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My name is Andrew C. McCarthy. I am currently a senior fellow at National Review Institute and a contributing editor at *National Review*. From 1985 through late 2003 (but for a short break in service in 1998), I was an assistant United States Attorney for the Southern District of New York (SDNY), one of the Justice Department's busiest and most important district offices. I retired in 2003 as the chief assistant U.S. attorney in charge of the SDNY's satellite office (which oversees federal law enforcement in six counties north of the Bronx), a position I held for nearly five years. Over the years, I held various other supervisory positions in the Office, which involved training new federal prosecutors, advising law enforcement agencies, the formulation of office policy, and representing the United States before the U.S. Court of Appeals for the Second Circuit.

During my nineteen years as a federal prosecutor, I worked very closely with virtually all of the federal, state and local law

enforcement agencies in New York City and upstate. Indeed, because my responsibilities ranged from front-line participation in investigations and prosecutions to management duties involving approving charges, directing investigations, establishing policy, and enforcing policy guidelines, I had particularly close contact, from the street level to the top supervisory levels, with the Federal Bureau of Investigation (which is the lead federal agency in most criminal cases), the Drug Enforcement Administration (which is the lead federal agency on many narcotics investigations), and the New York Police Department.

Moreover, beginning shortly after the World Trade Center (WTC) was bombed on February 26, 1993, through the end of the years I was privileged to work for the Justice Department, I was deeply involved in national security and counterterrorism efforts. From 1993 until 1996, I was the lead prosecutor in charge of the investigation and prosecution of the terrorism cell of Sheikh Omar Abdel Rahman, which resulted in the convictions of numerous jihadists for conspiring to wage a war of urban terrorism against the United States – a war that included the WTC bombing and a subsequent plot to bomb New York City landmarks, and a war that has never ceased, as most recently demonstrated by last weekend's atrocious jihadist attacks in Paris.

I participated and provided advice in several other terrorism investigations after the Blind Sheikh prosecution. I also helped supervise the command post established near Ground Zero by federal and state law enforcement and national security agencies in the aftermath of the 9/11 attacks. Consequently, I worked closely with national security and intelligence agencies, at both the front-line and supervisory levels, particularly agents of the FBI's National Security Division (formerly known as the Foreign Counter-Intelligence Division) and the Joint Terrorism Task Force, which is run by the FBI and prominently features participation by the NYPD. Because of the grave threat jihadist terrorism poses, and the fact that New York City was (and to my mind, remains) the principal target of radical Islamic terror networks, I forged good working relationships with the NYPD's upper ranks.

My nineteen years as a prosecutor involved in law enforcement and national security matters is also informed by the years I spent working as a deputy United States marshal in the Witness Security Division (SDNY), as well as interning in the SDNY before I was hired as a prosecutor. Since retiring from the Justice Department in 2003, I have remained closely involved in law enforcement and national security matters as an author, commentator and analyst.

For example, I testified before a subcommittee of the Senate Judiciary Committee in support of the Real ID Act proposed by former Senator Jon Kyl. I also consulted with members of Congress in both parties in urging passage of the Patriot Act reauthorizations.

My combined experience has made it abundantly clear to me that state and local law enforcement, like federal law enforcement agencies, are profoundly affected – indeed, in many ways *controlled* – by policies made at the federal level, particularly by the Justice Department. Common sense tells us why this must be so.

State and local police agencies, in conjunction with the populations they serve, are the great force-multiplier in law-enforcement and intelligence-gathering. They dwarf the comparatively modest resources of federal law-enforcement in terms of personnel. In fact, to take an obvious example, there are roughly three times as many police officers just in New York City than there are FBI agents throughout the United States. Nevertheless, law enforcement has necessarily become more federalized in the last half-century as the U.S. Supreme Court and the lower federal courts have incorporated

many of the Constitution's federal civil rights guarantees against the States.

