative solution in a federal biometric privacy act.

I believe that current legal approaches to both surveillance and privacy are incapable of addressing the issues arising out of biometric technology, particularly FRT. In my view, we will need to not only explore comprehensive international agreements on the use of biometric technology but reexamine our concept of privacy in the age of biometrics. The solution is not to deny this technology to law enforcement but to regulate its use to address legitimate concerns raised over its growing use.

II. BACKGROUND

Given the limitations of time, I will not dwell on the background of biometrics in law enforcement. However, a few points are worth noting. There has been an enormous investment and incorporation of biometrics in other countries, particularly Russia and China, which remain two of the most dominant countries in terms of new technology. The Chinese government is particularly enthralled with this technology for all the wrong reasons. FRT can create the type of "fishbowl" society long feared by civil libertarians and long sought by authoritarian governments. Notably, the greatest concern voiced by protesters in the 2019 protests in Hong Kong was evading FRT systems.[8] Not surprisingly, much of the FRT efforts in China have been directed at ethnic Muslims like the Uighurs and other populations viewed as a threat to the authoritarian regime.[9] With the world's largest network of cameras in public spaces, China was able to incorporate FRT to create a fearsome surveillance system. In one month alone, officials in the city of Sanmenxia screened 500,000 images of Uighurs.[10] Police called it "minority

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Reconsidering Privacy in the Age of Biometrics, 100 B.U. L. Rev. (forthcoming Dec. 2020). Much of this testimony is taken from this article.

[8] Paul Mozur, *In Hong Kong Protests, Faces Become Weapons*, N.Y. TIMES (July 26, 2019), https://www.nytimes.com/2019/07/26/technology/hong-kong-protests-facial-recognition-surveillance.html.

[9] Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, N.Y. TIMES (Apr. 14, 2019), https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html.

[10] *Id.*

identification," a system that has been denounced for its ability to categorize and identify people based on their ethnicity. Indeed, Chinese companies are now selling programs with "minority recognition functions."[11] China is currently completing the largest FRT system in the world – aimed at identifying all of its 1.3 billion citizens within three seconds with a 90 percent accuracy. Once completed, the already limited ability of citizens in China to engage in protests or reform activities will be sharply reduced. China's interest in FRT is both political and economic. The Chinese and Russians are quickly dominating this international market. Indeed, Microsoft is believed to be using a Chinese algorithm.

The United States has also made significant investments in FRT. In 2017, the government used FRT at nine airports for its Biometric Entry-Exit Program. Biometric e-gates are operating at LAX in California, New York's JFK Airport, Orlando International in Florida, and other airports.[17] TSA test programs are now being used in airports like Las Vegas.[18] This biometric system was not only funded as part of the Consolidated Appropriations Act of 2016 but also ordered to be implemented by Executive Order 13780.

In addition to the entry-exit program, various agencies already utilize biometric technology with a massive collection of data. The Federal Bureau of Investigations (FBI) recently disclosed that it has 641 million facial images in its databank associated with the Facial Analysis, Comparison, and Evaluation (FACE) program. Almost 40 million such images were taken from the FBI's Interstate Photo System of mugshots. The rest were mined from databanks ranging from passport to driver license files. The FBI's Next Generation Identification (NGI) is moving ahead with little regulation from the Congress. Likewise, the Department of Defense (DoD) implemented a highly advanced Automated Biometric Identification System (ABIS) that interacts with other databanks and can cross-check facial recognition, palm prints, fingerprints, irises, and other biometric data on individuals. The domestic incorporation of this FRT extends to municipal and law

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[11] *Id*.

[17] Sean O'Kane, *British Airways brings its biometric identification gates to three more US airports*, VERGE (Mar. 9, 2018, 12:17 PM), https://www.theverge.com/2018/3/9/17100314/british-airways-facial-recognition-boarding-airports.

[18] Brandi Vincent, *TSA Launches Facial Recognition Pilot at Las Vegas Airport*, NEXTGOV (Aug. 27, 2019), https://www.nextgov.com/emerging-tech/2019/08/tsa-launches-facial-recognition-pilot-las-vegas-airport/159479/.

enforcement departments, like the New York Police Department, which is currently storing pictures of individuals as young as eleven years old.[19]

The dangers of this technology are not just limited to privacy loss. There are been serious concerns raised over racial discriminatory results, particularly with persons of color. For many years, the industry has struggled with false identifications that continue to concern many of us over the accuracy and application of the technology.

Conversely, biometrics offers obvious benefits to law enforcement that cannot be dismissed.

Dzhokhar Tsarnaev, was ultimately found outside the "containment zone" once authorities abandoned near martial law. Once people were allowed out of their homes and with millions of new eyes on the street, Tsarnaev was quickly spotted hiding in a boat. In such a situation, FRT can help law enforcement avoid time consuming area searches and the questionable practice of forcing people out of their homes to physically examine them. As Tsarnaev and his brother traveled around Boston, FRT systems might have identified them and ultimately avoided such draconian measures.

It is also important to recognize that biometrics can have privacy benefits. When properly used, they can enhance privacy interests and even reduce racial profiling by reducing false arrests and unwarranted Terry stops.[23] Consider again the Portland controversy. FRT can radically increase the chances that the person detained was actually the person being sought by the federal officers. Bans like the one in San Francisco not only deny police a technology widely used by businesses, but returns police to the highly flawed default of "eye balling" suspects where the error rate is considerably higher than top FRT programs. A study in Australia offers a glimpse into the

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[19] Joseph Goldstein & Ali Watkins, *She Was Arrested at 14. Then Her Photo Went to a Facial Recognition Database*, N.Y. TIMES (Aug. 1, 2019), https://www.nytimes.com/2019/08/01/nyregion/nypd-facial-recognition-children-teenagers.html.

[22] Jonathan Turley, *The Pavlovian Politics of Terror*, JONATHANTURLEY.ORG (Apr. 29, 2013), https://jonathanturley.org/2013/04/29/the-pavlovian-politics-of-terror/comment-page-4/.

