



SYMPOSIUM ESSAY

## Law and Order as the Foundational Paradox of the Trump Presidency

Trevor George Gardner\*

**Abstract.** This Essay scrutinizes the feuding between the Trump White House and various federal law enforcement agencies, concurrent with criminal lawbreaking in the Trump Administration, in an effort to extend scholarly understanding of the relationship between law-and-order politics and popular regard for rule-of-law principles. Sociolegal scholars have long argued that the politics advanced under the banner of “law and order” reduces the whole of the criminal–legal order to minority violent crime. In doing so, these politics stoke white racial anxieties regarding one or more racial minority groups. But under the Trump regime, law-and-order politics exhibited an additional benefit to its purveyors: obfuscation of the threat to the criminal–legal order posed by the very purveyors of these politics. This is to say that the criminal offending of the Trump campaign and Administration would likely have been more politically damaging to the Administration had much of the public not been fixated on Trump’s allegation of a rising tide of minority violent crime. Moreover, this same reductive logic has badly damaged the political standing of Black Lives Matter. It has often reduced the Black Lives Matter organization—effectively, a rule-of-law campaign targeting extra-legal police violence—to the limited instances of violent crime found at the margins of Black Lives Matter protest activity.

---

\* Professor of Law, Washington University in St. Louis School of Law. This Essay was written for the 2021 *Policing, Race, and Power* Symposium hosted by the *Stanford Law Review* and the Stanford Black Law Students Association, and for the cross-journal *Reckoning and Reformation Symposium*. Thanks to Jessica Eaglin, Chad Flanders, Eisha Jain, Andrea Katz, Tracey Meares, Shaun Ossei-Owusu, Brian Tamanaha, Aaron Tang, Guy Uriel-Charles, the *Stanford Law Review* editorial staff, and the Stanford Black Law Students Association for helpful feedback on various drafts of this Essay, and to Matt Suddarth for research support.

**Table of Contents**

Introduction .....143

I. The Paradox .....145

    A. American Carnage .....146

    B. In the Shadow of Law and Order .....148

        1. Select criminal charges and convictions.....149

        2. Pending criminal investigations.....151

        3. Uncharged criminal conduct .....152

        4. Attacks on the legitimacy of the FBI and Department of Justice .....153

II. Decline of the Criminal–Legal Order .....156

III. The Legibility of Black Lives Matter .....158

    A. Black Lives Matter as a Rule-of-Law Campaign.....158

    B. Black Lives Matter as a Threat to the Criminal–Legal Order .....159

Conclusion.....161

## Introduction

How did the Trump presidential campaign manage to advance a viable law-and-order politics in 2016 despite media reports of criminal lawbreaking within the orbit of the campaign? How did President Trump sustain these politics over the course of his presidency while persistently condemning the nation's foremost criminal enforcement institutions?

This Essay proposes a conceptual overlay by which to improve scholarly understanding of the relationship between law-and-order politics and rule-of-law principles.<sup>1</sup> It argues first that law-and-order politics tends to reduce the notion of *order* to the violent crime committed by racial minorities. Sociolegal scholars have characterized the law-and-order campaign as, in significant part, a political tactic based on implicit appeals to white racial bias.<sup>2</sup> But the Trump

- 
1. The “rule of law” has been described by legal philosophers as the notion that state actors and citizens are “obligated to abide by the regime of legal rules that govern their conduct.” Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 469 (2007). The rule-of-law regime is also, in part, rule by legal norms, “norms whose meaning is not so obscure or contestable as to leave those who are subject to them at the mercy of official discretion.” Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 NOMOS 3, 4 (2011).
  2. See, e.g., MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 2 (2005) (“Law and order thus became the vehicle by which urban whites transmitted their antipathy to neighborhood integration and fear of racial violence from the municipal to the presidential arena”); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 247 (2007) (“[Conservatives] attached civil rights to lawlessness by arguing that civil disobedience flouted laws and would inevitably lead to more lawless behavior”); Amy E. Lerman & Vesla M. Weaver, *Race and Crime in American Politics: From Law and Order to Willie Horton and Beyond*, in OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION 41 (Sandra Bucerius & Michael Tonry eds., 2014) (discussing how stereotypes regarding black criminality are often used for political gain); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 41-42 (1997) (describing 1960s conservative political strategies, including “appealing to racial fears and antagonisms. . . and the use of coded antiblack campaign rhetoric (e.g., law-and-order rhetoric)”); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 54 (2014) (“By making black violence (against whites) the barometer of progress, liberals doubly abnegated structural law-and-order—once in the circumscribed definition of violence, and once again in the mismeasure of racial justice”); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 50 (10th anniversary ed. 2020) (“The rhetoric of ‘law and order’ was first mobilized in the late 1950s as Southern governors and law enforcement officials attempted to generate and mobilize white opposition to the Civil Rights Movement”); RANDALL KENNEDY, RACE, CRIME AND THE LAW 4 (1997) (“For some politicians, the law and order slogan has served as a thinly veiled code with which to signal sympathy for and solidarity with whites upset by the social, political, and cultural changes brought about by upheavals of the 1960s particularly the Civil Rights Revolution”). For similar analysis in popular media, see David A. Graham, *The Shaky Basis for Trump’s “Law and Order” Campaign*, ATLANTIC (July 12, 2016), <https://perma.cc/C8J4-M9RC> (discussing law and order as a “potent mantra” for Richard Nixon during his 1968 presidential
- footnote continued on next page*

Administration's deployment of law-and-order politics reveals another important implication of the law-and-order campaign, one that speaks to rule-of-law norms. In narrowing the state of the criminal-legal order (that is, the degree of criminal-legal compliance) to the state of minority violent crime, the law-and-order campaign may, in effect, reduce the salience of various other *suborders* within the criminal-legal order.<sup>3</sup> Put another way, criminal offending within the Trump presidential campaign and Administration may have been more politically damaging to the Trump Administration had much of the public not been fixated on the allegation of a rising tide of minority violent crime.

This Essay thus considers the relationship between law-and-order politics and regard for rule-of-law principles by way of the Trump presidential campaign and presidency. Part I outlines an apparent paradox of the Trump presidency. It relates the Trump campaign's reliance on minority-crime narratives (urban violence,<sup>4</sup> immigrant violence,<sup>5</sup> and Muslim terrorism<sup>6</sup> chief among them) to the criminal lawbreaking of the Trump White House, Trump Administration efforts to call into question the basic legitimacy of various federal law enforcement agencies,<sup>7</sup> and President Trump's own expressions of support for extralegal punishment meted out by police officers.<sup>8</sup> Part II attempts to explain this dissonance by modeling law and order as a politics and discourse that implicitly narrows the broad scope of the criminal-legal order to the subject or *suborder* of minority violent crime.

