

## Statement of Commissioner Gail Heriot

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 exposed their neglect in his influential 1944 book, *An American Dilemma: The Negro Problem and Modern Democracy*:<sup>984</sup>

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.<sup>985</sup> . . . Yet the Southern Negro community is not at all happy about this double standard of justice in favor of Negro offenders. Law-abiding Negroes point out that there are criminal and treacherous Negroes who secure immunity from punishment because they are fawning and submissive toward whites. Such persons are a danger to the Negro community. Leniency toward Negro

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<sup>984</sup> Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 551 (1944).

<sup>985</sup> Myrdal wrote that he could personally attest to a few cases of a white upper class person obtaining a lenient sentence for an African American accused of a crime against another African American. Myrdal at ch. 26, note 15. He also quotes as an example of Southern attitudes Progressive reformer Edgar G. Murphy, who wrote in 1904: "Petty crimes are often forgiven him, and in countless instances the small offences for which white men are quickly apprehended are, in the negro, habitually ignored. The world hears broadly and repeatedly of the cases of injustice, it hears little of those more frequent instances in which the weaknesses of a child-race are accorded only an amused indifference or a patient tolerance by their stronger neighbors." Edgar G. Murphy, *Problems of the Present South* 176 (1904), quoted at Myrdal, ch. 26, note 16.

Myrdal quotes a letter he received from a white lawyer in the Upper South: "... I have noted that cases between Negro and Negro are handled somewhat differently than cases between white and white. I mean a spirit of levity, an expectation of something 'comical' appears to exist. The seriousness in the white vs. Negro case is decidedly lacking. As you know, it is a rare case indeed in which a Negro who has murdered a Negro receives the extreme penalty, either death or life imprisonment here, regardless of the facts. Only the other day in a local case a Negro who murdered another with robbery as motive, a charge that would have been as between white and white, or Negro and white victim, good for the electric chair, was disposed of by a jury with a 15-year sentence. The punishment as between Negro and Negro, as distinguished from white vs. white, or Negro vs. white victim, is decidedly different and clearly shows the racial approach to the question. In short the court-room feeling is that the Negro is entirely inferior, with punishment for crimes by him against his own kind punished with less punishment than when the white man is involved." Letter of June 19, 1940 in Myrdal at ch. 26, note 14.

defendants in cases involving crimes against other Negroes is thus actually a form of discrimination.

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 crime. For law enforcement authorities to leave one part of the population without the full protection of the law was not the least bit "friendly." It was a travesty.<sup>986</sup>

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 not enough better. During the 1960s and 1970s new approaches to crime and law enforcement were being discussed and experimented with across the country. Alas, much of it was wrongheaded. A good example is Karl Menninger's 1966 *The Crime of Punishment*, which argued that *all* punishment is cruel and useless and that criminal behavior should instead be treated as mental illness. As Menninger saw it, those who asked us to spare a thought for the victims were being "melodramatic" and "childish" and appealing only to the "unthinking."<sup>987</sup>

To read Menninger today is itself punishment. Here's a sampling:

*I suspect that all the crimes committed by all the jailed criminals do not equal in total social damage that of the crimes committed against them.*<sup>988</sup>

And there is one crime we all keep committing, over and over. . . . We commit the crime of damning some of our fellow citizens with the label "criminal." And having done this, we force them through an experience that is soul-searing and dehumanizing.<sup>989</sup>

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<sup>986</sup> Yet one doesn't hear much about it today. Instead, the law enforcement issue we tend to learn about from history is the practice of lynchings. Lynch mobs were indeed a horrific problem that deserves to be discussed, but lynch mobs were by no means the only crime-related problem for African American communities in the Jim Crow South. It isn't even clear they were the most important problem. Without close examination of the historical record, it is impossible to say which caused the greater harm to African American communities: lynch mobs or law enforcement officers who don't care about the safety of entire communities. Fortunately, there is no need to decide: They were both horrors.

These days school children tend to come away with the impression that lynching was overwhelmingly a Southern practice and that it was used against African Americans exclusively or nearly so. But lynching was a frequently used practice in the West as well, where African Americans were by no means the only victims. See Ken Gonzales-Day, *Lynching in the West: 1850-1935*; Lisa Arellano, *Vigilante and Lynch Mobs: Narratives of Community and Nation* (2012); Stephen J. Leonard, *Lynching in Colorado 1859-1919* (2002).

<sup>987</sup> Karl Menninger, *The Crime of Punishment* 9 (1966).

<sup>988</sup> *Ibid.* at 28 (italics in original).

<sup>989</sup> *Ibid.* at 9.

