

# Civil Unrest and the Role of the Attorney General: A Comparison of Ramsey Clark to William Barr

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## I. INTRODUCTION

On May 25, 2020, a Minneapolis police officer killed George Floyd, a Black man suspected of passing a counterfeit \$20 bill, by kneeling on his neck for a reported eight minutes and forty-six seconds, while two other officers assisted in pinning him down.<sup>1</sup> The entire shocking episode was captured on video and repeatedly telecast throughout the nation and world. The public's angry reaction was swift and powerful. Both in the United States and abroad, an unprecedented wave of protests ensued. The crowds were massive, diverse, and largely unified and peaceful. However, in urban areas throughout the country, there was significant violence, property destruction, and looting of businesses.<sup>2</sup>

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<sup>1</sup> See Evan Hill, Ainara Tiefenthäler, et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020, updated Nov. 5, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>. Although the length of time that Officer Derek Chauvin kneeled on George Floyd's neck has been widely reported at 8:46, it appears that it may have actually been longer.

<sup>2</sup> See Meredith Deliso, *Timeline: The Impact of George Floyd's Death in Minneapolis and Beyond*, ABC NEWS (June 10, 2020), <https://abcnews.go.com/US/timeline-impact-george-floyds-death-minneapolis/story?id=70999322>.

Rewind. On March 3, 1991, fourteen Los Angeles police officers pursued Rodney King, a Black man suspected of drunk driving, on a high-speed chase that culminated in several of the officers brutally beating King. While King was on the ground, the officers kicked him repeatedly and struck him at least fifty-six times with their nightsticks, resulting in skull fractures, broken bones and teeth, and permanent brain damage.<sup>3</sup> Eighty-one seconds of the fifteen-minute attack was caught on a grainy video that was subsequently viewed by millions around the world.<sup>4</sup> The public was outraged, but the streets did not erupt in protests or violence, at least not yet. That would happen a year later.

Two weeks after the incident, a Los Angeles County grand jury indicted four of the officers—Theodore Briseno, Stacey Koon, Laurence Powell, and Timothy Wind—on charges of felony assault and other offenses.<sup>5</sup> On April 29, 1992, they were found not guilty on all charges, and as word of that verdict spread, so did the disbelief and anger, setting off an almost immediate violent reaction in the streets of Los Angeles, the scale and severity of which expanded and intensified over the succeeding five days and nights. There was burning, looting, and property destruction, as well as attacks on police, firefighters, and hapless non-Black motorists who ventured into the South-Central section of the city.<sup>6</sup>

Rewind again. On August 11, 1965, a routine traffic stop of Marquette Frye, a Black citizen of the Watts area of Los Angeles, escalated into a combative encounter between the police, Frye, and two members of Frye's family. Efforts to subdue Frye ended with one officer reportedly jabbing him in the stomach with a nightstick before striking him on the brow.<sup>7</sup> The Fryes were eventually forcibly handcuffed,

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<sup>3</sup> See the Associated Press, *Rodney King Riot: Timeline of Key Events*, AP NEWS (Apr. 26, 2017), <https://apnews.com/article/fa4d04d8281443fc8db0e27d6be52081>; Anjali Sastry & Karen Grigsby Bates, *When LA Erupted In Anger: A Look Back At The Rodney King Riots*, NPR (Apr. 26, 2017), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

<sup>4</sup> See John L. Mitchell & Shawn Hubler, *Rodney King gets award of \$3.8 million*, L.A. TIMES (Apr. 20, 1994), <https://www.latimes.com/local/california/la-me-king-award-19940420-story.html>. ("Excerpts were aired around the world, serving as a flash point for racial tensions as the grainy image of the cowering King was shown to billions of viewers.").

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* See also *infra* note 158 and accompanying text.