The Essay closes in Part III by extending its specific modeling of the relationship between law-and-order politics and rule-of-law principles to the

---

campaign). "Nixon was skilled at leveraging racial tension and resentment to get white votes. Trump is pursuing a similar strategy." *Id.*

3. In this sense, the Trump presidency raises a question yet to be squarely addressed in the sociolegal literature: *What sort of criminal mischief happens in the shadow of the law-and-order campaign?*
4. German Lopez, *Donald Trump's Black-on-Black Crime Tweet is Wrong in So Many Ways*, VOX (Nov. 23, 2015, 11:30 AM EST), <https://perma.cc/2XKE-8QR4> (to locate, click "View the live page").
5. Domenico Montarano, Danielle Kurtzleben, Scott Horsley, Sarah McCammon & Richard Gonzales, *Fact Check: Donald Trump's Speech on Immigration*, NPR (Aug. 31, 2016, 9:44 PM ET), <https://perma.cc/RF8Z-NDLY>.
6. Jenna Johnson & Abigail Hauslohner, "I Think Islam Hates Us": A Timeline of Trump's Comments About Islam and Muslims, WASH. POST (May 20, 2017, 12:16 PM PDT), <https://perma.cc/5K9X-XZ7J>.
7. See *infra* Part I.B.4.
8. On one occasion, President Trump suggested that police officers knock arrestees' heads against the squad car when taking them into custody. See Mark Berman, *Trump Tells Police Not to Worry About Injuring Suspects During Arrests*, WASH. POST (July 28, 2017, 5:43 PM PDT), <https://perma.cc/U9T9-L54M>.

Black Lives Matter protests of 2020. It argues that the 2020 protests were subject to the same rule-of-law distortion as the Trump regime—namely, a fixation on minority violent crime—but to opposite effect. While much of the public did not consider criminal offending under the Trump regime as evidence of law and order's decline, Black Lives Matter was often reduced within Trump's law-and-order paradigm to the relatively few incidents of criminal violence committed by affiliated protesters.<sup>9</sup>

## I. The Paradox

The Trump presidential campaign began with a promise to the national public: Then-candidate Trump would restore *law and order* upon entering the White House by, among other things, ending the supposed free rein given violent criminal predators by Democratic Party politicians.<sup>10</sup> Yet the Trump White House, time and again, showed open contempt for rule-of-law principles. Concurrent with its law-and-order stance, the Administration exhibited criminal behavior and routinely attacked the legitimacy of the nation's chief law-enforcement agencies.

As a preliminary matter, this Part argues that despite the deep tension between these two positions, manifest over the course of the Trump presidency, the Administration's law-and-order politics did not wither and die on the vine. The contradiction inherent to President Trump's role as law-and-order chieftain never registered in the public consciousness despite recognition that the Trump presidency threatened to erode cherished rule-of-law principles.

---

9. See Erica Chenoweth & Jeremy Pressman, *This Summer's Black Lives Matter Protestors Were Overwhelmingly Peaceful, Our Research Finds*, WASH. POST (Oct. 16, 2020, 3:00 AM PDT), <https://perma.cc/84V7-VXW4> (arguing that "the Black Lives Matter uprisings were remarkably nonviolent"); *Demonstrations & Political Violence in America: New Data for Summer 2020*, ARMED CONFLICT LOCATION & EVENT DATA PROJECT, <https://perma.cc/YA65-7WWE> (archived Apr. 17, 2021) ("In more than 93% of all demonstrations connected to the movement, demonstrators have not engaged in violence or destructive activity.").

10. In a campaign speech in Virginia Beach, Virginia, then-candidate Trump left little to the imagination: "We must maintain law and order at the highest level or we will cease to have a country, 100 percent . . . I am the law and order candidate." Louis Nelson, *Trump: 'I Am the Law and Order Candidate'*, POLITICO (updated July 11, 2016, 3:15 PM EDT), <https://perma.cc/EY2H-VDRM>; see also Phillip Bump, *Trump Keeps Claiming that the Most Dangerous Cities in America Are All Run by Democrats. They Aren't*, WASH. POST (June 5, 2020, 2:28 PM PDT), <https://perma.cc/QCG9-XATK> ("You hear about certain places like Chicago and you hear about what's going on in Detroit and other—other cities, all Democrat run," [Trump] said. "Every one of them is Democrat run. Twenty out of 20. The 20 worst, the 20 most dangerous are Democrat run.").

A. American Carnage

In an op-ed in *MinnPost*, Eric Black asked how then-President Donald Trump was able to sell an American “carnage” narrative in his Inaugural Address given that the nation had enjoyed decreasing crime rates over the course of his predecessor’s tenure.<sup>11</sup> After referring to Trump’s use of the term in his inauguration speech that day, Black cited the dictionary definition of carnage—“the slaughter of a great number of people, as in battle; butchery; massacre”—and registered his objection.<sup>12</sup>

*Carnage* served as a through-line for the Trump campaign.<sup>13</sup> In his opening press conference, Trump argued that Mexico was “not sending [the U.S.] their best . . . . They’re sending people that have lots of problems and they’re bringing those problems to us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”<sup>14</sup>

The association between rape and a disfavored racial element strikes a nerve given the way in which rape has been used in the national discourse to affirm the nation’s racial hierarchy.<sup>15</sup> But for the purposes of this Essay, it’s important to turn from visceral reaction to Trump’s now-famous quote to focus narrowly on his premeditation. Time and again, the Trump campaign plucked the same string, directing the public’s attention to the subject of minority criminal violence. And while it may seem uncharitable to highlight the most provocative of Trump’s references to minority violence, these are the statements that did the heavy lifting. Splashy anecdotes about minority crime and fabricated minority violent crime statistics conveyed to the public the threat posed to law and order as conceived by Trump himself.

The Trump campaign’s narrative about the decline of criminal–legal compliance included a range of minority characters—from the violent

---

11. See Eric Black, Opinion, *Trump Looks at America and Sees “Carnage.” Really?*, MINNPOST (Jan. 20, 2017), <https://perma.cc/S99R-YL89>. According to the FBI’s Uniform Crime Report, the number of violent crimes fell by an average of about 18,000 per year during Barack Obama’s presidency. 2016: *Crime in the United States*, FBI: UCR, <https://perma.cc/UL28-BHM9>; see also Graham, *supra* note 2.

12. Black, *supra* note 11.

13. See Aaron Blake, *Trump Said He Would Stop the “American Carnage.” It Hasn’t Even Slowed Down.*, WASH. POST (Oct. 3, 2017, 8:35 AM PDT), <https://perma.cc/ASP5-LXEH>.

14. Alexander Burns, *Choice Words from Donald Trump, Presidential Candidate*, N.Y. TIMES (June 16, 2015, 2:01 PM EDT), <https://perma.cc/ERV8-XM7X>.