The inescapable conclusion is that society secretly *wants* crime, *needs* crime, and gains definite satisfactions from the present mishandling of it! We condemn crime; we punish offenders for it; but we need it. The crime and punishment ritual is a part of our lives. We need crimes to wonder at, to enjoy vicariously, to discuss and speculate about, and to publicly deplore. We need criminals to identify ourselves with, to secretly envy, and to stoutly punish. Criminals represent our alter egos—our “bad” selves—rejected and projected. They do for us the forbidden, illegal things we wish to do and, like scapegoats of old, they bear the burdens of our displaced guilt and punishment—“the iniquities of us all.”<sup>990</sup>

As Menninger's and similar views become common among policymakers, incarceration rates dipped, while crimes rates soared, especially in African-American neighborhoods in large cities.<sup>991</sup> Meanwhile, he was given many honors, including the Presidential Medal of Freedom by President Jimmy Carter.<sup>992</sup>

Were African Americans of that era as keen as Menninger and his disciples on reducing the level of incarceration for criminal wrongdoing? In *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment*, Professor Michael Javen Fortner demonstrates that most were not. In the Preface to the book, Fortner makes it clear that his interest in the subject 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.”<sup>993</sup>

Fortner's book, however, is not a memoir. Rather, it meticulously documents that while African Americans were not at all monolithic 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

<sup>990</sup> Ibid. at 153 (italics in original).

<sup>991</sup> At the same time the number of psychiatric inpatients declined precipitously from a high of over 550,000 in 1950 to around 30,000 by the 1990s. Megan Testa and Sara G. West, *Civil Commitment in the United States*, 7 *Psychiatry* (Edgmont) 30, 33 (Oct. 2010). As a result, many of those who in an earlier day would have been institutionalized in psychiatric hospitals wound up in prisons instead or on the street. Estimates of exactly how many vary widely. Seth J. Prins, *The Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 *Psychiatr. Serv.* 862 (2014). But today's incarceration rates are surely influenced by the near absence of psychiatric inpatients in the American systems. This makes incarceration rate comparisons with other countries where psychiatric inpatients are more common hopelessly flawed.

Menninger very much favored the de-institutionalization of psychiatric inpatients. Interestingly, that de-institutionalization and the corresponding incarceration of many mentally ill individuals created common ground between the average American and Menninger: There are certainly some prisoners today who would be more effectively dealt with as psychiatric patients.

<sup>992</sup> *Karl Menninger, 96, Dies; Leader in U.S. Psychiatry*, N.Y. Times (July 19, 1990).

<sup>993</sup> Michael Javen Fortner *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment* x-xi (2015).

that it would be “very helpful” or “somewhat helpful.” A near majority also agreed that “tougher police policies” would be a good thing.<sup>994</sup>

Polling data in this context has obvious limitations. More important, Fortner shows that during the 1970s, African-American grassroots leaders in New York pushed for more intervention from the police, not less. Among the many statements and events he discusses to support his point is a well-attended public hearing on crime held at Harlem’s Salem Methodist Church. The hearing was opened with these words by the chairman of the Harlem Youth Opportunities Unlimited and Associated Community Teams (HARYOU-ACT):

I charge the Mayor and the Police Commissioner with gross neglect of our community in failing and refusing to provide adequate police protection to Harlem as they do to white areas. This neglect is criminal. Perhaps 200,000 angry black residents will have to march on City Hall and Police Headquarters to protest this criminal neglect, and to say to the Mayor and the Police Commissioner just how angry we are, to provide equal protection for our law-abiding citizens who are daily being mugged, raped, assaulted, molested and killed by a small but effective band of criminal who have made us prisoners in our own homes.<sup>995</sup>

Sometimes leaders went beyond pushing for more police protection. On a different occasion, Waldaba Stewart, an African-American state senator from Brooklyn, argued for vigilantism: “If [the crime problem] is bigger than police then we must organize vigilante operations and arm ourselves in defense of our home, our families, and our children. . . . I have reached the place where I am on the verge of being the leader of the proposed vigilante group. . . . I don’t want to— but something has to be done.”<sup>996</sup>

Others argued against vigilantism, but nevertheless in favor of strong police measures. Fortner writes, for example: “Vincent Baker, author of the 1969 NAACP crime report that embraced the death penalty and stop-and-frisk, among other punitive strategies, regretted that there ‘is an embryonic vigilante movement in this community. It’s cropping up all over. Tenant groups are arming themselves.’ While he recognized a feeling of ‘anarchy and complete helplessness against marauding hoodlums,’ Baker considered such efforts anathema to his ‘law and order’ campaign. . . .”<sup>997</sup>

Fortner shows that 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

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<sup>994</sup> *Id.* at 155.

<sup>995</sup> *Id.* at 188-89.

<sup>996</sup> *Id.* at 187.

<sup>997</sup> *Id.* at 188.