[23] A similar debate arose over the use of body cameras. *See* Floyd v. City of New York, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013) (noting that the use of body camera

performance differential between human and FRT recognition.[24] A study of passport officers showed high error rates, including fourteen percent false acceptance rates in testing. What was striking was that the test used photos taken just two days before (and in optimal settings) the testing subjects appeared before the officers. The variables of aging and poor images were therefore not present to the same degree as real life. Nevertheless, the error rate was high with an overall matching rate of only seventy percent.[25] This was in a controlled environment with both the subjects and good quality photos in front of the officers, as opposed to a street with varying lighting and recollection of a prior image.

Finally, the suggestion that we can stop the use and expansion of this technology is naïve. This is a hugely popular technology that is already part of a multi-billion industry. To put it simply, there is no way to get this cat to walk backwards. We may, however, be able to get this cat to walk down a path that we lay to balance the interests of law enforcement and privacy.

III. PRIVACY IN THE BIOMETRIC AGE

The rapid expansion of this technology has collided with a body of law that has changed little conceptually from early eavesdropping cases in defining privacy protections. FRT and biometric technology presents a quantum shift for privacy theory. Since FRT occurs in public, it falls into an area long treated as having minimal expectations of privacy. Indeed, it is technology that is perfectly suited to evade privacy protections. For those worried about a post-privacy world, FRT and biometrics could well be the expanding portal to that dystopia. That technology implicates the loss of freedom to move and interact in public space without fear of being recognized or tracked. That loss impacts the ability of individuals to freely form new experiences, associations, and viewpoints.

The result is that the two sides have adopted the most extreme positions. Privacy advocates have called for total bans which will never occur while some FRT developers and investors have dismissed privacy as a dated concept outstripped by technology.[28] The question is whether

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[24] David White, Richard Kemp, Rod Jenkins, et al., *Passport Officers' Errors In Face Matching*, PLOS One, August 19, 2014.

[25] *Id.* at 3.

[28] Kashmir Hill, *The Secretive Company That Might End Privacy As We Know It*, The New York Times, Jan. 18, 2020 (Investor David Scalzo with Kirenaga Partners quoted in 2020 as saying "I've come to the conclusion that because information

technology and privacy are now part of are now, truly a zero-sum games. I

If left to traditional views of privacy (including its general rejection of the concept of "public privacy"), biometric technology could expand exponentially and create the type of "fishbowl" or post-privacy world that civil libertarians have long feared. Instead, I suggest that the focus of biometric privacy should be the protection of democratic values of speech and association in public. Specifically, we need to focus on anonymity rather than privacy in seeking judicial and legislative solutions. Anonymity comes closer to capturing the value that we seek to protect: allowing people to move in public without recognition or potential tracking. As noted, the problem with anonymity as the focus for biometric privacy is that we are increasingly living in a nonymous rather than anonymous society. This is due to a myriad of products and practices embraced by consumers that use FRT and biometric technology. Accordingly, I suggest that it is not anonymity but obscurity that should be the focus of biometric privacy. The idea is that we can protect democratic values of public association and interactions by obscuring recognition even in an otherwise nonymous society. In this way, a right to obscurity in public movements can help create and maintain the type of "bounded rationality" needed for democratic expression and associations.

This is why I suggest a comprehensive legislative approach that regulates the use of this technology, including criminal provisions. They include the use of warrants for FRT searches as well as regulations on the storage and sharing of images. An analogy is drawn to the drafting of omnibus law on electronic surveillance, which came after the Supreme Court defined privacy protections with the expansion of electronic surveillance. Biometric technology requires an even more fundamental reconsideration of the interests that we need to protect in public, including "anonymity by obscurity" in public movements and associations.

The creation of a Biometric Privacy Act can rely on the limited relevant decisions on biometrics the way that Congress did after the Supreme Court's rulings on electronic surveillance. In *Berger v. New York,*[29] the Court reviewed the New York surveillance law and found

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[29] Berger v. New York,

various constitutional deficiencies that were then used as the foundation for Title III of the Omnibus Crime Control and Safe Streets Act, which was enacted into law. The specific provisions of such an Act are the focus of another work.[30] However, a few broad components of a Title 55 for biometric privacy are worth emphasizing.

As a threshold matter, any effort to create a protected space for biometric privacy would require the preemption of state laws. The Illinois Biometric Information Privacy Act (BIPA)[31] is a leading example of state experimentation in regulating this expanding market. Texas[32] and California[33] also have enacted laws with state limits and liabilities. As with command and control statutes like the Clean Air Act and market-based statutes like the Sherman Act, biometric privacy is an interstate problem demanding a single national approach. Biometric technology is used on the Internet and has a classic interstate profile for regulation by Congress. The worst possible approach to regulation is the creation of a patchwork of different state laws with different approaches to privacy protections.

A Biometric Privacy Act would have to include both limits on public and private uses of FRT and biometric technology. While the Supreme Court should extend Fourth Amendment protections to biometric searches with the attendant requirement of a warrant, Congress can also require such protections as it did with Title III. In this way, law enforcement would be allowed to have FRT and biometric capabilities but would require the showing of probable cause to use this technology to find a wanted felon. Thus, if the police have probable cause supporting the identification of a murder suspect, it could secure a court order to allow access to live FRT systems in locating the individual in public. A law would also stipulate conditions and protections governing government biometric databanks, limiting access and barring the transfer of data absent the satisfaction of defined conditions. A national legislative solution would also need to create a compatible regulatory platform with recent European regulations of biometric technology. There is currently a vacuum created by the lack of any comprehensive U.S. law on biometrics.

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[30] Turley, *From Here To Obscurity*, *supra* note 73.

[31] 740 ILL. COMP. STAT. 14/1-14/99 (2008).

[32] TEX. BUS. & COM. CODE ANN. § 503.001 (West 2017).

[33] CAL. CIV. CODE § 1798.198(a) (West 2018).

An EU-compatible act would also allow FRT and biometric technology to be used more effectively for identity authentication. While often portrayed as a technology inimical to individual rights and privacy values, FRT and biometric technology could play a critical role in greatly reducing identity theft and other crimes. Likewise, an act could further strengthen international standards for products to address concerns over erroneous identifications based race and gender.