<sup>7</sup> See JERRY COHEN & WILLIAM S. MURPHY, BURN, BABY, BURN!: THE LOS ANGELES RACE RIOTS OF AUGUST 1965 36 (1966).

arrested, and taken away.<sup>8</sup> All of this unfolded before the watchful eyes of a throng of angry Black residents of Watts, who responded instantaneously. As police vehicles left the area following the arrests, the residents pelted them with rocks and bottles.<sup>9</sup> This contemporaneous, instinctive reaction quickly spread throughout the community and spawned six days of unprecedented violence and mayhem around South Los Angeles. There was burning, looting, and property destruction. In addition, rioters attacked police officers, firefighters, and motorists who unwittingly drove into the chaos.<sup>10</sup>

Unfortunately, I could go on recounting similar instances of police excess directed at Black Americans followed by widespread protests and intense civil unrest, many in 2020 alone.<sup>11</sup> However, I selected these three examples, in part, because of their striking similarities, but more importantly, because of the two men who played significant roles in their aftermaths—William Barr and Ramsey Clark. William Barr was the U.S. Attorney General during the 1992 Los Angeles riots, and he was the attorney general responsible for the federal response to the police killing of George Floyd and the powerful public reaction that it generated. Ramsey Clark was the U.S. Deputy Attorney General when the Watts riots occurred but would go on to serve as attorney general from 1967–1969, a period of widespread social upheaval that included numerous additional riots inspired by police aggression towards Black citizens, as well as the assassination of Martin Luther King, Jr. in 1968. Clark's Watts experience informed the approach he would take in leading the federal response to these later outbreaks of civil rebellion.

Although the two men occupied some common ground in how they addressed the rioting of their respective times, overall, the tone, and tenor of, as well as the apparent motivation for their reactions seem to have differed dramatically. Ramsey Clark, a liberal champion of civil

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<sup>8</sup> See *id.* at 37.

<sup>9</sup> See *id.* at 61–62.

<sup>10</sup> See *id.* at 67. For a detailed account of the Fries' arrests and the unrest that followed, see Lonnie T. Brown, Jr., *Different Lyrics, Same Song: Watts, Ferguson, and the Stagnating Effect of the Politics of Law and Order*, 52 HARV. CIV. RTS.-CIV. LIB. L. REV. 305 (2017) [hereinafter Brown, *Different Lyrics*]. See also GERALD HORNE, *THE FIRE THIS TIME: THE WATTS UPRISING AND THE 1960S* (1995).

<sup>11</sup> See, e.g., Richard A. Oppel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>; Aimee Ortiz, *What to Know About the Death of Rayshard Brooks*, N.Y. TIMES (Sept. 10, 2020), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html>. See also Brown, *Different Lyrics*, *supra* note 10, at 312, n.24.

rights, took an empathetic approach to the unrest, factoring in the legitimate anger, frustration, and hopelessness that he believed were at the root of urban violence. While there was a definite need to control the situations and reduce the likelihood of physical harm and property damage, Clark was loath to authorize a draconian show of force to accomplish this. He was more concerned with potential excesses in law enforcement than with the people's rioting, looting, and property damage. He believed that the answer to the violence was not suppression, but rather, massive, collective effort directed towards solving the underlying problems that caused it—in his view, the principal motivating force was the continued disparate and unequal treatment of Black citizens, especially in terms of education, employment, and relations between police and the community.<sup>12</sup> Clark saw the so-called rioters as victims, not violent criminals who needed to be dominated and potentially prosecuted.