Federal criminal defendants are tried in U.S. courts by Justice Department prosecutors, and they appeal their convictions as of right in the U.S. appellate courts where the Justice Department represents the law-enforcement position. Moreover, after direct appeals have been exhausted, defendants collaterally challenge their convictions in habeas corpus review (under Section 2255 of Title 28) – and even state defendants can challenge their convictions and conditions of confinement (under Section 2254). Those collateral challenges generally involve claims that constitutional and otherwise fundamental rights have been violated.

The federal courts must dispose of questions involving police conduct in connection with investigations, searches and seizures, other investigative techniques, temporary detention, arrest, post-arrest statements, grand jury procedures, indictment, assistance of counsel, plea negotiations, trial rights, sentencing – the full gamut of the criminal justice process. Inexorably, the Justice Department must formulate guidance based on this developing jurisprudence, balanced against the demands of law enforcement and national

security. The Justice Department's policies, in turn, influence the way courts analyze cases – it is, in fact, a commonplace for courts to ask the Justice Department to weigh in on significant criminal justice questions.

To the growing extent that the principles implicated and refined in this process are derived from the Constitution, and that the courts apply the federal Constitution to the states, state and local law enforcement are necessarily affected by the judicial promulgation of federal standards and Justice Department policies designed to ensure compliance with those standards.

Furthermore, the last half-century has seen an increasing trend of federal-state cooperation. The Joint Terrorism Task Forces throughout the United States are, perhaps, the best-known example, but they are hardly unique. There have been similar cooperative arrangements in a plethora of crime areas – organized crime, narcotics trafficking, gang crime, civil rights enforcement, child pornography, political corruption, various forms of fraud, etc. In my experience, while states and their subdivisions are often anxious to participate in these joint efforts (which typically involve funding streams that would not otherwise be available to support state efforts), the efforts tend to be federal initiatives, supervised

by lead federal agencies – usually the FBI, but the DEA and other federal agencies, too. Naturally, if state agencies are going to participate in federally-led initiatives, there is an expectation that they must conform to federal practices.

In addition, as terrorism has been a continuous threat to the homeland for most of the past quarter-century, it has been imperative to improve channels of cooperation and communication between federal, state and local law enforcement. As already noted, state and local police, and the communities they serve, are the best sources of information regarding threats within our borders – the feds simply do not have comparable resources. Yet, while some larger police departments that protect and serve palpable terror targets (like the NYPD) have cultivated relationships with counterparts in foreign countries, the federal government must obviously remain the nation's leader in collecting national defense information from, and sharing it with, foreign governments and sources. So, again, it is only natural that states and municipalities who are given access to this vital intelligence are expected to conform to federal requirements regarding its use.

For the most part, this federal-state cooperation is an extraordinarily positive development for national security, good policing, and the rule of law. It signals the development of a consensus about what our basic civil rights are and how policing should proceed, balancing appropriate deference to liberty with the demands of protecting communities.

A large but often unnoticed reason why it has worked so well over time is that federal law enforcement officials, having served their local communities and partnered with local police, have developed (a) an appropriate respect for challenges confronting local police that are unique to their communities, and (b) an admiration for the sensible manner in which local police handle those unique challenges, informed by an intimate knowledge of their communities that cannot be replicated at the further remove of the federal level. The federal officials who are most effective serving the public in cooperative efforts with their state and local colleagues are the ones who recognize that the federal government's best role is frequently *a support role*, not a managerial one, and certainly not an overbearing one.

Because state and local police know their communities best and deal with members of their communities with exponentially more

regularity than federal law enforcement does, the Justice Department has traditionally understood that it has much to learn from police practices at the local level. Indeed, it was the expectation of the Framers – and the guarantee that they made when adoption of the Constitution was being debated – that law enforcement was and would remain primarily the responsibility of the states. That goes a long way towards explaining why Congress did not even establish the Justice Department until 1870, some 81 years after the start of constitutional governance, and why the Justice Department as we know it today did not exist until long after that.