I have proposed the outlines of a biometric privacy act that would protect individuals in their public movements and associations as well as their Internet associations.[34] However, before such protections are debated, we need to clearly define what we are protecting and why. The democratic value of anonymity cannot be seriously denied. The question is how to protect those democratic values when society is turning away from anonymity. The answer that I propose is to build FRT and biometric privacy protections around the model of obscurity. It is possible in a nonymous society to codify a level of obscurity (as opposed to anonymity). After all, the most important interest in anonymity is the protection of the democratic process and engagement.[35] By codifying a type of "anonymity by obscurity," we can create the guarantee sought by many citizens that the government will be allowed to gather recognition data on public events without a tailored and specific warrant seeking an individual.[36]

Such protections are premised on the basic need for human development and democratic processes to be obscure. FRT threatens to reproduce the "Hawthorne Effect"[37] exponentially – changing how not just

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[34] Jonathan Turley, *From Here To Obscurity: Conceiving A Biometric Privacy Act for an Anonymous Society* (forthcoming 2019).

[35] In the balancing of interests with privacy, the importance of privacy to the democratic process has rarely been weighted by courts or commentators. *But see* DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY 50 (2011); James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 7 (2003).

[37] The Hawthorne effect was named after an experiment at the Hawthorne factory in Chicago in 1924. The owners wanted to see if the level of lighting impacted productivity and, if so, what level of lighting was optimal. The research found a direct correlation to observation on human behavior, something he called "the Hawthorne Effect." *See* Steven D. Levitt & John A. List, *Was There Really A Hawthorne Effect at the Hawthorne Plant? An Analysis of the Original Illumination Experiments*, 3 AM. ECON. J. APPLIED ECON. 224, 229-36 (2011).

how citizens act but interact. Even the possibility of constant recognition and tracking can have a pronounced impact on personal development. Put another way, people have always lost themselves in a crowd. That invisibility allows them to observe in a way that would be chilled by observation.

With the onslaught of transparency-forcing technology, it is not clear if we can go back to true anonymity by obscurity in society. However, we can make recognition less chilling by limiting the use and sharing of biometric data by private and government parties. That may be the best that can be done when citizens themselves are surrendering anonymity. Presented with increasing threats of identity theft (and a poor government record in combating such crime), citizens view FRT and biometric technology as a way of protecting their own identities. As a result, recognition technology is becoming a part of modern life as privacy continues to evolve with social norms.

III. CONCLUSION

FRT and biometric technology presents an obvious threat to privacy and the political process. The technology promises transformative change in both legal and social realities for citizens. It will force us to deal with what we are working to protect in public forums. This is a distinctly descriptive or instrumental approach to privacy. However, it can better understand the specific threat of this technology that can be lost in the thrill of recognition programs from cellphones to airport security gates. The success of biometric products in society will soon become a menace to society if we cannot reach a consensus on what we can protect and how we can protect it.

Any progress on biometric privacy will require a comprehensive re-examination of what interests we are seeking to protect in our new nomymous world, including the limits of traditional privacy definitions. If that zone of safe interaction and exploration is lost, the impact on society – particularly democratic societies – could be as transformative as it is tragic.

Once again, thank you for the honor of appearing before you to discuss this important issue. I am happy to answer any questions that you might have on the underlying legal standards that apply to this controversy.

Jonathan Turley
J.B. & Maurice C. Shapiro Chair of Public Interest Law
George Washington University

Attorney Panel

William McSwain

United States Attorney for the Eastern District of Pennsylvania

William M. McSwain was sworn in as the United States Attorney for the Eastern District of Pennsylvania on April 6, 2018. As U.S. Attorney, Mr. McSwain is the chief federal law enforcement officer responsible for all federal criminal prosecutions and civil litigation involving the United States in the Eastern District of Pennsylvania, which is one of the nation's most populous districts with over 5 million people residing within its nine counties (Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton and Philadelphia counties), covering about 4,700 square miles. Mr. McSwain supervises a staff of approximately 300 personnel, including over 140 Assistant U.S. Attorneys, at offices in Philadelphia and Allentown.

Prior to his appointment as U.S. Attorney, Mr. McSwain was a partner at the law firm of Drinker Biddle & Reath in the firm's Philadelphia office, specializing in white collar criminal matters and complex business litigation. He served as an Assistant U.S. Attorney in the Criminal Division of the U.S. Attorney's Office for the Eastern District of Pennsylvania from 2003 to 2006. While an Assistant U.S. Attorney, he led grand jury investigations and subsequent prosecutions of violent crime, narcotics distribution and white collar crime, including tax fraud, corporate fraud, bank fraud, federal procurement fraud, embezzlement, money laundering, and computer network intrusion. While at the U.S. Attorney's Office, he was specially assigned to the Department of Defense in 2004 to be the lead staff investigator and Executive Editor of the "Church Report," a worldwide examination of military interrogation techniques in the Global War on Terror that was commissioned by Secretary of Defense Donald Rumsfeld and chaired by Vice Admiral Albert Church. Mr. McSwain clerked for the Honorable Marjorie O. Rendell, United States Circuit Judge of the United States Court of Appeals for the Third Circuit.

Mr. McSwain earned a B.A. in Economics, with honors, from Yale University in 1991. He earned his J.D. from the Harvard Law School in 2000, where he served as an editor of the Harvard Law Review. While at Harvard, he was a member of the winning team in the Ames moot court competition and received the George S. Leisure award as the Best Oralist in the Ames competition. Mr. McSwain currently serves as an Adjunct Lecturer in Law at the University of Pennsylvania Law School. Prior to law school, Mr. McSwain served as a U.S. Marine Corps infantry officer and scout/sniper platoon commander.

Mr. McSwain resides in Chester County, PA, where he was raised. He is the first Chester County native to hold the position of U.S. Attorney for the Eastern District of Pennsylvania.

William M. McSwain
United States Attorney, Eastern District of Pennsylvania
Testimony before the President's Commission on Law Enforcement
Panel on Respect for Law Enforcement and the Rule of Law
Tuesday, July 21, 2020

Introduction

Thank you, Chairman Keith and thank you to the Commission for the important work you are doing on behalf of the Department. It is an honor to be here today to provide testimony on the importance of respect for law enforcement and the rule of law in our country.