William Barr, on the other hand, was and is a staunch proponent of law and order. This stance guided his approach to the civil unrest he faced, both in 1992 and 2020. He acknowledged the wrongful nature of the police conduct in the Rodney King beating and the killing of George Floyd, but his primary concern in connection with both incidents was eliminating the unrest that the killing produced. In other words, Barr's tactic was to eradicate the symptom, not the problem, and his actions and words reflected a close alignment and identification with law enforcement and its efforts nationwide to maintain order in America's cities. For the most part, he condemned the actions of the "rioters," focusing on those he perceived as engaged in violent, destructive behavior. Barr characterized them as gang members in 1992,<sup>13</sup> and in 2020, as far left extremists, radicals, outside agitators, and Antifa—an amalgamated assortment of anti-fascist organizations that he labeled as domestic terrorists.<sup>14</sup> His assessment of the 2020 unrest was that peaceful protests were being hijacked by these fringe elements, and

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<sup>12</sup> See Brown, *Different Lyrics*, *supra* note 10, at 324–28.

<sup>13</sup> See *infra* note 168 and accompanying text.

<sup>14</sup> See Attorney General William P. Barr's Statement on the Death of George Floyd and Riots, DOJ PRESS RELEASE (May 30, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-s-statement-death-george-floyd-and-riots> [hereinafter *Barr's Statement on the Death of George Floyd*]; Attorney General William P. Barr's Statement on Riots and Domestic Terrorism, DOJ PRESS RELEASE (May 31, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism> [hereinafter *Barr's Statement on Riots*].

they had to be stopped.<sup>15</sup> Harkening back to his handling of the Los Angeles riots, Barr proclaimed that in 2020 “[t]he rule of law will prevail,” as he believed it did in 1992.<sup>16</sup>

Clark and Barr’s divergent responses to highly similar instances of social disorder raise critical questions about the role of the attorney general in such contexts. Where exactly does responding to domestic rebellion fit within the wide-ranging duties of the attorney general and what is the scope of that authority? Is this an area in which it is appropriate for the attorney general to yield to the will of the President, or is the exercise of independence essential? Answering these role-related questions is crucial to assessing the two men’s respective approaches in handling civil unrest.

The job of attorney general is complex and far-reaching, ranging from administrative oversight of the Department of Justice (DOJ) to providing legal advice to the President and other executive officials, to participating in executive policy-making as a member of the President’s cabinet.<sup>17</sup> The attorney general even has his or her hand in foreign affairs through participation in National Security Council meetings.<sup>18</sup> However, the most important function of the attorney general is to act as the nation’s chief law enforcement official, the lead prosecutor for the United States.<sup>19</sup> It is in this capacity, that the attorney general bears responsibility for investigating and addressing perceived abuses by the police and the resultant civil unrest that our society has repeatedly witnessed over the years.

Although allegiance to the President seems appropriate in carrying out some of the attorney general’s duties and, in this regard, partisan interests may come into play, ideally, politics should play no role in responding to civil unrest. Of course, the attorney general’s views and actions may coincide with what the chief executive believes and wants,

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<sup>15</sup> See *Barr’s Statement on the Death of George Floyd*, *supra* note 14 (“Unfortunately, with the rioting that is occurring in many of our cities around the country, the voices of peaceful protest are being hijacked by violent radical elements”).

<sup>16</sup> Dept. of Justice, *Attorney General William P. Barr’s Remarks on Mr. George Floyd and Civil Unrest* (June 4, 2020), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-s-remarks-mr-george-floyd-and-civil-unrest> [hereinafter *Barr’s Remarks on Civil Unrest*].

<sup>17</sup> See *infra* notes 76–89 and accompanying text.

<sup>18</sup> See THE WHITE HOUSE, <https://www.whitehouse.gov/nsc/>.

<sup>19</sup> See Andrew McCanse Wright, *The Take Care Clause, Justice Department Independence, and White House Control*, 121 W. VA. L. REV. 353, 390 (2018) (“The Attorney General serves as both a legal advisor to the President and chief law enforcement officer with supervisory responsibility for criminal investigations and prosecutions.”).

but America's principal law enforcement official has an obligation to act independently and consistent with the rule of law, even if doing so will be contrary to the President's wishes.