It is the genius of the federal system that the best policing practices will evolve as different communities grapple with different crime problems, different threat environments, and different socio-economic circumstances. Because policing deals intimately with real life, and real life is dynamic, it often does not lend itself to antecedent guidelines and uniform standards.

This, of course, goes a long way toward explaining why the criminal justice system in the United States has always been based on prosecutorial discretion rather than a mandate that all statutes be enforced to the letter in all situations. One-size-fits-all policing

would be inappropriate in a moderate-size city; plainly, it would poorly serve a nation of over 300 million.

Policing at the state and local level over the past 20 years has not just been evolutionary, it has been revolutionary. Programs developed by the NYPD – and spread nationally – forged an intelligence-based rather than a reactive form of policing. It has focused on statistical analyses about the occurrence of crime, as well as intelligence-gathering regarding crime trends and criminal elements derived from lawful arrests for low-level crimes and lawful temporary detention based on reasonable suspicion (known as *Terry* stops – see *Terry* v. *Ohio*, 392 U.S. 1 (1968) – or "stop and frisk"). Streams of accumulated information gathered from interviews, arrests and searches, combined with input from informants and other lawful means of gathering information, have been used to target police resources to crime problems as they emerge, and divert or retarget those resources as circumstances change.

The result, over the last generation, has been a dramatic reduction in crime, in particular violent crime. As the Manhattan Institute's Heather Mac Donald recently observed, "crime dropped 50 percent nationally over the last two decades." In New York City, which

was ravaged by crime waves when I grew up in the Bronx in the 1960s and 1970s, murder fell by almost 80 percent, and other serious felonies by about 75 percent.

The intelligent policing strategy that contributed mightily to the reduction in crime is a good example of how the federal government can contribute positively to effective state and local law enforcement. The techniques used, while innovative, were all consistent with federal constitutional principles and with federal policy, especially that pursued in the 1980s to confront crime aggressively and to throw federal resources at organized crime, narcotics and gang activity.

A more unintended but still significant alignment of federal and state interests came in the area of national security. The terrorist campaign that began with the 1993 WTC bombing eventually culminated in the jihadist attacks of September 11, 2001. After those eight years, there came a realization at the national level that our priorities had to change: i.e., that it was more important to prevent catastrophic terror strikes from occurring than to content ourselves with prosecutions after mass-murder attacks occurred.

That meant moving to a counterterrorism strategy that prioritized intelligence-gathering and attempting to disrupt plots, from what had primarily been a law-enforcement posture of conducting post hoc investigations. It also meant recognizing that meaningful intelligence that might help prevent domestic attacks was much less likely to come from comparatively limited federal resources than from citizen vigilance (hence, the "if you see something, say something" ad campaigns) and engaged local police.

There is no question that this harmony of state and federal interests, as well as the federal encouragement of state vigilance in protecting the homeland, contributed significantly to the historic reduction in crime and the remarkable prevention of a 9/11 reprise – even though we know well that terror networks have worked tirelessly to attempt to attack the United States.

This brings me to the point that I would most like to stress to this afternoon.

There are many experts who are fully equipped, more so than I am, to provide the committee with (a) alarming statistics which illustrate that we are trending back towards the bad old days of rising crime, and (b) that this phenomenon is directly attributable

to a sea change in Justice Department policy – one that substantially discourages intelligent policing and puts police on the defensive; one that, for reasons I find hard to fathom, is more solicitous of criminals (including violent criminals) than of the communities (predominantly, minority communities) on which those criminals prey.

I believe it is imperative, however, to emphasize what I refer to as the "ethos of law enforcement agencies" and how that ethos is dictated by leadership at the Justice Department.

It is a reliable rule of thumb that prudent people do not like to live on the margins of their authority, which invites legal jeopardy. Consequently, there is virtually always a prophylactic layer around the literal rules and regulations that define a law enforcement agent's authority. It guides what is expected of the agent, as opposed to what the agent is permitted by law to do.