I have served as the United States Attorney for the Eastern District of Pennsylvania since April 2018, and my Office is one of the nation's largest U.S. Attorney's Offices. We serve a population of over five million citizens and cover a geographic area of roughly 4,700 miles across nine counties in southeastern Pennsylvania – Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, and Philadelphia counties. In addition to the suburban and rural areas within the District's borders, we serve five of Pennsylvania's eight major cities: Philadelphia, Allentown, Reading, Bethlehem, and Lancaster. In our District, the criminal behavior that we encounter runs the gamut, with a mix of issues to confront: big-city problems, small-town problems, and everything in between.

Despite these differences, every law-abiding citizen wants the same thing – to live in a community that is safe for themselves and their families. This is why this Commission's work is so critical: the study of crime, including its causal factors, is essential to reduce its prevalence.

President Trump's Executive Order establishing this Commission directed it to study "important current issues facing law enforcement and the criminal justice system."[1] One of the specific subjects identified for study was "refusals by the state and local prosecutors to enforce laws or prosecute categories of crime."[2]

Which brings me to the topic of this hearing and my testimony today. Though respect for law enforcement and the rule of law are broad concepts, my testimony today will primarily focus on one important and troubling recent development – that is, the undeniable fact that the rule of law and law enforcement officers are currently under attack in many parts of our nation. In many cities and counties across the country, so-called progressive prosecutors have been elected on an agenda of sending fewer people to jail, by whatever means necessary, and with little regard for the public safety consequences.[3]

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[1] Exec. Order No. 13896, 84 Fed. Reg. 58595 (2019), www.federalregister.gov/documents/2019/11/01/2019-24040/commission-on-law-enforcement-and-the-administration-of-justice.

[2] *Id.*

[3] *See* Emily Bazelon & Miriam Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. Times (Dec. 11, 2018), http://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html.

Philadelphia is, in many ways, ground zero for this experiment. But there are many other cities across the United States where the top local prosecutors are pushing progressive policies.[4] And in many of these cities, prosecutors are decriminalizing certain conduct, encouraging overly lenient plea bargaining,[5] firing career prosecutors who might not share their viewpoints,[6] and shifting significant resources into conviction integrity units,[7] among other significant policy changes.

My testimony today focuses on the work we have done in the Eastern District of Pennsylvania to serve as a counter-weight to some of the worst excesses of this movement. In the two-plus years I have served as U.S. Attorney, I have worked to restore a culture of respect for law enforcement and to uphold the rule of law and ensure that it is enforced in a consistent, impartial manner. I believe that the steps we have taken in the Eastern District of Pennsylvania can serve as a model for other federal districts that are facing the predictable rise in crime and chaos that results from radical "reform" policies.

Background

The Public Safety Crisis in Philadelphia and Its Root Causes

There can be no doubt that there is a public safety crisis in Philadelphia; one need only look to the staggering rise in serious violent crime in the past two-plus years as proof. The timing coincides with a decline in the number of local cases charged in several key categories and recently, a decline in the homicide clearance rate.[8]

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[4] *See* Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System is Fighting Back*, Wash. Post (Nov. 9, 2019), https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html. The nearly two dozen prosecutors who consider themselves in this category include Chesa Boudin (District Attorney of San Francisco, California); John Creuzot (District Attorney of Dallas County, Texas); Kim Foxx (State's Attorney of Cook County, Illinois (Chicago)); Eric Gonzalez (District Attorney of Brooklyn, New York); and Rachael Rollins (District Attorney of Suffolk County, Massachusetts (Boston)).

[5] *See, e.g.,* The Rachel Rollins Policy Memo (Mar. 2019), http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf. (last visited July 19, 2020).

[6] *See, e.g.,* Gabe Dreschler, *Why Did San Francisco's New District Attorney Fire Seven Prosecutors?*, KQED News, (Jan. 12, 2020), https://www.kqed.org/news/11795676/why-did-san-franciscos-new-district-attorney-fire-seven-prosecutors.

[7] Chicago District Attorney Kim Foxx revamped Cook County's Conviction Integrity Unit, which to date, has reversed convictions of over 20 defendants. https://www.law.upenn.edu/live/profiles/1248-kimberly-m-foxx/profiles/quattroneadvisory (last visited July 19, 2020).

[8] The Philadelphia District Attorney's Public Data Dashboard provides statistics relating to charges filed and outcomes across various types of criminal offenses. Examining the Year-to-Date Count of Cases Charged by Offense Category, as of July 17, 2020, the Dashboard reports that the District Attorney's Office charged 30% fewer cases overall as compared to the same time period in 2019. It also reports 20% fewer violent crime cases charged, 48% fewer drug cases charged, and 31% fewer retail theft cases as compared to the same time period in 2019. https://data.philadao.com/Charge_Report.html (last visited July 19, 2020). And in reporting case outcomes year-to-date (January 1, 2020 to July 17, 2020) as compared to the same time in 2019, the Dashboard reports a decrease in outcomes (defined as "the various ways a criminal case can end") in several key categories of cases charged. For example, in the category of violent offenses, case outcomes have decreased 53 percent. When broken down further,

In 2019, Philadelphia recorded its highest number of homicides since 2007, and more people were shot in Philadelphia in 2019 than in any other year since 2010, according to Philadelphia Police statistics. The 2020 numbers are on track to be even higher. As of July 12, 2020, there have been 227 homicides, a 28% increase from the same date in 2019, and 1,578 shooting incidents, a 55% increase from the same date in 2019. On Sunday, July 6, 2020, a staggering 23 people were shot across Philadelphia – the most in a single day in years. Of these victims, six of them died, including a six-year old boy.

These statistics undoubtedly establish the problem. And in Philadelphia and other large cities where murders and shootings continue to rise at an alarming rate,[9] one of the root causes is that criminals believe that there will be no consequences for their actions.

There are two main reasons why criminals think there are no consequences.

First, the local criminal justice system does not hold them fully accountable. Criminals bank on the fact that certain progressive policies – things like requiring assistant district attorneys to decline charges and to offer lenient plea deals in a broad swath of cases – will give them some breathing room to ply their trade.

Second, criminals believe they can commit crime without facing the consequences because the community is too often told that police are the enemy, which discourages witnesses from cooperating with the police and results in crimes remaining unsolved. Beyond the negative impact that mistrust of police has on rank and file morale, there are grave consequences to the community. Such mistrust also results in deadly assaults on police officers – of which unfortunately, Philadelphia has had its fair share recently.