In this article, I compare the respective manners in which Ramsey Clark and William Barr responded to instances of civil unrest during their tenures and assess each man's correspondent fidelity to the ideal of independence. Did they live up to their sworn responsibility? Or did they allow personal morality, public sentiment, or political pressure to influence their behavior?

Part II provides biographical background on the two men to gain an appreciation for what experiences may have shaped their approaches as attorney general, most specifically, with regard to addressing civil unrest. Part III then generally discusses the attorney general's role and, in particular, the necessity for independence in fulfilling aspects of that role. It also examines each attorney general's personal views on this important facet of their responsibilities. Part IV recounts how Attorneys General Clark and Barr responded to civil unrest—for Clark, the focus is on the Watts riots of 1965 and the widespread social disturbances that occurred in the late 1960s; and for Barr the pertinent episodes are the 1992 Los Angeles riots and the 2020 George Floyd protests. The article concludes in Part V with a critical comparison of the two men's words and actions, in terms of their direct responses to civil unrest and, more broadly, regarding the overarching issue of racism within the criminal justice system.

While Clark and Barr both, to varying degrees, adhered to aspects of independence and dedication to upholding the rule of law, in the end, it appears that the quantity and quality of their independence was more a function of their individual substance and ideals, rather than any committed effort to conform to the dictates of their office. The two men's contrasting styles in addressing civil unrest, notwithstanding their identical positions, leads to the somewhat troubling but unsurprising conclusion that perhaps it is the attorney general who shapes the role, not the role that shapes the attorney general. As the article demonstrates, at the intersection of race and social discord, the identity and perspective of the role-shaper can decisively influence the manner in which justice is framed and administered.

## II. THE MAKING OF AN ATTORNEY GENERAL

A. *Who is Ramsey Clark?*

William Ramsey Clark was born in 1927 in Dallas, Texas.<sup>20</sup> He was the son of Tom C. Clark, who served as President Harry Truman's attorney general and as an Associate Justice on the U.S. Supreme Court from 1950 to 1967. Though a Democrat, Tom was viewed as a conservative member of the Court.<sup>21</sup> His conservatism, however, appeared to have little influence on his son's eventual political views, unless it inspired Ramsey to trend in the opposite direction.

One episode during Ramsey's youth undoubtedly had a profound effect upon his perception of justice and fairness. After the Japanese bombing of Pearl Harbor, Tom Clark, then working in President Franklin Delano Roosevelt's DOJ, was appointed to oversee the internment of Japanese Americans as the civilian coordinator of the Alien Enemy Control Program for the West Region, described by one official as the "toughest and nastiest job in the [DOJ]." <sup>22</sup> This was a truly dark chapter in America's history, and Tom would express deep regret for the integral role he played—"I have made a lot of mistakes in my life, but one that I acknowledge publicly is my part in the evacuation of the Japanese from California in 1942." <sup>23</sup>

At the time, the attack on America and his father's involvement in the nation's response actually inspired Ramsey, then only thirteen, to attempt to enlist in the Marines.<sup>24</sup> He was, of course, unsuccessful because of his age but later would serve in the Marines near the end of the war as a courier delivering confidential diplomatic and military information from Washington to various parts of Europe and North Africa.<sup>25</sup> This experience, coupled with his exposure to his father's participation in the Japanese internment, laid the groundwork for Ramsey's lifelong opposition to war and commitment to protecting human rights, domestically and internationally.

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<sup>20</sup> For an in-depth account of Ramsey Clark's life, see LONNIE T. BROWN, JR., *DEFENDING THE PUBLIC'S ENEMY: THE LIFE AND LEGACY OF RAMSEY CLARK* (2019) [hereinafter BROWN, *DEFENDING THE PUBLIC'S ENEMY*]. See also ALEXANDER WOHL, *FATHER, SON, AND CONSTITUTION: HOW JUSTICE TOM CLARK AND ATTORNEY GENERAL RAMSEY CLARK SHAPED AMERICAN DEMOCRACY* (2013).