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 association, 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. . . .<sup>998</sup>

Changing the drug laws in New York did not immediately put a dent in crime rates nationwide (and I will leave it to others to judge whether it was a significant factor in controlling crime in New York). But there is no doubt that it was a significant part of the crime-fighting agenda of African-American leaders in New York at the time. In an opinion piece in the *New York Law Journal*, Charles Rangel, the Member of the U.S. House of Representatives from Harlem, called for President Nixon to wage war on the drug trade here and abroad.<sup>999</sup> Rangel, with the full support of the Black Caucus, was a leading voice in Congress for get-tough drug legislation at the national level into the 1980s. Nevertheless rates of violent crime did not peak until the early 1990s.<sup>1000</sup>

The good news is that violent crime has decreased dramatically since that time. This has benefited everyone, but it has especially benefited African Americans. When law-abiding people don't need to be constantly worrying about crime, they can spend their time achieving their own goals instead. 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.

Small differences between living and working in a safe place and a not-so-safe one must be multiplied by the millions of individuals who benefit. The result has been an overwhelming change for the better. Every day individuals of all races and ethnicities are added to the middle class—maybe not as quickly as we'd like—but they get added. They succeed. Every day the black middle class in particular gets larger.

The reasons for this steep decline in crime since are complex. Some of it is that the average American is a little older than in 1990. Violent crime is largely a young person's game. (Is it wrong

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<sup>998</sup> *Id.* at 212-13.

<sup>999</sup> Charles B. Rangel, *Addiction Epidemic in Harlem*, *New York Law Journal* (July 6, 1971).

<sup>1000</sup> See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 *J. Econ. Perspectives* 163, 166 (2004).

for a member of the U.S. Commission on Civil Rights to point out that young people commit more violent crimes than older people? Of course not.) Some of it is that crime-solving technologies and other law enforcement techniques have improved. But a large reason is people of all races and communities got fed up and saw to it that our public policies changed. As a nation, we made the decision to use incarceration more often than we had in the 1960s and 1970s, not just for drug offenses, but for all offenses, particularly violent ones. We hired more police officers.<sup>1001</sup> Menninger's notion that the dominant response to crime should be therapeutic lost favor.

We haven't exactly reached the Promised Land. There is still plenty of crime in the country, and lives continue to be ruined on account of it. The number of violent crimes today is roughly twice what it was in 1960 per 100,000 persons. And, of course, the financial cost and social cost of incarceration should not be ignored in evaluating our present position.

Significantly, especially for this Commission, it remains the case that African Americans are, on average, more likely to be victimized by crime than others. For example, while African Americans are only about 13%<sup>1002</sup> of the population, they are about 43% of the murder victims<sup>1003</sup> and 22.4% of the victims of violent crimes generally.<sup>1004</sup>

Why then aren't African Americans still demanding greater police protection? A significant part of the answer is that they are. As Heather Mac Donald stated in her written testimony to the Commission:

Go to a police community meeting in Harlem, the South Bronx, or Central Brooklyn, and you will invariably hear some variant on the following requests: "We want the dealers off the corner." "You arrest them and they're back the next day." "There are kids hanging out on my stoop, why can't you arrest them for loitering?" "I smell weed in my hallway, can't you do something?" I met an elderly cancer amputee in the Mount Hope section of the Bronx who was terrified to go into her lobby to get her mail because of the youth hanging out there trespassing and selling drugs. The only time she felt safe was when the police were there. "Please, Jesus," she said, "send more police!"<sup>1005</sup>

There is certainly no reason to believe that Mac Donald's observation applies only to New York. My strong suspicion is that requests for more police protection—from people of all races—are made at community meetings with police in Chicago, Oklahoma City, and Santa Ana and indeed in every city. They just don't seem to make the news.

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<sup>1001</sup> See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. Econ. Perspectives 163, 184 (2004).

<sup>1002</sup> United States Census Quick Facts, available at <https://www.census.gov/quickfacts/fact/table/US/PST045217> (giving % of population that is black or African American only.)

<sup>1003</sup> FBI: Uniform Crime Reporting, "2015 Crime in the United States," *supra* note 106. Figures for recent past years are extremely similar.

<sup>1004</sup> Crime Victimization, 2014, Bureau of Justice Statistics, available at <https://www.bjs.gov/content/pub/pdf/cv14.pdf> (August 2015, rev. September 29, 2015)(App. tbl. 6).

<sup>1005</sup> Written Testimony of Heather Mac Donald, 3-4.

Maybe that is in part a consequence of the decline of journalism, particularly at the local level. Not many of the dwindling number of reporters left on the local beat can spend their time at community meetings with police. There just aren't enough of them left on the payroll. Instead, too often, reporters have to let the news come to them. News ends up being constructed out of press releases. If you don't have a publicist working for you, your story may not get told.