The culture of disrespect for law enforcement was on full display in front of a national audience this past August when Maurice Hill, a convicted felon with a long rap sheet, opened fire on Philadelphia police officers as they attempted to execute a search warrant. This confrontation left six officers wounded and a neighborhood in North Philadelphia traumatized. It is a miracle that every officer survived this attack.[10]

In March of this year, the Philadelphia police were not as fortunate. On March 13, 2020, Philadelphia Police Sergeant and SWAT member James O'Connor was gunned down while trying to arrest Hassan Elliot, a known affiliate of a dangerous drug gang who was wanted by local authorities for murder and multiple other offenses.[11]

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case outcomes in the category of robberies with a gun are down 65 percent; and homicide outcomes are down 62 percent. https://data.philadao.com/Case_Outcomes_Report.html (last visited July 19, 2020).

[9] Safia Samee Ali, *Gun Violence Is Surging in Cities, and Hitting Communities of Color Hardest,* NBC News (July 9, 2020) (discussing rise in shootings and homicides in Philadelphia, Chicago, and other major cities), https://www.nbcnews.com/news/us-news/gun-violence-surging-cities-hitting-communities-color-hardest-n1233269.

[10] *Statement by United States Attorney William M. McSwain on the Shooting of Six Philadelphia Police Officers* (Aug. 15, 2019), https://www.justice.gov/usao-edpa/pr/statement-united-states-attorney-william-m-mcswain-shooting-six-philadelphia-police.

[11] *Statement of William M. McSwain Regarding the Murder of Philadelphia Police Corporal James O'Connor* (Mar. 16, 2020), https://www.justice.gov/usao-edpa/pr/statement-us-attorney-william-m-mcswain-regarding-murder-philadelphia-police-corporal.

And just last month, 27 Philadelphia Police Officers were injured after a period of violence, rioting, and looting that swept across several sections of Philadelphia. What began on May 30, 2020 as peaceful protests concerning the death of George Floyd turned violent, and over the course of several days, officers sustained injuries ranging from chemical burns, head injuries, and broken bones.[12] One officer was hospitalized after suffering severe damage to his upper body – a crushed shoulder and broken ribs – when a woman drove over him when protesters turned violent during a demonstration that look place at Seventh and Chestnut Streets – steps away from Independence Hall and my Office.

As tensions continue to mount between the police and the public, police officers remain on their heels, which gives violent criminals the room to operate that they seek. Criminals literally think they can get away with murder, shootings, looting, and rioting. And in many cases, they are.

EDPA's Response to the Rise in Violent Crime and Culture of Lawlessness

The U.S. Attorney's Office for the Eastern District of Pennsylvania is committed to stemming the wave of violent crime that is occurring in parts of our District. This section highlights the ways in which my Office has worked to promote the rule of law and respect for law enforcement.

1. Increase Focus on Violent Crime Prosecutions

The first strategy my Office has employed is to increase our violent crime prosecutions District-wide. For example, in Fiscal Year 2019, our Violent Crime Unit charged the largest number of cases in all of the Criminal Division Units in my Office. We charged 208 violent crime cases, as compared to 136 the year before, which represents a 53% increase.

And in Philadelphia's most dangerous neighborhoods – police districts that are designated as "Project Safe Neighborhood" hot spots – federal prosecutions continue to rise. Project Safe Neighborhood (PSN) is a collaborative effort by federal, state, and local law enforcement agencies, prosecutors, and communities to deter and punish gang and gun violence. The Department of Justice's PSN Strategy requires each District to identify PSN "target areas" with the highest violent crime rates and adopt cases for federal prosecution in those areas. In the Eastern District of Pennsylvania, our PSN target areas are all located in police districts in Philadelphia. In Fiscal Year 2019, my Office charged 143 violent crime and illegal gun possession cases (against 195 defendants) in PSN target areas as compared to 82 cases (against 92 defendants) charged in the previous year. That amounts to a 72% increase in the number of PSN cases this Office pursued and a 112% increase in the number of defendants prosecuted.

To manage the increase in caseload, the Office has dedicated additional resources to our Violent Crime Unit. In addition to adding multiple Assistant U.S. Attorneys to the Unit, this past year, we earmarked our District's PSN grant funds to hire two experienced prosecutors from the

[12] *See* Fox29 News, *Commissioner: 768 Arrests, 27 Officers Injured in Continued Violence in Philadelphia* (June 7, 2020), https://www.fox29.com/news/commissioner-768-arrests-27-officers-injured-in-continued-violence-around-philadelphia.

Criminal Law Division of the Pennsylvania Attorney General's Office who are stationed full-time in our Violent Crime unit, working solely on cases in the PSN target areas. We are currently in the process of hiring a third full-time attorney. These cross-designated Special Assistant United States Attorneys have served as a force multiplier in our fight against rising violent crime.

2. Seize Opportunities to Take on High Impact Cases that Serve Deterrence

My Office has also been involved in a variety of impactful criminal and civil cases and remains at the forefront of many important areas of federal law enforcement. In the face of the uncertainty created by district attorneys and city leaders who advocate pro-defendant policies, it is important for federal prosecutors to show the public – law abiding citizens and would-be criminals alike – that federal law enforcement will step in to fill the law enforcement vacuum. Doing so has an important deterrent effect.

For example, my Office charged a criminal case against Jouvan Patterson, who shot and nearly killed a Cambodian store owner in South Philadelphia with an AK-47 during a store robbery. We charged Patterson federally after he received an overly lenient plea deal from local authorities. Even though the victim is confined to a wheelchair, the plea deal he received on the state charge could have meant that Patterson would serve as little as 3 ½ years in prison. He faces a much longer, more appropriate sentence in our case.

In the wake of statements by Philadelphia leaders that suggested plans of leniency toward the rioters and looters who turned peaceful protests over George Floyd's death into mayhem, my Office has offered a swift response. For example, we charged Lore-Elisabeth Blumenthal with two counts of arson after allegedly setting two Philadelphia police cars on fire in front of City Hall on May 30. We have also brought charges against defendants accused of taking advantage of the unrest by, among other things, blowing up ATM machines and burglarizing banks, and we have many active, ongoing investigations that we expect will lead to many more arrests.