<sup>21</sup> See BROWN, *DEFENDING THE PUBLIC'S ENEMY*, *supra* note 20, at 224.

<sup>22</sup> MIMI CLARK GRONLUND, *SUPREME COURT JUSTICE TOM C. CLARK: A LIFE OF SERVICE* 62 (2010); see also WOHL, *supra* note 20, at 37–43.

<sup>23</sup> GRONLUND, *supra* note 22, at 74.

<sup>24</sup> See BROWN, *DEFENDING THE PUBLIC'S ENEMY*, *supra* note 20, at 25.

<sup>25</sup> See *id.*

Following his honorable discharge from the military, Ramsey completed his interrupted high school work through correspondence courses. He then embarked on a remarkably concentrated academic odyssey, obtaining a bachelor's degree from the University of Texas, as well as a master's degree in history and a J.D. from the University of Chicago in less than four years.<sup>26</sup>

After he graduated from Chicago, Ramsey moved to Dallas, Texas, where he practiced law for the next ten years with Clark, Coon, Holt & Fisher, later known as Clark, Reed & Clark.<sup>27</sup> In 1961, at the age of 33, he joined newly elected President John F. Kennedy's Justice Department as Assistant Attorney General for the Lands Division, the predecessor to what is now the Environment and Natural Resources Division.<sup>28</sup>

Notwithstanding the environmental-related focus of his position, Ramsey, like all leaders within the DOJ at that time, was thrust into the heart of the Kennedy administration's efforts in the area of civil rights.<sup>29</sup> For starters, Bobby Kennedy dispatched him to Alabama, Georgia, South Carolina, and Louisiana in 1962 and 1963 to enforce the federal school desegregation mandate that was being studiously subverted throughout the south.<sup>30</sup> He later played a major role in monitoring the historic admission of James Meredith as the University of Mississippi's first Black student.<sup>31</sup> In the wake of this experience, Ramsey drafted a memo to Bobby Kennedy that outlined recommendations for civil rights initiatives and became a major impetus for what would be the landmark Civil Rights Act of 1964.<sup>32</sup>

Notably, throughout his early years in the DOJ, Ramsey Clark gained a reputation for independence and a willingness to express his views openly, even when those perspectives may have been outside the mainstream. He was unfailingly principled, many believed to the point of being downright obstructive. Ed Guthman, a spokesperson for Kennedy's DOJ, stated that "Ramsey usually was the one who raised

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<sup>26</sup> See *id.* at 28.

<sup>27</sup> See *id.* at 29.

<sup>28</sup> Victor S. Navasky, *Wrong Guy for the Wrong Post at the Wrong Time?*, SAT. EVENING POST (Dec. 16, 1967).

<sup>29</sup> See RICHARD L. SCHOTT & DAGMAR S. HAMILTON, PEOPLE, POSITIONS, AND POWER: THE POLITICAL APPOINTMENTS OF LYNDON JOHNSON 89 (1983).

<sup>30</sup> See BROWN, DEFENDING THE PUBLIC'S ENEMY, *supra* note 20, at 34–35.

<sup>31</sup> See *id.* at 35.

<sup>32</sup> See Ramsey Clark Oral History Interview II (Feb. 11, 1969), by Harri Baker, LBJ Presidential Library, [http://www.lbjlibrary.net/assets/documents/archives/oral\\_histories/clark\\_r/clark-r2.pdf](http://www.lbjlibrary.net/assets/documents/archives/oral_histories/clark_r/clark-r2.pdf).



the moral questions about issues.”<sup>33</sup> Along the same lines, *New York Times* reporter Fred Graham noted that Clark’s primary weakness was “not complaisance to pressure from above but a tendency to stand on principle when practical men would compromise.”<sup>34</sup> Lyndon Johnson’s special counsel Larry Temple described Clark as tough-minded, preferring to resign rather than do something with which he disagreed.<sup>35</sup> Clark’s moral rigidity earned him the nickname “the Preacher” among his DOJ colleagues.<sup>36</sup>