Sometimes this prophylactic guidance is written. For example, the U.S. Attorney's Manual has always set forth a disclaimer that the guidance in the manual does not and is not intended to create any enforceable claims or rights for criminal defendants and other potential litigants. The idea behind this disclaimer is that we would

prefer for federal prosecutors and the agents and police they advise to enforce the law comfortably within the limits of their power. We understand that, in appropriate circumstances, they may have to press the limits of the law – in exigencies, they may even have to test those limits. But we realize the letter of the law is indulgent of law enforcement because police operate clearly within the letter of the law the vast majority of the time. Encouraging them to do so projects the appearance of propriety, which promotes the rule of law.

Much of the time, though, the guidance law enforcement agents are given is not written down. Or, if it is, the guidance is vague, leaving much of the day-to-day application to the discretion of agency superiors – with the added benefit (for the authors of the guidance) of wiggle room to claim that a proper interpretation would have forbidden or permitted the controversial act that was or was not taken by police.

Let me be more concrete. In the mid-1990s, the Justice Department provided the FBI and federal prosecutors with guidance that became known, infamously, as "the wall." The wall was meant to control cooperation between criminal investigators, on the one hand, and national security agents, on the other. There was a

hypothetical fear that if criminal investigators lacked sufficient evidence to show probable cause for search warrants or wiretap orders, they could manufacture a terrorism angle that would enable them to use the same techniques under national security authorities that were arguably less demanding.

For various reasons, I – like some other prosecutors involved in terrorism cases at the time – contended this fear was unrealistic. Nevertheless, the specter of rogue agents using the Foreign Intelligence Surveillance Act (FISA) to authorize evidence collection that would not be permitted by the Fourth Amendment in ordinary criminal cases was sufficiently powerful among Justice Department leadership that regulations – the wall – were prescribed. They placed tight controls on the sharing of information between intelligence agents and criminal investigators.

Of course, if agents cannot combine information to develop a full threat mosaic, they are apt to miss plots, which in terrorism cases can lead to massive carnage. No one wants to be thought responsible for such a horrific thing, so naturally the wall regulations were written with enough wiggle room that the Justice Department could contend, in the event of a terrorist attack, that information should have been shared, but could also contend, in

the event that some hypothetical criminal case was "tainted" by FISA evidence, that the information should not have been shared.

Clearly, this disserved the agents who needed clear guidance in a complex legal thicket. Worse, though, was how the wall worked in practice – the ethos it created. What resulted was paralysis, as if there were, in fact, a bright-line prohibition against intelligence sharing.

Agents were working in a culture that told them, in no uncertain terms, that the only way they could get in trouble was by *cooperating* with each other. Of course the agents who were involved in terrorism investigations – whether on the law-enforcement or national security side of the FBI's house – understood better than anyone how reckless it was to forbid the left hand from knowing what the right hand was doing. No one benefitted except the terrorists, and the public was profoundly endangered.

As we now know from various government and media reports about the 9/11 attacks, the Justice Department's wall regulations led FBI headquarters to prevent intelligence agents and criminal investigators to collaborate when suspected terrorist Khalid al-

Midhar was discovered to have entered the United States in August 2001. Just a few weeks later, al-Midhar was part of the team of jihadists that piloted Flight 77 into the Pentagon, part of the operation in which nearly 3,000 Americans were killed. The 9/11 Commission report gently concluded that an agent primarily responsible for deciding, based on the wall regulations, not to permit information sharing in Midhar's case "appears to have misunderstood the complex rules that could apply to this situation." *9/11 Commission Report* (2004), pp. 269-71 & nn.

The point is that police take their guidance more from the manner in which guidelines are applied than from what the guidelines literally say. It could hardly be otherwise. Most police officers are not lawyers, and even those who have legal training are bound by the construction of rules dictated by the upper ranks of their agencies.