In the civil context, my Office filed a civil lawsuit to prevent the opening in Philadelphia of the first-ever supervised heroin injection site in the United States. Those who support such injection sites – including some city officials – are attempting an end-run around the federal Controlled Substance Act (CSA). The case is currently on appeal before the U.S. Court of Appeals for the Third Circuit, and we expect a decision later this year.

3. Communicate Support of the Police and Share Our Deterrent Message with the Public

The progressive prosecutor reform movement has garnered significant media attention across the country. The best way to counter disrespect for law enforcement and the rule of law is to publicly challenge those who promote an anti-law enforcement culture. It is important for federal prosecutors to speak out when public safety is at risk and to support our federal, state, and law enforcement officers whenever possible.

One of the first things I did when I began my tenure as U.S. Attorney was to form a new unit called the Office of Public Affairs and External Engagement (OPAEE). OPAEE is designed to promote transparency with the community, foster relationships with law enforcement stakeholders and the public, and work with community groups on deterrence initiatives and crime prevention.

My Office has increased transparency in a number of ways. For example, I appear and speak to civic, legal, and law enforcement groups whenever possible, and I take every opportunity to publicly communicate my steadfast support of the police. When significant local events occur that have a negative impact on law enforcement efforts, I share my views with the community we serve. In addition, I recently launched an anti-violence campaign across the District to deter violent crime by raising public awareness about the types of federal criminal charges that can be brought when firearms are involved. The campaign, #fedcrimegetsfedtime, features public service announcements encouraging would-be offenders to put the guns down and make the right choice for their future.

Conclusion

As senior Department of Justice officials, U.S. Attorneys have a platform and a voice to stand up for the rule of law and respect for law enforcement, which go hand-in-hand. We should use that platform responsibly and forcefully and serve as a counter-weight to so-called "reform" policies that threaten public safety. As Attorney General Barr has put it, the first duty of the government is to protect the safety of our citizens. The law is the foundation of our society, and we at the Department are the caretakers of the law. By upholding the law, we make possible the common life of our nation and the freedom, safety, and equality under the law that define our country.

McGregor W. Scott

United States Attorney for the Eastern District of California

For McGregor Scott, California is home. He was raised in Eureka and received his B.A. from Santa Clara University in 1985 and his J.D. from Hastings College of the Law in 1989. From 1989 to 1997, he served as a deputy district attorney in Contra Costa County before serving as the elected District Attorney of Shasta County from 1997 to 2003. While in Shasta County, Mr. Scott headed the prosecution of two brothers whose hate-filled ideology led them to kill a homosexual couple near Redding. Mr. Scott served his first term as U.S. Attorney for the Eastern District of California from 2003 to 2009. During Mr. Scott's first term, the office led the nation in civil actions to recover damages against companies that cause wildfires in National Forests.

In 2009, Mr. Scott joined the law firm of Orrick, Herrington, & Sutcliffe LLP as a partner, focusing on white collar criminal defense and corporate investigations. In addition, in 2008, Mr. Scott retired from the U.S. Army Reserve as a lieutenant colonel after 23 years of service. In December 2017, he returned to serve a second term as the U.S. Attorney for the Eastern District, which today has 97 congressionally authorized attorney positions and offices in Sacramento, Fresno, and Bakersfield. Mr. Scott has focused on the environmental devastation caused by cartel marijuana grows in our National Forests, keeping guns out of the hands of violent criminals, human trafficking, and working with community leaders to establish a federal halfway house in Sacramento.

Testimony of McGregor W. Scott, United States Attorney for the Eastern District of California, representing the United States Department of Justice

On February 7, 2020, I participated as a panelist at a Hastings College of Law (my *alma mater*) symposium entitled "Progressive Prosecution and the Carceral State." At a day-long event, I was the only presenter who any way called into question the wisdom of elected district attorneys adopting the "progressive prosecutor" model by subjectively choosing which laws to enforce, placing a higher value on the perpetrators of crime than on the victims of crime, and ignoring that it is minority communities that are disproportionately victimized by violent crime. The following is a summary of my prepared remarks at the symposium.

At the outset, I have spent the great majority of my legal career as a prosecutor – deputy district attorney, elected district attorney, and two terms as United States Attorney. I embrace the concept of being a progressive prosecutor. The people in my office work hard every day to make the criminal justice system better, fairer, and more just for all involved. The guiding doctrine I repeat to my lawyers regularly is that our job is to do the right thing for the right reasons. We fully support reentry courts, better choices court, and veterans' court. Over the last year, I have personal led the effort to site a Bureau of Prisons Residential Reentry Center in Sacramento. We have longstanding, regular and ongoing outreach to various communities such as houses of worship of all faiths and our Sacramento Hate Crimes Task Force. We have provided training regarding active shooter incidents at schools, how to protect our children on the internet, and the dangers of opioids, among others. Thus we completely embrace the concept that the role of the prosecutor is not limited to the courtroom, but rather is to protect and improve the community we serve.

I strongly disagree, on the other hand, with the current popular idea of "progressive prosecution" because at its base level it undermines the rule of law. The progressive prosecutor model as practiced in cities like Baltimore, Boston, San Francisco, Chicago and others has four fundamental flaws: 1) it usurps the constitutional role of the legislative branch; 2) miscasts who the prosecutor represents in a criminal case; 3) causes violent crime rates to go up, especially in minority communities; and 4) and forgets crime victims.

John Adams famously wrote that "[O]urs is a government of laws, not of men." This basic concept has been the bedrock of this nation since its inception. In the "progressive prosecutor" view, however, that concept has been turned upside down and in those jurisdictions we have "[A] government of men or women, not of laws." We have all learned the basic concepts of our constitution and thus the rule of law: the legislative branch creates the law, the judicial branch interprets the law, and the executive branch enforces the law. When a "progressive prosecutor" announces that he or she will stop prosecuting a whole category of crimes, rather than exercising prosecutorial discretion on a case by case basis, he or she has usurped the constitutional role of the legislative branch. If you want to change the law, run for the state legislature, not district attorney. California is replete with examples of district attorneys and the Governor simply ignoring the law and doing what they think is "right," rather than following our constitutional system and respecting the rule of law.