15. See generally Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103 (1983) (detailing the disproportionate impact the legal system’s selective approach to rape law has had on Black men and women); see also JOANE NAGEL, RACE, ETHNICITY, AND SEXUALITY: INTIMATE INTERSECTIONS, FORBIDDEN FRONTIERS 99-100 (2003) (discussing race and rape in colonial Virginia, and noting that “[r]ape in early America was a crime whose definition was structured by race”).

immigrant gangster<sup>16</sup> to the Muslim immigrant terrorist<sup>17</sup> to the predatory black thug.<sup>18</sup> In his speech at the Republican National Convention, Trump addressed the victims and witnesses of the derivative “chaos” saying, “I have a message for all of you: the crime and violence that today afflicts our nation will soon come to an end. Beginning on January 20, 2017, safety will be restored.”<sup>19</sup>

Then-candidate Trump presented Chicago, President Barack Obama’s adopted hometown, as the paradigmatic example of the public-safety problem. In an August 2016 tweet that characterizes his trademark misdirection, Trump expressed optimism that African Americans would support his candidacy because “[i]nner-city crime is reaching record levels,”<sup>20</sup> adding that African Americans “know that I will stop the slaughter going on!”<sup>21</sup>

Extending the theme in a September debate with Democratic nominee Hillary Clinton, Trump incorporated references to African Americans, Hispanics, Chicago, and hell:

We have a situation where we have our inner cities, African Americans, Hispanics are living in hell because it’s so dangerous. You walk down the street, you get shot. In Chicago, they’ve had thousands of shootings, thousands since January 1st. Thousands of shootings. And I’m saying, where is this? Is this a war-torn country? What are we doing? And we have to stop the violence, we have to

- 
16. In Trump’s narratives regarding immigrant violent crime, he regularly returned to the subject of sanctuary cities. Trump complained of the Latin American gangs “infest[ing]” the country. Ben Zimmer, *What Trump Talks About When He Talks About Infestations*, POLITICO MAG. (July 29, 2019), <https://perma.cc/7JKQ-UGB9>. The theme of minority crime infestation frequently appeared in President Trump’s tweets, prompting *New York Times* columnist Charles Blow to highlight the danger of President Trump’s language given that the logic of infestation serves as the basis for “exterminations.” *Id.* (quoting Charles M. Blow, Opinion, *The Rot You Smell Is a Racist POTUS*, N.Y. TIMES (July 28, 2019), <https://perma.cc/3SAA-P78J>).
  17. See Johnson & Hauslohner, *supra* note 6 (providing a timeline of President Trump’s comments on Muslims, including references to “Islamic terrorism” in America and a 200,000-man army of Syrian refugees in America, which he termed “one of the greatest tactical ploys of all time” that “could make the Trojan horse look like peanuts”).
  18. Trump has referred to Black Lives Matters protestors as “thugs,” a label known to have racial connotations. See Nicole Chavez & Ray Sanchez, *Trump Calls Protestors “Thugs” Despite Peaceful Demonstrations in Tulsa and Much of the US*, CNN (updated June 20, 2020, 10:53 PM ET), <https://perma.cc/H8QD-AN67>; George Floyd Protest: What Do “Thug,” “White Privilege” and “Ally” Mean?, BBC NEWS (June 10, 2020), <https://perma.cc/6826-JKJF> (suggesting that among political leaders, the word “thug” “has become a loaded term when referring to black people”).
  19. *Full Text: Donald Trump 2016 RNC Draft Speech Transcript*, POLITICO (July 21, 2016, 6:21 PM EDT), <https://perma.cc/RZR4-7AYR>.
  20. Philip Bump, *Donald Trump’s Understanding of the Historical Nature of Crime Is Upside Down*, WASH. POST (Aug. 29, 2016, 7:44 AM PDT), <https://perma.cc/66RU-PF6F>.
  21. *Id.*

bring back law and order in a place like Chicago where thousands of people have been killed, thousands over the last number of years.<sup>22</sup>

On another occasion, in the early stages of his campaign, Trump linked the trope of the murderous black predator to fake statistics by way of a retweet.<sup>23</sup> The embedded tweet displayed a figure with dark skin, dressed in dark clothing and a face-masking bandana, extending a handgun. Hovering just below the handgun were several statistics: that 81% of white homicide victims suffered their fate at the hands of a black assailant, that only 16% of white homicide victims are killed by white perpetrators, and that 97% of black homicide victims were killed by other blacks.<sup>24</sup>

The statistics are plainly inaccurate. For instance, 82% of white murder victims are murdered by white assailants.<sup>25</sup> But the tweet itself amounted to a dare: *Go ahead, try to un-ring the bell.*

## B. In the Shadow of Law and Order

Many within and in close proximity to the Trump campaign and presidency violated the federal criminal law, often to further President Trump's political interests. The following profile describes in broad strokes public corruption by federal law-enforcement officials in the Trump campaign and White House. Within the Essay's theoretical framework, this corruption should be considered as a suborder within the larger criminal-legal order, one whose decline did not meaningfully alter the arch of Trump's law-and-order politics.

---

22. Tara Golshan, *First Presidential Debate Transcript: Live Updates from Hillary Clinton and Donald Trump's Face-off*, VOX (Sept. 26, 2016, 7:00 PM EDT), <https://perma.cc/UAC4-MSCS>. For articles documenting Trump's use of terms like "hell" and "war-torn" to describe predominantly African-American and Hispanic residential spaces and to establish a premise for the law-and-order campaign see Aaron Blake, *The First Trump-Clinton Presidential Debate Transcript, Annotated*, WASH. POST (Sept. 26, 2016, 8:59 PM PDT), <https://perma.cc/PER7-DC3M>; Matthew Nussbaum, *Trump at Debate: Minorities in Cities "Are Living in Hell"*, POLITICO (Sept. 26, 2016, 10:05 PM EDT), <https://perma.cc/QZF6-AYN5>; Jaweed Kaleem & Ann M. Simmons, *Trump Says African Americans Are Living in Hell. That Depends on What You Mean by Hell*, L.A. TIMES (Nov. 5, 2016, 6:55 AM PT), <https://perma.cc/V4W3-Q7BV>; Jonathan Easley, *Trump: African-Americans and Hispanics "Are Living in Hell"*, THE HILL (Sept. 26, 2016, 10:04 PM EDT), <https://perma.cc/8SA3-TRH5>; and Melissa Chan, *Donald Trump Claims Black and Hispanic People Are "Living in Hell"*, FORTUNE (Sept. 26, 2016, 10:11 PM PDT), <https://perma.cc/UKJ4-CVH9>.

23. Philip Bump, *Donald Trump Retweeted a Very Wrong Set of Numbers on Race and Murder*, WASH. POST (Nov. 22, 2015, 1:46 PM PST), <https://perma.cc/2AR8-WD9F>.

24. Lopez, *supra* note 4.

25. *Id.*

1. Select criminal charges and convictions

Even the most dedicated political observer would have struggled to track the scope of criminal lawbreaking under the Trump political regime. A full accounting of criminal transgressions by members of the Trump campaign and White House—a virtual crime spree within and around the federal executive—seems an essential first step toward appreciation of the relationship between law-and-order politics and rule-of-law principles under the Trump presidency. This Essay offers just a sample.

*Michael Cohen.* President Trump’s former personal attorney pled guilty on August 21, 2018 to eight criminal charges relating to campaign finance, tax evasion, and bank fraud.<sup>26</sup> The campaign finance violations were based in part on money payments to women who had previously had intimate relationships with “Individual-1,” widely understood to be President Trump himself.<sup>27</sup> Cohen was also convicted in November 2018 of lying to the Senate regarding Trump’s pursuit during the 2016 presidential cycle of a real estate project in Moscow.<sup>28</sup> U.S. District Judge William H. Pauley III sentenced Cohen to three years in federal prison and ordered him to pay a \$50,000 fine.<sup>29</sup> Cohen was later disbarred.<sup>30</sup>

*Paul Manafort.* President Trump’s former campaign chairman plead guilty to two counts of conspiracy to defraud the United States.<sup>31</sup> U.S. District Judge Amy Berman Jackson sentenced Manafort to seven-and-a-half years in prison.<sup>32</sup> At sentencing, Judge Berman Jackson noted the long arc to

---

26. *Michael Cohen Pleads Guilty in Manhattan Federal Court to Eight Counts, Including Criminal Tax Evasion and Campaign Finance Violations*, U.S. DEP’T OF JUST. (Aug. 21, 2018), <https://perma.cc/T56E-FZPB>.