Meanwhile more and more of our news comes from organizations and foundations that function at the national rather than the grassroots level. It therefore gets filtered, sometimes consciously but more often unconsciously, to suit the goals of those organizations and foundations and the individuals who run them.<sup>1006</sup> Big stories sometimes get missed entirely.<sup>1007</sup>

The same is true of political activism more generally. Activism guided by national organizations and foundations is different from grassroots activism. Their leaders tend to be college graduates whose experiences are very different from the typical American's or from the kind of individuals they are trying—usually in good faith—to represent. Inside-the-beltway civil rights organizations, for example, tend to be staffed by lawyers and other professionals who have never lived in a high-crime neighborhood. Issues like voting law and affirmative action at the college and university level tend to be of great importance to them. And it is understandable why this would be so. They themselves have benefited from a college education, and they see that experience as crucial to their own success. The fact that their organizations are located in or near the nation's capital suggests that their work tends to include lobbying Congress. For lobbyists, getting to right people elected to office is generally a prime concern.

Such organizations have the resources to draw a newspaper's or radio station's attention to a need for increased police protection if they so desire. But it is not the kind of story to which they are likely to give priority. It also invites the question, "Why are African Americans victimized at such high rates?" That inevitably leads to the answer that, for a variety of demographic, historic and economic reasons, African Americans are not just disproportionately the victims of violent crime, they are also disproportionately likely to commit violent crimes. That's a story these organizations may be reluctant to tell.<sup>1008</sup>

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<sup>1006</sup> Hal Pashler & Gail Heriot, *Perceptions of Newsworthiness are Contaminated by a Political Usefulness Bias*, 5 Royal Soc. Open Sci.172239 (2018).

<sup>1007</sup> Raise your hand if you are a college graduate who resides inside the beltway *and* you accurately predicted well before Election Day that Donald Trump would be elected President of the United States in 2016. A significant number of those who read this report will fall into that basic demographic. Only a tiny number of them saw the 2016 election returns coming. This is what I mean when I say that big stories sometimes get missed entirely.

<sup>1008</sup> What are those reasons for that reluctance? One of them is likely the understandable fear that when this fact is brought up, it will cause listeners to be less sympathetic with all African Americans. Of course it shouldn't. Americans pride themselves on their ability to judge people as individuals. But one can sympathize with the reluctance of civil rights organizations to dwell on the negative.

Another reason may be related to socio-economic class. In general, the individuals who set priorities for civil rights organizations are fairly well off. They often don't live in the neighborhoods that are hardest hit by crime and may not identify as closely with the victims of crime as someone who does.

Yet it's a true story, and it is important to discuss criminal justice issues with our eyes open. According to FBI statistics, 52% of all homicides between 1990 and 2008 were committed by African Americans.<sup>1009</sup> In 2013, the figure for robbery is 66.9% and for kidnapping/abduction, 37%.<sup>1010</sup>

Part of it is that African Americans are, on average, younger than whites. Another part is that African Americans are more likely to be low-income or unemployed. But those factors don't account for all of difference in crime rates. Part of it, no doubt, has to do with African Americans' unique history in this country. We live in a complex world, but it is ordinarily better to face those complexities head on rather than ignore them.

It is worth noting that African Americans were not the first ethnic group to come along with higher than average rates of social pathologies (nor are they the only such group now). One hundred and fifty years ago, it was Irish Americans.<sup>1011</sup> That changed. There is no reason that African

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On the other hand, I suspect few things are as infuriating for an African-American professional as being pulled over by a police officer for no apparent reason. This could make it easier for them to identify with what is no doubt a very real experience: Law abiding African Americans, especially young men, essentially have a "tax" levied upon them because of their skin color.

<sup>1009</sup> See Alexia Cooper and Erica Smith, *Homicide Trends in the United States, 1980-2008*, Bureau of Justice Statistics (November 2011), <https://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

<sup>1010</sup> See *Offenders Race by Offense Category, 2013*, <https://ucr.fbi.gov/nibrs/2013/table-pdfs/offenders-race-by-offense-category-2013>.

<sup>1011</sup> These days to be Irish American is to be a member of the "majority." But it was not always thus. Irish immigrants and the first few generations of Irish Americans had a difficult time.

Direct comparisons between the histories of African Americans and of Irish Americans are not possible. But by all accounts, nineteenth-century Ireland—from which Irish immigrants to this country fled by the boatloads—was a remarkably dismal place even before the Great Potato Famine. As Gustave de Beaumont, traveling companion to Alexis de Tocqueville, wrote in the 1830s: "I have seen the Indian in his forests and the Negro in his chains, and thought, as I contemplated their pitiable condition, that I saw the very extreme of human wretchedness; but I did not know then the condition of unfortunate Ireland." See Andrew M. Greeley, *That Most Distressful Nation: The Taming of the American Irish* 34-35 (1972).