A fundamental miscasting of the role of the "progressive prosecutor" is that the district attorney does not represent the defendant. By all means, the prosecutor has legal and ethically obligations to ensure the constitutional rights of the defendant are protected at all times, but this is an adversarial system. The defendant has his own counsel and it is the role of the

prosecutor to represent the community. The website of the California District Attorneys' Association website includes this statement: "The primary role of the District Attorney is to protect the community he or she is elected to serve. District Attorneys represent the public and endeavor to improve the public safety by prosecuting those who threaten the well-being of the community and its citizens by breaking the law. Ultimately a District Attorney strives to improve the community he or she represents by making it a better place to live for everyone."

This is why criminal cases in state court, for example, are captioned *People of the State of California v. Defendant; State of Maryland v. Defendant;* and *Commonwealth of Massachusetts v. Defendant.* The District Attorney represents the state against the defendant and does not represent the defendant. "Progressive prosecutors" have all too often lost sight of this fundamental concept. A follow-on effect is that victims of crime are forgotten by the District Attorney. There are any number of widely publicized cases across the nation where the victim was completely forgotten because the "progressive prosecutor" was too focused on protecting the defendant.

In 2018 and 2019, after a multi-year increase, there was a general decline in the homicide rate nationwide. In contrast to that nationwide trend, many jurisdictions with "progressive prosecutors" saw a dramatic increase in homicides. For example, In Philadelphia, in District Attorney Larry Krasner's first year in office, homicides increased 11%, to the highest level in more than a decade. In 2019 they were up again, and in 2020 they are up yet again. In Baltimore, homicide rates have risen each year since 2015, which was the first year of State's Attorney Marilyn Mosby's term. In 2019, Baltimore experienced the highest number of

homicides per capita **ever.** In 2020, the numbers are up again. Mr. Krasner and Ms. Mosby are, of course, two of the more famous "progressive prosecutors" in the United States.

The additional tragedy of these increasing homicide rates is the simple fact that when violent crime rates go up, members of minority communities are disproportionately affected. In Philadelphia, in 2018, 92% of homicide victims were African-American or Hispanic. In Baltimore, in 2018, 93% of homicide victims were African-American. These "progressive prosecutor" policies resulted in enhanced victimization of minority communities. The present calls to "defund the police" will only exacerbate this tragedy. From all public reporting, shootings and homicides have dramatically increased in several major cities across the nation thus far this year, involving a disproportionate number of minority victims. More minority victims of violent crime; is that really what we want?

"Ours is a nation of laws, not of men." This is the legal concept which has separated us from nearly all other nations in the long history of the world. It is the concept that makes all else possible in this nation. We are all too rapidly in too many places in this nation moving away from this bedrock concept of our country. Let us stop that slide for the sake of our nation.

Nicholas A. Trutanich

United States Attorney, District of Nevada

Nicholas A. Trutanich is the U.S. Attorney for the District of Nevada. He was nominated by President Donald J. Trump and unanimously confirmed by the U.S. Senate. Prior to January 2019, Mr. Trutanich served as the First Assistant Attorney General and Chief of Staff at the Office of Nevada's Attorney General.

As U.S. Attorney, Mr. Trutanich oversees all criminal and civil cases brought on behalf of the United States in the District of Nevada. He supervises an office of over 100 staff professionals and Assistant U.S. Attorneys (AUSAs), prosecuting cases involving white collar crime, violent and organized crime, cybercrime, terrorism, narcotics trafficking, public corruption, and civil rights violations, as well as a wide range of affirmative and defensive civil litigation, including asset forfeiture, financial litigation, and programs fraud. Mr. Trutanich contributes to several leadership roles in the Department of Justice, including serving on the Attorney General's Advisory Committee and on a working group for the President's Commission on Law Enforcement and the Administration of Justice.

As Nevada's First Assistant Attorney General and Chief of Staff, Mr. Trutanich led nearly 400 state attorneys, staff professionals, and criminal investigators.

Mr. Trutanich previously served as an AUSA in the Central District of California, where he handled complex grand jury investigations and criminal prosecutions, including mortgage fraud, money laundering, identity theft, tax fraud, and national security. Mr. Trutanich volunteered to detail to Iraq as the Deputy Justice Attaché, where he counseled and supervised law enforcement partners. When Mr. Trutanich moved to Nevada in 2014, he was the Deputy Chief of the Violent and Organized Crimes Section.

After law school, Mr. Trutanich started his legal career as a litigator at an international law firm, and clerked in the U.S. District Court for the Central District of California.

Mr. Trutanich received his undergraduate degree from University of California, Davis (B.S., Managerial Economics) and his J.D. from Georgetown University Law Center.

Written Testimony of Nicholas A. Trutanich

Title: United States Attorney for the District of Nevada
Organization: United States Department of Justice

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Thank you for the honor of sharing my thoughts and experiences about promoting a strong rule of law, as well as my recommendations for the Commission's consideration. I believe my statements today will likely reinforce a fundamental point that many of you already appreciate: Our approach towards building and defending a strong rule of law must balance efforts and resources across a broad spectrum of institutions and stakeholders. The public has put its trust in both our institutions and the individuals who work within them to humbly and faithful exercise the power that has been yielded to them by the people.

The rule of law not only serves as the foundation of our criminal justice system, but it is also the linchpin of our entire constitutional system of government. Since her founding, America has continually fought to uphold her most cherished responsibilities. For example, in 1794 (an era before local police departments, where the most critical law enforcement was carried out by federal soldiers backed by state militias), Pennsylvania militiamen unnecessarily killed two citizens on their way to suppress the Whiskey Rebellion. The killings prompted a reprimand from Alexander Hamilton to the Pennsylvania governor. Writing on behalf of President George Washington, Hamilton expressed "poignant regret" over the incident, noting that brutality undermines the cause of free government:

> It is a very precious & important idea, that those who are called out in support & defense of the Laws, should not give occasion, or even pretext to impute to them infractions of the laws. They cannot render a more important service to the cause of Government & order, than by a conduct scrupulously regardful of the rights of their fellow Citizens and exemplary for decorum, regularity & moderation. The vindication of the just authority of the laws, by effectual yet legal means, will not be neglected; but all good Citizens must unite in the wish that none other may be employed.