27. *Id.*; see also Chuck Rosenberg, *Michael Cohen Named Trump as “Individual-1.” Here’s Why Prosecutors Haven’t Identified Him in Court*, NBC NEWS (Dec. 12, 2018, 11:51 AM PST), <https://perma.cc/52E3-K4WY>; Associated Press, *What of “Individual-1”? Feds’ Trump Campaign Case Is “Dead”*, AP NEWS (Feb. 5, 2021), <https://perma.cc/L844-MASP> (to locate, click “View the live page”).

28. Mark Mazzetti, Benjamin Weiser, Ben Protess & Maggie Haberman, *Cohen Pleads Guilty and Details Trump’s Involvement in Moscow Tower Project*, N.Y. TIMES (Nov. 29, 2018), <https://perma.cc/PE8B-U79W>; Transcript of Plea Hearing at 7, 25, United States v. Cohen, No. 1:18-cr-850 (S.D.N.Y. Nov. 29, 2018), <https://perma.cc/X7ZL-7MKG>.

29. *Michael Cohen Sentenced to Three Years in Prison*, U.S. DEP’T OF JUST. (Dec. 12, 2018), <https://perma.cc/9JWN-R27V>.

30. Tom Winter, *Michael Cohen Has Been Disbarred*, NBC NEWS (Feb. 26, 2019, 2:17 PM PST), <https://perma.cc/5JU2-PSD4>.

31. Sharon LaFraniere & Kenneth P. Vogel, *Paul Manafort Agrees to Cooperate with Special Counsel; Pleads Guilty to Reduced Charges*, N.Y. TIMES (Sept. 14, 2018), <https://perma.cc/JB4P-CAQK>.

32. Sharon LaFraniere, *Paul Manafort’s Prison Sentence Is Nearly Doubled to 7 ½ Years*, N.Y. TIMES (Mar. 12, 2019), <https://perma.cc/97YP-6D9P>.

Manafort's criminal offending, finding that much of Manafort's professional career had been spent "gaming the system."<sup>33</sup> President Trump issued Manafort a full pardon on December 23, 2020.<sup>34</sup>

*Roger Stone.* In the months leading up to the 2016 presidential election, Roger Stone coordinated with the website WikiLeaks to obtain stolen emails damaging to the Clinton presidential campaign.<sup>35</sup> (The Justice Department alleged in court filings that Russian hackers obtained the documents and delivered them to WikiLeaks.<sup>36</sup>) While under oath before the House Intelligence Committee, Stone testified that he had not discussed his WikiLeaks contacts with the Trump campaign.<sup>37</sup> When evidence arose establishing that, in fact, Stone had been in regular contact with the Trump campaign regarding his dealing with WikiLeaks, a federal jury convicted Stone of seven felony counts.<sup>38</sup> Judge Amy Berman Jackson sentenced Stone to more than three years in prison. President Trump commuted Stone's prison sentence on July 10, 2020, and pardoned Stone on December 23, 2020.<sup>39</sup>

*Michael Flynn.* Flynn served in the Trump Administration for twenty-three days as National Security Advisor.<sup>40</sup> He resigned in the face of allegations that he had made false statements to federal investigators regarding communications with the Russian government just prior to President Trump's inauguration.<sup>41</sup> Flynn eventually plead guilty to the charge of lying to federal investigators regarding the same communications.<sup>42</sup> President Trump pardoned Flynn on November 25, 2020.<sup>43</sup>

---

33. *Id.*

34. Amita Kelly, Ryan Lucas & Vanessa Romo, *Trump Pardons Roger Stone, Paul Manafort and Charles Kushner*, NPR, <https://perma.cc/JE6B-VWEC> (last updated Dec. 23, 2020, 11:00 PM ET).

35. See Lauren Gambino, *Roger Stone: Trump Adviser Found Guilty on All Counts in WikiLeaks Hacking Case*, GUARDIAN (Nov. 15, 2019, 1:31 PM EST), <https://perma.cc/3MC8-PS95> (to locate, click "View the live page").

36. Ellen Nakashima & Shane Harris, *How the Russians Hacked the DNC and Passed Its Emails to WikiLeaks*, WASH. POST (July 13, 4:26 PM PDT), <https://perma.cc/F4DD-M74H>.

37. Gambino, *supra* note 35.

38. *See id.*

39. *Here Are Some of the People Trump Pardoned*, N.Y. TIMES (Jan. 26, 2021), <https://perma.cc/2PE2-Q6R8>.

40. *Michael Flynn: Trump's Pardoned National Security Advisor*, BBC (Nov. 25, 2020), <https://perma.cc/DE2N-3LF5>.

41. Chad Day, *The Mueller Report's Account of Michael Flynn's Lies*, AP NEWS (Apr. 29, 2019), <https://perma.cc/68TQ-CK6Y> (to locate, click "View the live page").

42. Statement of the Offense at 1, *United States v. Flynn*, No. 1:17-cr-00232 (D.D.C. Dec. 1, 2017), <https://perma.cc/KC3L-EB2Z>.

43. *Here Are Some of the People Trump Pardoned*, *supra* note 39.

Stephen Bannon. The Justice Department charged former campaign manager and Chief White House Strategist Steve Bannon with fraud in connection with an alleged scheme to use private donations slated for the project of building a wall on the nation's southern border for personal benefit.<sup>44</sup> President Trump pardoned Bannon on January 19, 2021.<sup>45</sup>

## 2. Pending criminal investigations

As of this writing, the Justice Department continues to investigate irregular financial transactions associated with President Trump's 2016 inaugural committee, which raised a record \$107 million.<sup>46</sup> Among the crimes reported to be of interest are mail fraud, wire fraud, and money laundering.<sup>47</sup> A media firm run and owned by a personal friend of First Lady Melania Trump received \$26 million as the event's highest-paid contractor, most of which is alleged to have been passed on to subcontractors.<sup>48</sup> There is also an ancillary criminal inquiry into whether foreign entities illegally donated to the committee.<sup>49</sup>

Finally, at the time of this writing, the Justice Department is investigating Republican fundraiser Elliott Broidy for operating a "bribery-for-pardon" scheme in conjunction with the Trump White House.<sup>50</sup> The alleged scheme is

---

44. Alan Feuer, William K. Rashbaum & Maggie Haberman, *Steve Bannon is Charged with Fraud in We Build the Wall Campaign*, N.Y. TIMES, <https://perma.cc/CF9E-TZMP> (last updated Jan. 20, 2021).