When the agency ethos informs police that taking enforcement action can, at a minimum, expose an officer to internal forms of discipline and derail the possibility of career advancement; and, in addition, may expose the officer to criminal and civil liability – entailing all the hardships of the criminal justice process, including the need to retain legal counsel, the public stigma of being

suspected of wrongdoing, and the anxiety of worrying about the financial and social well being of the officer's family, then inevitably there will be a drastic reduction in enforcement action.

There is abundant reason to believe that this is exactly what is happening in our country at the present time.

Let me address three reasons for the increasing police passivity.

First, the Obama administration has powerfully signaled in various ways that it is sympathetic to a demagogic narrative that depicts the nation's police as systematic violators of the federal civil rights laws.

This narrative essentially proceeds on a disparate impact theory, which holds that statistical disparities in the racial and ethnic make-up of people who are subjected to police investigative tactics are the result of police bias. This simplistic and deceptive method of statistical inference is itself systematically skewed: It fails to account for *criminal behavior* – as it occurs and as it is reported by crime victims, witnesses, and criminals who confess. When criminal behavior is accounted for, the fact is that employment of police investigative tactics – such as stop-and-frisk techniques – to

minority suspects actually under-represents their portion of the *criminal* population even if it over-represents their portion of the *general* population.

In any event, bias is a positive state of mind, not an unintended statistical outcome. To be sure, there are corrupt police officers. Where there is solid evidence that police have willfully violated civil rights, and especially when that solid evidence indicates decisions based on racial prejudice, it is imperative that such police officers be removed from the force – and there should be aggressive prosecutions toward that end to convey in the strongest terms that such abuse of power will not be tolerated.

In the absence of solid evidence, however, divining racial prejudice by statistical hocus-pocus or projecting it by demagoguery tells police that the safest course for their livelihoods is to refrain from enforcement action.

Since a great deal of crime involves minority offenders preying on minority communities, it is those communities that bear the brunt of police passivity. Assuming for argument's sake the good intentions of a civil rights enforcement approach that is hostile to police investigations of minority suspects, the approach ironically

harms the communities its advocates claim to champion – and the vast majority of law-abiding people are made to suffer for the benefit of law-breakers.

The second rationale for police passivity involves a pattern extremely destructive of effective law enforcement that the Justice Department has followed over the last seven years.

A tragic event occurs, such as the killing of a young black male during a conflict with a non-black male or a police officer in which the young male is at least partially if not primarily responsible. It will be patent that there is insufficient evidence of intentional killing or intentional deprivation of civil rights. Yet, minority community activists will demand prosecution.

Rather than help the communities understand that not all tragic events constitute federal criminal wrongs, the Justice Department and its Civil Rights Division convey the opposite message, appearing to confirm the activists' claims that violations have occurred – even pressuring state law enforcement agencies to embark on prosecutions based on insufficient evidence. Naturally, this fans the flames of community discord and, to my mind, has contributed to the unrest, rather than easing it.

Inevitably, it becomes obvious that no civil rights or other prosecutable violation occurred. Yet, while unable to bring a case in connection with the tragedy that drew its attention, the Justice Department exploits the controversy to commence a large-scale civil rights investigation not just of individual police officers involved in the tragedy but of the entire police department. This is done under a 1994 law known as the Violent Crime and Law Enforcement Act. It licenses the Justice Department to prosecute "any government authority" that it claims "engage[s] in a pattern or practice of conduct by law enforcement officers … that deprives a person of [federal] rights, privileges, or immunities." Crucially, it authorizes the attorney general to sue municipalities and their subdivisions civilly to "obtain appropriate equitable and declaratory relief to eliminate the [offensive] pattern or practice."

These investigations and the threat of civil suits have been used by the Justice Department to obtain effective control over police departments in numerous major cities and towns across the United States. While there can be little doubt that some real abuses that should be addressed turn up in these investigations – just as a thoroughgoing investigation of the Justice Department itself would

turn up abuses – the claim that these departments are systematically violating people's rights is absurd.