With the famine, things took an almost unimaginable turn for the worse in Ireland. In a remarkably short period of time, the potato, Ireland's staple crop, essentially disappeared. One and half million, half-starved souls were cast upon American shores in the years between 1845 and 1855. And these were the lucky ones. Out of Ireland's population of eight million, one million died.

When these immigrants got off the boat, most were illiterate, unskilled and ill-equipped for urban life. Not everyone sympathized with their plight. Friedrich Engels, who fancied himself a champion of the workingman, regarded the Irish immigrant to Great Britain as having a "crudity" that "places him little above the savage." For work requiring skill or patience, Engels complained, "the dissolute, unsteady, drunken Irishman is on too low a plane." Here in America, many agreed with Engels. "No Irish" signs went up.

I would like to be able to say that each and every Irish American struggled heroically against all these obstacles, refusing to let his or her dignity or sense of responsibility flag for even a moment. Of course, that would be true of some of them. But not everyone is a hero. That why most of us should thank our Creator that circumstances have never put us to the test; real human beings can be disappointing. Irish neighborhoods had more than their share of crime, prostitution, and other urban pathologies. Family abandonment was more common among the Irish than



Americans or any other group should remain marginalized forever. The process of integration into the mainstream has been well underway with African Americans for decades now. You wouldn't know it from the wild statements that get made in the media, but slowly and sometimes fitfully, it has been working.

All of this leads me to the point I want to make about the present debate over the criminal justice system. And by "debate over the criminal justice system," I mean the debate over incarceration rates, police shootings, police practices in general, the death of Michael Brown, the Ferguson, Missouri riots, the Black Lives Matter movement, the death of Freddie Gray, the Baltimore riots, and much more. *There is far too much one-sidedness in this debate.*

One of the best examples of this is the failure to acknowledge African American victimhood and the need to ensure that the African-American community receives adequate police protection.<sup>1012</sup>

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among other immigrant groups at the time. And in 1914, more than a half century after the first great wave of Irish immigration, about half of Irish families living on the West Side of New York were still (for that and other reasons) without fathers.

Yet despite all these difficulties, things worked out. A group that suffers from higher than average social pathologies today will not necessarily be the one that is still suffering later on.

See, e.g., Thomas Sowell, *Ethnic America: A History* (1981); Patrick J. Blessing, *Irish in The Harvard Encyclopedia of American Ethnic Groups* 524-45 (Stephan Thernstrom, Ann Orlov and Oscar Handlin, eds.) (1980); Andrew M. Greeley, *That Most Distressful Nation: The Taming of the American Irish* (1972).

<sup>1012</sup> Part of the one-sidedness stems from misinformation. Commissioner Kirsanow's Statement in this report discusses the misinformation in connection with the death of Michael Brown—misinformation that led to riots. Unfortunately, it is not the only example of the epic effects of misinformation in this debate.

Another example was the death of Trayvon Martin. This led to a panic over "Stand Your Ground" laws that has still not completely subsided. See Elliott C. McLaughlin and Amir Vera, *Florida's "Stand Your Ground" Law Is "a License to Kill Black People," Attorney Says*, CNN (July 25, 2018) available at <https://www.cnn.com/2018/07/24/us/florida-stand-your-ground-fatal-shooting/index.html>.

The debate has become surreal.<sup>1013</sup> No sensible policy decisions can be expected to arise out of such a corrupt discourse.<sup>1014</sup>

I don't doubt that there have been police abuses. In order to do their jobs, police officers must have power. Wherever there is power, there will be abuses of power. That is why it is important to avoid concentrating more power than is necessary in anybody's or any institution's hands (a topic that all Americans should think about regularly.) Fortunately, the overwhelming majority of police officers want to do their jobs right. (They would probably also like a little credit for the heroism that they must routinely engage in, and I cannot blame them for that.)

I also don't doubt that there are ways to improve police practices so as to better protect the rights of those suspected of crimes and of bystanders. There is always room for improvement. I am

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<sup>1013</sup> Part of the one-sidedness stems from taboos. On November 27, 1993, the Rev. Jesse Jackson told an audience at a meeting of Operation PUSH in Chicago: "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery. Then turn around and see somebody white and feel relieved." "We've got the power right now to stop killing each other," Jackson said then. See Mary A. Johnson, *Crime: New Frontier—Jesse Jackson Calls It Top Civil-Rights Issue*, Chicago Sun-Times (November 29, 1993)(quoting Jackson's remarks at a meeting of Operation PUSH in Chicago on November 27, 1993). See also Mike Royko, *Jesse Jackson's Message Is Too Advanced for Most*, Baltimore Sun (December 3, 1993).