45. *Here Are Some of the People Trump Pardoned*, *supra* note 39. Each of the Trump presidential campaign managers in the 2016 cycle—Corey Lewandowski, Paul Manafort, and Steve Bannon—was subject to criminal charges based on activities related to the campaign. Philip Bump, *Each of the Three People Who Led Trump's 2016 Campaign Has Now Faced Criminal Charges*, WASH. POST (Aug. 20, 2020, 7:54 AM PDT), <https://perma.cc/NH2V-WZHL>; Jemima McEvoy, *Bannon Joins Long List of Trump Associates Who Have Been Charged or Imprisoned*, FORBES (Aug. 20, 2020, 12:56 PM EDT), <https://perma.cc/2KV3-46QB>.

46. Maggie Haberman & Ben Protess, *Trump Inaugural Committee Ordered to Hand over Documents to Federal Investigators*, N.Y. TIMES (Feb. 4, 2019), <https://perma.cc/JX8R-JL85>; Jefcoate O'Donnell, *All the Legal Trouble in Trumpworld*, FOREIGN POL'Y (Mar. 8, 2019, 6:00 AM), <https://perma.cc/783L-2VGE>. For a more recent report on the investigation, see Mike Ives, *Donor to Trump Inauguration Sentenced to 12 Years in Federal Inquiry*, N.Y. TIMES (Feb. 19, 2021), <https://perma.cc/57F9-75GE>.

47. O'Donnell, *supra* note 46.

48. Ilya Marritz & Justin Elliott, *Trump's Inauguration Paid Trump's Company—With Ivanka in the Middle*, PROPUBLICA (Dec. 14, 2018, 1:19 PM EST), <https://perma.cc/G5PT-LLXM>.

49. Haberman & Protess, *supra* note 46.

50. Michael S. Schmidt, Kenneth P. Vogel, Katie Benner & Adam Goldman, *Trump Associates Said to Have Been Scrutinized in Suspected Pardon Scheme*, N.Y. TIMES, <https://perma.cc/5AL4-8RJR> (updated Dec. 4, 2020); Matt Stieb, *DOJ Investigating "Bribery-for-Pardon" Scheme Involving White House*, N.Y. MAG. (Dec. 3, 2020), <https://perma.cc/Z5HY-C42Y> (to locate, click "View the live page").

reported to involve Trump son-in-law Jared Kushner's lawyer, Abbe Lowell.<sup>51</sup> Broidy had just recently been convicted of conspiracy to violate foreign lobbying laws as part of an effort to sell to foreign entities his influence within the Trump White House.<sup>52</sup> President Trump pardoned Broidy on January 20, 2020.<sup>53</sup>

### 3. Uncharged criminal conduct

Volume II of the Justice Department's Mueller Report details ten acts by President Trump that may have constituted obstruction of justice.<sup>54</sup> Legal commenters disagree as to whether criminal liability attached to these acts given uncertainty about the precise scope of presidential authority.<sup>55</sup>

In an unrelated incident in July 2019, characterized by the House Judiciary Committee as implicating various federal criminal statutes including bribery (18 U.S.C. § 201), wire fraud (18 U.S.C. § 1343), and honest-services fraud (18 U.S.C. § 1346),<sup>56</sup> President Trump pressured the President of Ukraine to investigate Joseph Biden and his son, Hunter Biden.<sup>57</sup> At the time of the call, Joseph Biden was viewed by many as the Democratic candidate who posed the greatest threat to Trump's reelection in 2020.<sup>58</sup>

---

51. Schmidt et al., *supra* note 50.

52. Kenneth P. Vogel, *Elliott Broidy Pleads Guilty in Foreign Lobbying Case*, N.Y. TIMES (Oct. 20, 2020), <https://perma.cc/DA2V-TQHF>; Stieb, *supra* note 50.

53. *Factbox: Notable Names on Trump's Pardon List*, REUTERS (Jan. 20, 2021, 7:53 AM), <https://perma.cc/S4NT-5SDH>.

54. ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 8 (2019), <https://perma.cc/RXK5-P589> ("[I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state.").

55. *See, e.g.*, Quinta Jurecic, *Obstruction of Justice in the Mueller Report: A Heat Map*, LAWFARE (Apr. 21, 2019, 2:32 PM), <https://perma.cc/MTB6-6G3A> (discussing the multiple actions by Trump that could have served as the basis for obstruction of justice charges).

56. Jonathan Mahler, *Can America Restore the Rule of Law Without Prosecuting Trump?*, N.Y. TIMES MAG. (updated Nov. 19, 2020), <https://perma.cc/W28X-SM4Z>.

57. Devlin Barrett, Matt Zapotosky, Carol D. Leonnig & Shane Harris, *Trump Offered Ukrainian President Justice Dept. Help in an Investigation of Biden, Memo Shows*, WASH. POST (Sept. 25, 2019, 9:39 PM PDT), <https://perma.cc/8U42-8NMH>. The call would later serve as the evidentiary basis for the first Trump impeachment. Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (last updated Feb. 10, 2021), <https://perma.cc/Z6VU-RGTL>.

58. *See* Henry Olsen, *Opinion: Trump's Greatest Threat Has Arrived*, WASH. POST (Apr. 25, 2019, 11:51 AM PDT), <https://perma.cc/XT9M-P2MG>.

4. Attacks on the legitimacy of the FBI and Department of Justice

The challenge the Trump Administration posed to the criminal–legal order extended beyond criminal lawbreaking to broad-based rhetorical attacks on federal law-enforcement agencies and pinpoint attacks on specific federal law-enforcement agents. Trump himself routinely denigrated federal criminal-enforcement institutions and agents by way of rhetorical darts from the national bully pulpit.

Then-candidate Trump initiated such an attack during the 2016 presidential campaign in response to the Justice Department’s investigation of Trump’s opponent in the campaign, Hillary Clinton. At the time, Clinton was suspected of unauthorized use of a private email server in connection with her role as Secretary of State within the Obama Administration.<sup>59</sup> Trump alleged that Clinton was being protected by a “rigged system,”<sup>60</sup> pointing to a brief private meeting between Bill Clinton and Loretta Lynch on an airplane tarmac—a meeting that raised ethical questions across political media.<sup>61</sup> At a campaign stop in Sterling Heights, Michigan, after FBI Director James Comey announced that the FBI had closed the investigation without filing charges against Clinton, Trump again broadly questioned the agency’s integrity: “Hillary Clinton is guilty, she knows it, the FBI knows it, the people know it and now it’s up to the American people to deliver justice at the ballot box.”<sup>62</sup>

Many of Trump’s criticisms of federal law enforcement were based on the claim of rank institutional corruption. The quality of these criticisms should be distinguished from criticism of discrete law-enforcement-agency missteps or claims regarding the proverbial “bad apples” of law enforcement. Trump’s verbal assaults instead matched that of anti-establishment, leftist law enforcement rhetoric of the 1960s<sup>63</sup>—seemingly the very antithesis of a pro-law-enforcement position.

---

59. See Tessa Berenson, *Donald Trump: Hillary Clinton Email Scandal “Worse than Watergate”*, TIME (Oct. 17, 2016, 8:35 PM EDT), <https://perma.cc/FZ3V-7LRX>; *US Election 2016: Trump Cries Foul as FBI Clears Clinton*, BBC (Nov. 7, 2016), <https://perma.cc/BAR3-ZMZB>.

60. David M. Jackson, *Trump: FBI Decision on Clinton Emails Was “Rigged”*, USA TODAY (updated July 5, 2016, 8:57 PM ET), <https://perma.cc/SZ69-SCG2>; *US Election 2016*, *supra* note 59.