Applying those principles to our times, in the wake of protests raising real and legitimate concerns over the death of George Floyd, there was acknowledgment across our country that we must protect the right to join with others in peaceful assembly regarding police misconduct. At the same time, however, it was disappointing to see the civil unrest caused by agitators and instigators who hijacked and exploited peaceful demonstrations for their own (often radical) agendas.

Like many Americans, I welcome a frank and renewed national conversation about rule of law. I'm grateful for the work of this Commission in facilitating that conversation, as robust debate is a very American thing to do.

My own perspective on the rule of law has been shaped by my career as a public servant and prosecutor. Serving on assignment with the Department of Justice's Office of the Rule of Law Coordinator, as its deputy justice attaché in Baghdad, had a great impact on my opinions about rule of law. After arriving in Iraq in 2010, I quickly came to understand that there is nothing more important to a functioning rule of law than the physical safety and security of the citizenry. As the U.S. Armed Forces reduced its footprint, Iraqis turned to domestic law enforcement to secure their newfound freedoms.

I saw that freedom and law enforcement are far from mutually exclusive, contrary to what some people are suggesting these days. Indeed, without laws and brave individuals to enforce them, there cannot be freedom. In the violent and anarchic power vacuum in postwar Iraq, families cowered in fear and felt powerless because violence could come from any direction at any time: including in their schools, markets, and mosques.

Whereas the U.S. Armed Forces' mission was to suppress insurgent violence, the Department of Justice's goal was to promote respect for Iraq's rule of law across all functions of its fledgling democratic government. We worked with Iraqi judges, police officers, and government officials on the gamut of rule of law issues, such as counterterrorism cases,

criminal procedure questions, and the exchange of ideas with prison wardens about custodial reintegration programs. Critically, I saw first-hand that the rule of law also depends on principal actors subordinating their personal interests to the solemn duties and responsibilities of the offices they held.

Most importantly, I came to understand that citizens can never truly be free when they live in fear. The fear struck by deadly sectarian violence and the fear struck by arbitrary enforcement (or non-enforcement) of the laws are actually quite similar — particularly in how they can promote distrust in prosecutors and the justice system. As Baron de Montesquieu put it, "[t]here is no tyranny more cruel than that which is exercised within the shade of the law and with the colors of justice."

That sentiment continues to resonate today, including in inner cities that are experiencing the most violence. In the mid-2000s, as an Assistant United States Attorney who focused on going after predatory organized crime, my years in the courtroom, together with the opportunity to learn from juries and witnesses, taught me an important lesson: Communities beset by violence yearn for effective and comprehensive law enforcement, perhaps even more other communities. Using both violence and the threat of violence, I've seen how gangs terrorize the neighborhoods they control. And with each overlooked or unaccounted-for offense, violent criminals grow stronger and more emboldened. Meanwhile, the community's wellbeing declines.

Of course, this does not mean that neighborhoods suffering from violent crime should be over-policed. Rather, the key takeaway in my view is that communities suffering the scourge of violent crime would benefit from lasting partnerships of trust with law enforcement. Partnerships built on trust are necessary because we've seen how communities are less likely to cooperate with law enforcement when they: (a) lack confidence in their government's promises of safety, instead viewing the criminal justice system as ineffective or

inattentive; and/or (b) consider law enforcement to be an overaggressive or antagonistic occupying force.

When I was working as an Assistant United States Attorney, a notoriously violent criminal street gang maintained control over northeast Los Angeles. As the violence became more and more intolerable, local, state and federal law enforcement partnerships sprang into action. More than 140 gang members were indicted on federal racketeering statutes, helping a besieged community. That task force also solved numerous "cold cases" involving homicides, attempted murders, and other violent crimes.

During the sentencing hearing for one of the gang's most violent members, after he was convicted of what had been a previously-unsolved attempted murder, the victim — who was shot in the face years earlier, losing an eye — addressed the judge. From counsel table, I saw the victim look directly at the defendant and say: "I stand here with half of a skull and no eye, but I am proud to see clearly that justice will be served today." The victim then asked God to have mercy on his assailant's soul. Many years later, this instance still sticks out in my mind because it illustrates how, despite having suffered so much, the victim's faith in the justice system was vindicated and inspired our team to work even harder on the community's behalf.

Against the backdrop of these experiences, I respectfully propose the following three recommendations for the Commission's consideration to build and defend a strong rule of law in our country:

1. Community leaders and law enforcement should consider forming partnerships, involving regular meetings attended by executive-level officers, to build and maintain trust. Among other things, such meetings would allow law enforcement to solicit feedback from community leaders, and continually reinforce that the safety of the community (not arrests or convictions) is law enforcement's highest priority. In my current role as the U.S. Attorney for the District of Nevada, I have been very impressed by the close partnerships that local, state, and federal law enforcement agencies — particularly the Las Vegas Metropolitan Police Department — have forged with our communities.

2. Law enforcement should continue striving to provide a baseline of security for our communities. By working with the community to hold offenders accountable, law enforcement helps bring closure to victims and reinforce the community's trust in the justice system. When violence recently broke out in Nevada — including the shooting of a Las Vegas Metropolitan Police Department officer, the firebombing of a squad car, and a plot to attack protestors and police by violent extremists — our office was proud to be able to coordinate with our law enforcement partners to quickly investigate and work with the community to hold lawbreakers accountable.

3. Accountability must likewise be imposed on prosecutors and law enforcement officers who allow personal or political agendas to interfere with their oaths to uphold the law. A prosecutor who disagrees with a law must do what every other concerned citizen should: Work with the legislative branch to potentially change the law. But allowing prosecutors to refuse to enforce the law — or do so only in the manner that she or he personally sees fit — significantly undermines rule of law principles.

Like any policy, the rule of law will stumble unless sustained by the confidence of the majority. Put another way, it needs the broad voluntary support of the vast majority of citizens, both outside of law enforcement and those working within law enforcement. A lasting, genuine rule of law cannot be imposed merely though force, fines, or criminal penalties. Instead, an enduring rule of law rests on the choice of citizens to obey what they consider a just body of law: we want people to adhere to the law because they know that it serves and safeguards them. I hope that my recommendations help achieve that goal.

Thank you very much for the opportunity to share my thoughts, experiences, and recommendations. I look forward to any questions the Commission may have after my verbal testimony.