I recently ran across an exchange on an internet message board among several individuals. One asked whether Jackson had ever apologized for the statement. Another opined that Jackson meant it as a confession that even he could harbor racist thoughts and an illustration that such thoughts are wrong. See <https://boards.straightdope.com/sdmb/showthread.php?t=559631>.

I can't help but wonder if he or any other African-American leader would be able to make that statement again today without a deluge of criticism.

<sup>1014</sup> In the last few years, it has become fashionable among intellectuals to argue that our prison system is deeply racist. Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*—a New York Times Bestseller—is a good example. In the book's introduction, Alexander wrote that she had recently come to suspect that the criminal justice system "was not just another institution infected with racial bias but rather a different beast entirely." "I came to see," she wrote with a dramatic flair best reserved for fiction, "that mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow."

Hyperbolic rhetoric has always been fashionable among intellectuals. I suppose it helps sell books. A few things need to be said about Alexander's claim: No one would deny that racism rears its ugly head in our criminal justice system from time to time. But any suggestion that it is "strikingly similar to Jim Crow" is wrongheaded.

Those who suggest that racial disparities in arrests or incarceration are attributable in significant part to race discrimination should remember this: (1) If racial disparities in arrests were attributable to race discrimination, one would expect the worst disparities to occur in connection with minor crimes, where the chance of getting away with a false accusation is greatest. But the worst disparities are with murder, where the motivation for making a false accusation and the likelihood of getting away with one are at their lowest; (2) If racial disparities in incarceration were attributable to race discrimination, one would expect those disparities to be most pronounced in the state popularly viewed as most racist (i.e. the states of the old Confederacy); but precisely the opposite is true. Using the statistics provided by the Prison Policy Initiative, I calculated that Minnesota and Vermont are among the top five states in terms of racial disparities in rates of incarceration. Alabama and Mississippi are among the bottom five. See Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race-Ethnicity*, Prison Policy Initiative (May 28, 2014), available at <https://www.prisonpolicy.org/reports/rates.html>.

particularly optimistic about the use of cameras by police. Cameras are not perfect solutions to any problem. But they are very important partial solutions. They protect both police officers and the public. They have an important role to play in creating trust between police officers and the public.

Here's another one: I don't doubt that there may be ways in which the weight of our high incarceration rate can be lightened. I am not, however, optimistic that this can be done easily. I fear that those who believe that our incarceration rates can be significantly decreased without a corresponding increase in crime are being naïve.

My real doubt is in the country's present ability to enter into a thoughtful consideration of those issues. I am not hearing realistic discussions of the trade-offs involved. Until those discussions take place, I very much doubt that progress can be made. On the other hand, the likelihood that things can be made worse is very high.

It's not easy to insist *both* that police officers vigorously protect the public from crime *and* that they refrain from using force when they believe it is to be necessary for their own self-defense. Training is helpful, but all the training in the world will not resolve the underlying tension between those two aspirations. Instead, the more likely result is that police officers will avoid engaging with individuals they regard as dangerous.

*The decrease in crime over the last few decades has been an important achievement. Let's not let it slip through our fingers.*

#### ADDENDUM:

In response to the Statements of my fellow Commissioners, let me add the following:

I am not convinced that increased federal control over local police forces holds much promise except in the most egregious of cases. Seldom does adding layers and layers of bureaucracy on a problem improve it. Alas, the Commission does not have sufficient evidence to determine whether all or indeed any of the cases of federal intervention conducted by the Department of Justice mainly during the Obama Administration were justified.

Chair Lhamon and Commissioner Narasaki are apparently of a different opinion. They praise the Department of Justice's numerous interventions under Attorneys General Eric Holder and Loretta Lynch, while they chide the current Attorney General, Jeff Sessions, for following a policy of greater local control.

The efforts under Holder and Lynch usually involved an urban police department that received attention in the media for a particular police shooting or for a higher than average number of police shootings in a particular year. The Department of Justice would investigate the police department, sometimes bringing a lawsuit and sometimes not. It would then negotiate an agreement with the targeted police department, which would become a consent decree in those cases for which a lawsuit had been filed or a collaborative reform agreement in those cases for which there was no

lawsuit. Even the advocates of such agreements agree that “there is no question [they] are arduous and complicated.”<sup>1015</sup>

A typical such consent decree is the 110-page Cleveland decree. It requires Cleveland to have a DOJ-approved Independent Monitor to enforce the decree as well as a 13-member Community Police Commission, which must issue reports at least annually). Members of the Commission will be selected by a specially-constituted selection panel and will work with the (apparently already-existing) Community Relations Board and the District Community Relations Committees (renamed the District Policing Committees). The police department is also required to create a Force Investigative Team, a Mental Health Response Advisory Committee, a Force Review Board, and a Consent Decree Implementation Unit. Extensive training and recordkeeping duties were undertaken throughout the system. Put differently, layers and layers of bureaucracy were added.