61. See, e.g., Dylan Matthews, *Bill Clinton and Loretta Lynch’s Meeting Scandal is Every Clinton Scandal in Miniature*, VOX (July 1, 2016, 1:20 PM EDT), <https://perma.cc/8Q8Z-D48E>; Julian Hattem, *Lynch Pressured to Recuse Herself After Clinton Tarmac Meeting*, THE HILL (July 1, 2016, 6:03 AM EDT), <https://perma.cc/Q5T8-BHB5>.

62. *US Election 2016*, *supra* note 59. Trump asserted in public comments that it was impossible for the FBI to complete a review of the server within the given time period. *Id.*

63. See David Greenberg, *Here’s What Happened the Last Time the Left Got Nasty*, POLITICO MAG. (July 5, 2018), <https://perma.cc/M3RY-ZAZU> (discussing the impact of leftist antiwar  
*footnote continued on next page*

Later, in 2019, Trump alleged that the FBI had attempted to “overthrow the presidency.”<sup>64</sup> He made this claim after the revelation that an FBI agent had improperly altered a document used to secure the warrant that served as the basis for surveillance of campaign adviser Carter Page.<sup>65</sup> On another occasion, Trump broadly disparaged federal law enforcement, alleging (via tweet) “tremendous leaking, lying and corruption at the highest levels of the FBI, Justice & State.”<sup>66</sup> And in yet another similar instance, Trump described the FBI as “badly broken” after the Justice Department Inspector General Michael Horowitz concluded that the Department’s investigation into Russian interference in the 2016 election had not been politically motivated.<sup>67</sup>

Here, the analytical point is not that these various characterizations of federal law enforcement by Trump were inaccurate, but rather that they were offered by a president whose nascent political identity was predicated on diligent enforcement of the criminal law in service of social order. One would think the tension between Trump’s law-and-order campaign and the Trump regime’s repeated attempts to discredit federal criminal enforcement agencies would have been deeply compromising if not politically suicidal. This was not at all the case.

In a subsequent tweet urging the Justice Department to prosecute Hillary Clinton and Clinton’s aide, Huma Abedin, Trump identified the Department of Justice as subject to the “deep state.”<sup>68</sup> He later accused the FBI of being partially

---

and antipolice rhetoric in the 1960s). Notably, Trump concentrated his rhetorical attacks on law-enforcement actors and institutions at the federal level. One could frame this approach as falling in tension with his effusive praise of police officers, but also as an extension of his condemnation of national elites. Maureen Groppe, *President Trump Says He’ll Praise Police While Others Won’t*, USA TODAY (May 15, 2017, 2:07 PM ET), <https://perma.cc/UH7V-CYM5>; Cathleen Decker, *Analysis: Trump’s War Against Elites and Expertise*, L.A. TIMES (July 27, 2017, 3:00 AM PT), <https://perma.cc/8GTK-MWSN> (to locate, click “View the live page”).

64. Eric Tucker & Deb Riechmann, *FBI Lawyer Suspected of Altering Russia Probe Document*, AP NEWS (Nov. 22, 2019), <https://perma.cc/YA75-Z7QB>.

65. *Id.*

66. Kathryn Watson, *Trump Lashes out at FBI, State and Justice Departments for “Leaking, Lying and Corruption”*, CBS NEWS (Mar. 17, 2018, 6:24 PM), <https://perma.cc/564G-TTEB> (the full text of Trump’s tweet, while now deleted on Twitter, is quoted in this article).

67. Allie Malloy, *Trump Lashes out at FBI Chief Wray for Embracing Watchdog Report*, CNN (updated Dec. 10, 2019, 5:19 PM EST), <https://perma.cc/S9BQ-SHP4>; see also OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI’S CROSSFIRE HURRICANE INVESTIGATION iii-iv (2019), <https://perma.cc/Q29E-E88M> (concluding that the investigation was “in compliance with Department and FBI policies” and without political bias or improper motivation).

68. Stephen Collinson & Jeremy Diamond, *Trump Again at War With “Deep State” Justice Department*, CNN (updated Jan. 2, 2018, 3:30 PM EST), <https://perma.cc/ZA86-27WD> (“Crooked Hillary Clinton’s top aid, Human Abedin, has been accused of disregarding  
*footnote continued on next page*”).

responsible for a mass shooting at a Florida high school that left seventeen people dead, arguing that the time the agency had dedicated to investigating Russian interference in the 2016 election had made schools less safe.<sup>69</sup> Trump would later describe the Russian-interference investigation team based in the Justice Department as “highly conflicted” and a “gang of Democratic thugs.”<sup>70</sup> His personal attorney, Rudy Giuliani, compared the FBI to Nazi storm-troopers.<sup>71</sup> A prominent acolyte, Representative Devin Nunes, used similar rhetoric, tweeting that General Michael Flynn, President Trump’s former National Security Advisor, “was set up by dirty cops at the highest levels of our government.”<sup>72</sup>

In addition to challenging the credibility of the nation’s foremost law-enforcement agencies, President Trump targeted individual federal law-enforcement agents and their families. He alleged that Acting FBI Director Andrew McCabe had been compromised because his wife had run for political office as a Democrat.<sup>73</sup> He tweeted that FBI Director Comey was the “WORST FBI director in history”;<sup>74</sup> and in a closing flourish, suggested that federal law-enforcement agencies may have been involved in the alleged corruption of the 2020 presidential election: “This is total fraud. And how the FBI and Department of Justice—I don’t know—maybe they’re involved, but how people are getting away with this stuff—it’s unbelievable.”<sup>75</sup>

---

basic security protocols. She put Classified Passwords into the hands of foreign agents. Remember sailors pictures on submarine? Jail! Deep State Justice Dept must finally act? Also on Comey and others.”)

69. Michelle Price, *Trump Says FBI Missed Signs on Florida Shooting Due to Russia Probe, Draws Criticism*, REUTERS (Feb. 18, 2018, 7:32 AM), <https://perma.cc/RP56-4BSD>.
70. Adam Edelman, *Trump Rages About Mueller Probe, Claims ‘Total Mess . . . Absolutely Nuts’*, NBC NEWS (updated Nov. 15, 2018, 8:38 AM PST), <https://perma.cc/M74G-7WK7>.
71. John Wagner & Robert Costa, *Comey Takes to Twitter to Knock Giuliani for Calling FBI Agents ‘Stormtroopers’*, WASH. POST (May 3, 2018, 11:03 AM PDT), <https://perma.cc/ZU6Y-WTRS>.
72. Devin Nunes (@DevinNunes), TWITTER (Apr. 29, 2020, 3:51 PM), <https://perma.cc/Q8XC-U9SA> (to locate, click “View the live page”).
73. See Carol E. Lee, *Trump’s Gripes Against McCabe Included Wife’s Politics, Comey’s Ride Home*, NBC NEWS (updated Jan. 29, 2018, 2:16 PM PST), <https://perma.cc/A7RH-U7AG>.
74. John Bacon, *Trump: ‘Slippery’ Comey Wanted a Job if Clinton Won White House*, USA TODAY (updated Apr. 15, 2018, 6:23 PM ET), <https://perma.cc/4RFU-STFZ> (stating that, in addition to calling Comey the “WORST FBI director in history, by far!”, Trump claimed that Comey had expected employment in the Clinton Administration in the event that Clinton won the presidential election).
75. Jemima McEvoy, *Trump Claims FBI and Justice Department May Have Helped Rig Election*, FORBES (Nov. 29, 2020, 11:42 AM EST), <https://perma.cc/B8FV-RS22>.