Nevertheless, Congress funds the Justice Department to the tune of nearly $30 billion per year and, to my knowledge, does virtually nothing to restrict how it uses these funds – including how the Civil Rights Division spends its share. Cities and towns are targeted for investigation on such allegations as "subjecting individuals to excessive force" – in particular, "using excessive force against persons of color" and "escalating situations and using excessive force when arresting individuals for minor offenses." The targeted municipalities either cannot afford to compete with the Justice Department's resources in waging a vigorous defense, or are governed by politicians sympathetic to the Justice Department's agenda (or both). For the most part, they surrender, entering consent decrees that mandate far-reaching changes in their procedure (to the more passive style of policing preferred by today's Justice Department).

Again, the message conveyed to police by the federal government is that the best way to stay out of harm's way is to minimize enforcement action.

Finally, a third rationale for police passivity is found in Justice Department corruption plainly intended to harm the rights of police officers.

The Justice Department has been cited by U.S. District Judge Kurt D. Engelhardt in Louisiana for intentionally corrupting the trial of New Orleans police officers involved in shooting deaths on the Danziger Bridge that occurred in what the court described as "the anarchy following Hurricane Katrina."

After the U.S. attorney's office indicted several officers on civil rights, firearms and obstruction of justice charges, the court made the shocking discovery that high-ranking federal prosecutors, under assumed names, were conducting a public smear campaign against the police defendants on the website of the New Orleans *Times-Picayune*. For example, they portrayed the NOPD as a fish "rotten from the head down."

The prosecutors concealed their corrupt conduct throughout the trial of the case. It was finally discovered afterwards – and only after Justice Department officials serially misled the court. Eventually, it emerged that complicit in the smear campaign, in addition to government lawyers in New Orleans, was Karla

Dobinski, a longtime veteran of the Civil Rights Division at Main Justice.

The district judge was sufficiently outraged by what he described as the "grotesque" and "appalling" Justice Department misconduct that he ordered the convictions reversed in a scathing 129-page opinion issued in September 2013. His ruling was recently upheld by the U.S. Court of Appeals for the Fifth Circuit. In its opinion, the appellate court observed that Ms. "Dobinski is disturbingly vague … about how many other people in her department were aware" of her participation in the smear campaign.

Astoundingly, it appears (to my knowledge) that no meaningful prosecutorial or disciplinary action has been taken by the Justice Department in this matter. Some implicated prosecutors resigned, some retired with their benefits intact, and – at least in August 2015, when I wrote about the case – Ms. Dobinski was reportedly still in her job at the Civil Rights Division, having received only a reprimand. (McCarthy, "The Justice Department's 'Grotesque' Misconduct against New Orleans Cops" (*National Review*, August 22, 2015) (http://www.nationalreview.com/article/422923/justice-departments-grotesque-misconduct-against-new-orleans-cops-andrew-c-mccarthy) (linking to relevant court opinions)).

In sum, in its public positions, legal actions, and corrupt misconduct, the federal government has powerfully communicated to the nation's police officers that they take great risks – risks well beyond the dangers their jobs innately entail – if they engage in lawful enforcement actions. It would defy common sense to believe that the notable increase in crime rates in many parts of the nation is unrelated to the demonstrable reduction in arrests and other enforcement action by police. They have been intimidated into passivity, and it is beginning to show – not yet like it showed from the 1960s into the 1980s, but the trend lines are ominous.

As last weekend's events in Paris showed once again, we are in a period of high risk. Terrorist enemies of the United States continue to threaten the homeland. We cannot afford to forfeit the astonishing national prosperity that has resulted from the heroic policing that caused crime to plummet for the last quarter-century. Nor can we afford the heightened national security peril caused by a lack of intelligence about our threat environment. But that is exactly what we invite when we fail to support good faith, lawful policing.