Chair Lhamon and Commissioner Narasaki argue for this in different ways. Both ways, however, leave me unconvinced.

Chair Lhamon points to a graph that appeared in *Vice News*. The graph purports to show that, at police departments that have been subjected to DOJ consent decrees/collaborative reform agreements, the number of police shootings decreases. It further purports to show that at other police departments, the number has gone up and down with no clear net effect.

There are many problems with this chart. For example:

1. The *Vice News* article that the chart accompanies points out that the Department of Justice was invited to investigate Philadelphia precisely because it had high numbers of police shootings in a particular year. It is likely that, one way or another, many or most of the investigations were triggered by high numbers of shootings. If so, the chart is hopelessly flawed.

This is essentially a question of mathematical probabilities. Imagine a casino at which 100 gamblers operate 100 slot machines that randomly generate numbers 1 through 10. A number 10 is a big winner, while number 1 is a big loser. But whether one gets a 1 or a 10 or something in between is purely a matter of chance; it says nothing about one’s skill as a gambler. Consequently, if one were to take all the gamblers who got a 1 in the last round and subject them to intensive training in “gambling science,” it would not improve their chances of winning one iota. Nevertheless, they would appear to have improved dramatically, since the group, which had been selected on the basis of their poor performance in the last round, can be expected to achieve an average score of 5.5. It is simply a matter of regression to the mean. Meanwhile, the other 90 gamblers (whose average score was likely around 6 in the last round) can be expected to decrease slightly in score to the same 5.5).

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<sup>1015</sup> Sadie Gurman, Federal Overhauls of Police Departments Bring Mixed Results, Chicago Tribune (April 5, 2017)(quoting Chuck Wexler, executive director of the Police Executive Research Forum), available at <http://www.chicagotribune.com/news/nationworld/ct-federal-police-departments-overhaul-20170405-story.html>.

This may fully account for the results in the chart cited by Chair Lhamon.

2. Even if the decline in shootings is real rather than just the result of chance, it may be a bad sign rather than a good one. It may be a reflection of police disengagement (the “Ferguson effect”), which leaves high-crime neighborhoods less protected.
3. Strangely, four of the thirteen consent decrees/collaboration reform agreements included in the chart did not occur until the very end of the time period considered on the graph. These consent decrees/collaborative reform agreements cannot have been responsible for any decrease in police shootings during the period considered in the graph.
4. The article admits that the data for Philadelphia, the largest city subjected to a consent decree or collaborative reform agreement, largely drives the results. For all the reader can tell, it is the only city considered in the graph that managed to lower the number of police shootings. Because *Vice News* does not reveal the figures underlying its analysis, I cannot say for sure.

Commissioner Narasaki argues that police officials often appreciate federal interventions and includes several quotations to that effect in her Statement. There are at least three things Commissioner Narasaki is missing here. First, when a powerful federal agency is investigating someone, it's not uncommon for that someone to avoid complaining to the press. It may make them more vulnerable.<sup>1016</sup> Second, local governance is complex. Some individuals within the local police bureaucracy may indeed appreciate federal interventions, because it gives them an advantage in the competition for local resources. If the police chief can go to the mayor and city council and say, “You must give us more resources, because our consent decree demands more resources,” that is a good thing from the standpoint of the police chief. But it is not a good thing from the standpoint of local control. The mayor and the city council were elected to make the tough choices about how to allocate the local taxpayers' resources, not the police chief and not the Department of Justice.<sup>1017</sup> Third, the Department of Justice sometimes dispenses its own funds,

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<sup>1016</sup> Alas, this type of error is not uncommon. At a Commission briefing on federal government policy regarding bullying and harassment in K-12 schools, Russlyn Ali, the then-Assistant Secretary for Civil Rights at the Department of Education, testified about an OCR investigation that “Owatonna's superintendent, I'm pleased to say, said in the press when asked about this that the Office for Civil Rights, and we together with the Department of Justice, have made her school district better.” United States Commission on Civil Rights, Transcript of May 13, 2011 Briefing at 11. As I said to her then, “You've got to remember that, at a school district, the worst thing in the world that can happen to them is to have a giant investigation, which is often what happens. I was a little troubled by your quoting the school district, school board member praising the Department. Remember, they're under your authority.” Id. at 18-19.