## II. Decline of the Criminal–Legal Order

Law-and-order politics are based in part on a promise to restore rule-of-law principles in the field of criminal law. This Part presents a framework by which to consider the dissonance between the Trump Administration’s law-and-order rhetoric, on the one hand, and its criminal offending and attacks on the federal law enforcement institutions on the other. It seeks to answer a fundamental question: How did the Trump Administration retain its standing (among at least a sizable portion of the national polity) as a beacon of law and order under these seemingly incongruous political circumstances?

Law-and-order politics reflect a specific misrepresentation of the criminal–legal order. Within the discursive frame of law-and-order politics, the state of the criminal–legal order is determined through general impressions of the prevalence of minority violent crime rather than through objective assessments of criminal–legal compliance as a general matter. Thus, having established that law-and-order politics are about little more than the amount of minority violent crime in society, the purveyors of law-and-order politics can pose what amount to attacks on law-enforcement agencies and individual personnel without compromising the law-and-order campaign.

To better understand law-and-order politics under the Trump regime, we should first think of the criminal–legal order as containing a broad range of overlapping suborders. Each suborder corresponds to one or more of the criminal offenses articulated in statutory criminal law. In this sense, the reach of the criminal–legal order and its constitutive suborders is determined by the scope of substantive criminal law. For example, one might think of public corruption and domestic terrorism as discrete suborders within the criminal–legal order, created by corresponding criminal offenses outlined in the criminal code.

Sociolegal scholars have long contemplated the benefits conveyed by law-and-order campaigns. Some have argued that law-and-order campaigns serve as a fallback position for white nationalist politics when *de jure* racial discrimination is no longer politically acceptable.<sup>76</sup> Others have noted that law-and-order politics provide political cover for liberal politicians supportive of minority civil rights, but vulnerable to the public’s tendency to conflate civil-rights activism and minority criminality.<sup>77</sup> There is also the argument

---

76. See, e.g., Weaver, *supra* note 2, at 247 (“The new norms of racial equality required that proponents avoid the explicitly racist justifications of its Jim Crow predecessor. Instead, supporters of punitive crime legislation now argued that civil rights strategies promulgated the idea that laws could be obeyed selectively. With the nation engulfed in violent protests, they reopened this argument to legitimize their attacks on the civil rights agenda and initial appeals for heavier handed law enforcement.”).

77. See, e.g., MURAKAWA, *supra* note 2, at 78 (“Johnson’s speech in the immediate aftermath of Watts clarified the logic underlying his earlier Howard speech. ‘A rioter with a  
*footnote continued on next page*”)

that law-and-order politics are motivated by objectively high violent crime rates, and that derivative crime policy is designed in significant part to address such violence.<sup>78</sup> But none of these theories regarding the incentive structure of law-and-order politics addresses the relationship between such politics and the public's regard for forms of criminal offending unrelated to racial minorities.

What, then, is the relationship between law-and-order politics and the remainder of the criminal–legal order? In narrowing the criminal–legal order to a single suborder, law-and-order politics may lend political cover to its purveyors, namely, state officials who violate the criminal law, but do so in a manner unrelated to the suborder that the same officials target within law-and-order politics. Thus, the law-and-order political regime can be subject to a wide range of criminal investigations and convictions while continuing to advance a feasible law-and-order politics. It is the narrow conception of the criminal–legal order within law-and-order politics that, to some degree, obscures the parallel criminal involvement of the law-and-order regime.

The notion of discrete suborders within the criminal–legal order helps to clarify the function of law-and-order politics within a Trump Administration embroiled in multiple criminal investigations and at war with the federal government's principal criminal-enforcement institutions. It may be that the Trump Administration's own criminal acts and its rhetorical attacks on law-enforcement institutions and individual agents are irrelevant to law-and-order politics, properly understood. The Administration's criminal involvement fell within suborders that law-and-order politics will never meaningfully address. So long as the criminal–legal order is reduced to minority violent crime, the

---

Molotov cocktail in his hands is not fighting for civil rights any more than a Klansman with a sheet on his back and a mask on his face.' . . . [L]iberal Democrats could no longer dismiss southern focus on the threat of black violence as 'self-serving' efforts to 'shift attention away from the terrible problems of the South.'").

78. See LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME AND DEMOCRATIC POLITICS* 34 (2016) ("Without attention to how serious violence, political mobilization, and crime agendas may be linked, the repressive interests of the majority are easily overstated, and the political mobilization capacity and demands of the most vulnerable correspondingly understated."); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 185 (2017) ("Any significant reduction in the US prison population is going to require states and counties to rethink how they punish people convicted of violent crimes, where 'rethink' means 'think about how to punish less'"); David Garland, *Theoretical Advances and Problems in the Sociology of Punishment*, 20 PUNISHMENT & SOC'Y 8, 24 (2018); David Garland, *Penal Power in America: Forms, Functions and Foundations*, 5 J. BRITISH ACAD. 17 (2017) ("[A]fter two decades of declining rates of crime and violence, it is difficult to appreciate the climate of opinion that produced draconian measures such as the Violent Crime Control and Law Enforcement Act of 1994—and politicians associated with these laws are now being made to pay a price. But it is important to recall, along with all the populism, racism, and opportunism of political officials, that homicide levels and public concern about violent crime were, in these years, at an all-time high.").

state's own threat to the criminal–legal order will not fundamentally compromise the law-and-order campaign. To take the success of Trump's law-and-order campaign as a paradox is, perhaps, to misunderstand the true meaning of law-and-order politics as it relates to the broader criminal–legal order.

### **III. The Legibility of Black Lives Matter**

How does the Black Lives Matter campaign fit within the suborder framing of law-and-order politics? This Part argues that while the Black Lives Matter campaign has called for an array of policy changes, central among them is an appeal for an application of rule-of-law principles to physically abusive police. The campaign is motivated in significant part by the belief that the criminal–legal order lies in tatters with respect to police accountability for unlawful use of force. Despite its demand for enforcement of the criminal law against extralegal police violence, Black Lives Matter did not register as a movement resonant with basic rule-of-law principles. By the end of the spate of 2020 protests, the campaign was instead subject to the question of whether Black Lives Matter itself posed a threat to law and order.

This Part argues, briefly, that the Black Lives Matter campaign's mission to restore a specific suborder within the criminal–legal order was illegible in the summer of 2020 within the fog of law-and-order politics. Rather than presenting as a rule-of-law campaign targeting police misconduct, Black Lives Matter protests were often reduced within the law-and-order frame to protest violence. In this sense, law-and-order politics had precisely the opposite effect on the Black Lives Matter campaign that it had on the Trump Administration. While the Trump Administration's own criminal involvement was never understood as implicating law and order because of law-and-order politics' implicit focus on minority violent crime, Black Lives Matter, as a campaign for and by racial minorities, was often reduced in public discourse to the protest violence that occurred at its margins.

#### **A. Black Lives Matter as a Rule-of-Law Campaign**

Black Lives Matter is now far more than a mantra. It is a national political campaign, both highly visible and fiercely committed to a decentralized organizational structure.<sup>79</sup> Because the campaign is loosely organized, it can be difficult to discern its normative vision and platform. There are organized bodies within the campaign that present a comprehensive policy platform designed to close the resource gap between the African-American community

---

<sup>79</sup> John Eligon, *One Slogan, Many Methods: Black Lives Matter Enters Politics*, N.Y. TIMES (Nov. 18, 2015), <https://perma.cc/4HHL-EPN2>.

and the racial majority.<sup>80</sup> But from the first declaration on Twitter, in 2013, that “Black Lives Matter”<sup>81</sup> to the Floyd protests of 2020, the heart of the campaign has been the demand that the public and the state assign equal value to African-American life by holding police officers accountable for unlawful violence committed against African-American citizens.<sup>82</sup>

Derivative organizations such as Campaign Zero expressly call for legislation that would facilitate prosecutions of police.<sup>83</sup> To be sure, there is a tension between the abolitionist inclinations of certain camps within the larger police-reform campaign and the pursuit of police accountability by way of criminal prosecution.<sup>84</sup> Yet police accountability—specifically, the attachment of criminal liability for criminal acts by police officers—is a major plank in the reform platform.<sup>85</sup> In this sense, BLM and the larger police-reform movement call for the veneration of basic rule-of-law principles. They insist that the long arm of the law extend a bit further so that the policing of African-American individuals and communities no longer falls beyond its reach.

## B. Black Lives Matter as a Threat to the Criminal–Legal Order

For those wielding the law-and-order slogan, the rule-of-law question attached to the Black Lives Matter campaign is not about police accountability, but whether BLM affiliates themselves are inclined toward criminal

---

80. See, e.g., *The Preamble*, MOVEMENT FOR BLACK LIVES (June 19, 2020), <https://perma.cc/X7FV-ENMC>; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. LAW REV. 405, 431 (2018) (“Criminal and racial justice are intertwined with economic justice. This holistic view considerably widens the institutions typically suggested as targets within law reform conversations. Prosecutors and police are only the starting point: Schools, health care, and jobs must also be targets for reform. Otherwise, the reforms will not translate into meaningful difference in the lived realities of Black communities.”).

81. Monica Anderson, *The Hashtag #BlackLivesMatter Emerges: Social Activism on Twitter*, PEW RSCH. CTR.: INTERNET & TECH. (Aug. 15, 2016), <https://perma.cc/V27D-LSGD>.

82. See Madison Pauly & Samantha Michaels, *BLM Activists Demanded Police Accountability. In City After City, Voters Agreed.*, MOTHER JONES (Nov. 6, 2020), <https://perma.cc/M9JU-4GED>.

83. *Independent Investigations and Prosecutions*, CAMPAIGN ZERO, <https://perma.cc/S4KE-7L8A> (archived Apr. 17, 2021).

84. Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. (forthcoming 2021) (manuscript at 12–13, 26–36) (on file with author).

85. The tension between the two positions—police abolition and police accountability within the criminal–legal order—is presently the subject of some of the most compelling normative scholarship in the criminal law literature. See, e.g., Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016) (arguing that the increased visibility of police brutality demands a change in the protections police suspects receive compared to normal criminal suspects).

violence.<sup>86</sup> Thus, the ramifications of the rule-of-law rhetoric within law-and-order politics for the BLM campaign are precisely opposite that of the Trump presidency. The Trump Administration, no matter the scale of criminal lawbreaking within its network, could narrow the law-and-order debate to the question of whether minority violent crime threatened to topple the criminal-legal order. In contrast, the Black Lives Matter campaign struggled under this specific framing to maintain legitimacy in the eyes of a large portion of the American public. No matter its fundamental motivations (foremost among them, the pursuit of police accountability under substantive criminal law) the law-and-order frame tended to reduce Black Lives Matter to the violence that occurred at its fringes.<sup>87</sup>

To be sure, law-and-order discourse under the Trump Administration functioned as it always has, narrowing all of the criminal-legal order to the subject of violent crime, specifically that committed by minority perpetrators. That right-wing domestic terrorism became the Department of Homeland Security's most concerning security threat over the course of Trump's presidency without corresponding consideration within law-and-order political discourse reinforces the point.<sup>88</sup> Law and order as a politics and a discourse is about little more than stoking public anxiety about minority violent crime. And while scholars have long identified the racial valence of law-and-order politics, the Trump political regime has provided an opportunity to put more meat on the bone. It has shown law-and-order politics to be a distortion of the criminal-legal order such that other escalating criminal threats—those coming from predominantly white quarters of the country or from the very purveyors of the politics—will fail to register as relevant to claims regarding law and order's decline.

---

86. Jaclyn Peiser, *"Their Tactics Are Fascistic": Barr Slams Black Lives Matter, Accuses the Left of "Tearing Down the System"* (Aug. 10, 2020, 3:01 AM PDT), <https://perma.cc/92BU-8P3F>.

87. Daniel Trotta, *Despite Trump's "Law and Order" Rhetoric, Protesters Won't Back Down*, REUTERS (Sept. 11, 2020, 3:07 AM), <https://perma.cc/Q78N-BXS3>. In one of several characterizations of the Black Lives Matter protests of the summer of 2020, President Trump tweeted the following: "The Democrats never even mention the words LAW & ORDER at their National Convention . . . . If I don't win, America's Suburbs will be OVERRUN with Low Income Projects, Anarchists, Agitators, Looters and, of course, 'Friendly Protesters.'" *Id.*

88. See Betsy Woodruff Swan, *They Tried to Get Trump to Care About Right-Wing Terrorism. He Ignored Them.*, POLITICO (Aug. 26, 2020, 4:30 AM EDT), <https://perma.cc/VM72-5YWZ>; Adam Goldman, Katie Benner & Zolan Kanno-Youngs, *How Trump's Focus on Antifa Distracted Attention from the Far-Right Threat*, N.Y. TIMES (updated Feb. 1, 2021), <https://perma.cc/V58H-LSA4>.

### **Conclusion**

Scholars have long been critical of law-and-order campaigns, particularly in regard to the claim that such campaigns are motivated by the desire to restore what this Essay identifies as the criminal–legal order. The Trump campaign and Administration provide a unique opportunity to analyze this claim in greater depth given then-candidate Trump’s solemn promise to restore the criminal–legal order, juxtaposed with rhetoric and actions by his presidential campaign and Administration that repeatedly tore at the fabric of the same order.

This Essay argues that despite law-and-order politics’ promise to broadly restore the criminal–legal order and to venerate rule-of-law principles across the field of criminal administration, the politics reduces the public’s conception of the criminal–legal order to the subject of criminal violence by racial minorities. In addition to directing the public’s attention to racial minorities in anticipation of minority criminal offending, this misrepresentation of the criminal–legal order delivers secondary effects; among them, it tends to obscure criminal offending by the very architects of law-and-politics. Thus, while crimes committed by law-and-order politicians would seem uniquely detrimental to law-and-order politics, such crimes may not ultimately have much of an effect the feasibility of the politics.