<sup>1017</sup> As a law professor, I sometimes see a similar dynamic at work in the accreditation process. A disinterested observer might expect that law schools and the law school accrediting agency to have an adversarial relationship. But in general they do not. Law schools often are pleased when the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar requires them to make improvements. Those requirements can be taken to the central university and used to wrest greater resources for the law school. I strongly suspect the same dynamic is at work with medical schools, engineering schools and other components of universities as well as at police

which can make it very popular with local police chiefs. But that is how local control erodes, bit by bit. Federal control over the purse strings is not something to be celebrated.

Moreover, for what it's worth, I can quote several police officers and political leaders who do *not* favor these extensive interventions.

In Seattle, for example, according to *The Seattle Times*, Mayor Mike McGinn warned the Department of Justice's intervention could cost as much as \$41 million per year. He said the plan would put vital services at risk and that the Independent Monitor would function as a "shadow mayor," who could interfere with the city's ability to respond quickly to events.<sup>1018</sup>

New Orleans is similar. According to *Chicago Tribune*, the 2012 consent decree is expected to cost at least \$55 million and requires rank-and-file police officers to complete time-consuming paperwork rather than patrol the community.

Mike Glaser, president of the Police Association of New Orleans, has said that a relaxing of redundant oversight and reviews would help matters. More important, he has pointed out that excessive oversight can make officers more reluctant to act. They may think twice before approaching a suspicious person or making a traffic stop. Why make trouble for oneself?

"I'm not going to say that happens to everybody categorically," Glaser said. "But if you don't think that impacts the officer's behavior, you're naïve."<sup>1019</sup>

And then there is the special case of Chicago, where the Obama Administration had not yet completed the process of negotiating a consent decree when the 2016 Presidential election intervened. The Illinois Attorney General Lisa Madigan intervened by filing a separate lawsuit and negotiating a separate consent decree. Kevin Graham, president of the Fraternal Order of Police there, said in a statement that the proposed consent decree "is politically motivated and threatens both public safety and the well-being of our members." He excoriated the Illinois Attorney General for being unwilling to listen to police while being excessively willing to pay attention to "fiercely anti-police groups like Black Lives Matter and the American Civil Liberties Union."<sup>1020</sup>

Is it worth it to spend millions of dollars to bring an out-of-control police department of a major city under control (assuming it can be done in accordance with the rule of law)? Of course it is.

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departments being investigated by the Department of Justice. This is not evidence that the Department of Justice is not interfering with local control.

<sup>1018</sup> Steve Miletich, Jennifer Sullivan and Lynn Thompson, McGinn: DOJ Plan to Cost \$41M; but Feds Say That's 'Simply Wrong,' *Seattle Times* (May 14, 2012), available at <https://www.seattletimes.com/seattle-news/mcginn-doj-plan-to-cost-41m-but-feds-say-thats-simply-wrong/>.

<sup>1019</sup> Sadie Gurman, Federal Overhauls of Police Departments Bring Mixed Results, *Chicago Tribune* (April 5, 2017) available at <http://www.chicagotribune.com/news/nationworld/ct-federal-police-departments-overhaul-20170405-story.html>.

<sup>1020</sup> Ray Sanchez & Brad Parks, Draft of Reforms for Chicago Police Unveiled by Mayor, State Attorney General, *CNN* (July 27, 2018).

But that assumes a fact that has not been proven to us. We on the Commission cannot speak to the question of the performance of any of particular police department.<sup>1021</sup> That is not an inquiry we undertook. As a result, we cannot we opine on whether adding layers of bureaucracy will be a good thing or a bad thing in a particular case. Mercifully, we have not yet reached the point where bureaucracy is considered a good unto itself.

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<sup>1021</sup> In her statement, Chair Lhamon points out that she has experience with the Los Angeles police department back in 2002. However, I must point out that one of her statements seems to have inadvertently misstated something. She wrote, "As the U.S. Court of Appeals for the Ninth Circuit charitably phrased it, my clients had 'suffered from, and [were] likely to continue to suffer from, the unconstitutional police misconduct that forms the basis of the United States' suit against the City defendants.'" See *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9<sup>th</sup> Cir. 2002). The Court, however, was referring to Chair Lhamon's clients' *allegations*. It was not finding that those allegations were true. That opinion was simply about whether the District Court erred in failing to allow certain litigants (including Chair Lhamon's clients) to intervene. The Court ultimately found that that the Los Angeles Police Protection League should have been granted leave to intervene as of right. It further found that the District Court erred in the standards for determining whether the group that it referred to as the "Community Interveners" (Chair Lhamon's clients) should be permissively allowed to intervene. It therefore remanded for a re-determination of that issue. In the interim, however, the District Court had entered the consent decree without the participation of either the Los Angeles Police Protection League or the Community Interveners. On this matter, the Court held that "it was proper for the district court to continue to act in the case notwithstanding the intervention appeal because no stay was entered" and stated that its holding "does not require the district court to turn back the clock or rescind the consent decree." *Id.* at 404-05.

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