Following President Kennedy’s assassination in 1963, then-Vice President Johnson ascended to the presidency and drafted Ramsey Clark as a White House assistant working on appointments and other special matters.<sup>37</sup> Bobby Kennedy remained as attorney general, but really in name only, and once he formally exited the DOJ, Johnson replaced him with Nicholas Katzenbach and made Clark deputy attorney general.<sup>38</sup>

As deputy attorney general, Clark led the federal oversight of the third Selma-to-Montgomery march organized by Martin Luther King. Because local law enforcement had unleashed horrific violence against peaceful marchers in an earlier Selma-to-Montgomery effort—thereafter known as Bloody Sunday<sup>39</sup>—the federal government was intent on preventing an encore by Alabama police and antagonistic locals. Clark was charged with maintaining peace and protecting Dr. King, both of which he successfully managed.<sup>40</sup> He also worked tirelessly on the President’s behalf to secure passage of the Voting Rights Act of 1965,<sup>41</sup> and headed the federal government’s investigation into the Watts riots, which will be discussed in more detail in Part IV.

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<sup>33</sup> Andrew Maykuth, *Standing Alone*, PHIL. INQ. SUNDAY MAG. (July 7, 1991) (quoting Ed Guthman), <http://www.maykuth.com/Projects/clark91.htm>.

<sup>34</sup> BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 296 (1988).

<sup>35</sup> See Larry Temple Oral History Interview V (Aug. 11, 1970), LBJ Presidential Library, <https://www.discoverlbj.org/item/oh-temple-19700811-5-72-33-e>.

<sup>36</sup> See Peter Carlson, *The Crusader*, WASH. POST (Dec. 15, 2002), <https://www.washingtonpost.com/archive/lifestyle/2002/12/15/the-crusader/9de49dd7>.

<sup>37</sup> See SCHOTT & HAMILTON, *supra* note 29, at 89.

<sup>38</sup> See Nomination of Ramsey Clark to Be Deputy Attorney General of the United States: Hearing Before the Committee on the Judiciary, U.S. SENATE 89<sup>th</sup> Congress (Feb. 8, 1965).

<sup>39</sup> See DAVID HALBERSTAM, *THE CHILDREN* 511–15 (1998).

<sup>40</sup> See BROWN, *DEFENDING THE PUBLIC’S ENEMY*, *supra* note 20, at 44–45.

<sup>41</sup> See Ramsey Clark Oral History Interview II (Feb. 11, 1969), by Harri Baker, LBJ Presidential Library, [http://www.lbjlibrary.net/assets/documents/archives/oral\\_histories/clark\\_r/clark-r2.pdf](http://www.lbjlibrary.net/assets/documents/archives/oral_histories/clark_r/clark-r2.pdf).

In October 1966, Clark became acting attorney general when Katzenbach left the position for another post in the State Department, and was officially named attorney general in March of 1967. He had acquired many fans during his tenure in the DOJ. In endorsing Clark for the post, Johnson's personal advisor John Macy wrote:

He has the legal ability; he understands the political process; he is an able administrator; he has courage and high personal standards; he holds the respect of Congress, the Cabinet, the bar, the courts and the bureaucracy; and he is sensitive to your needs and your problems and is thoroughly loyal to you.<sup>42</sup>

Johnson personally had a very high opinion of Clark. He admired "his powerful and succinct speaking ability, and had great respect for [his] moral character."<sup>43</sup> In the end, Ramsey Clark proved to be the consensus choice. His confirmation was a foregone conclusion and proceeded quickly, without even a hint of controversy. In thanking the President for the nomination, Clark wrote:

I am deeply honored that you have chosen me to be your Attorney General. The opportunity to serve a cause deemed mighty is the most that one can ask in life. This you have given me. The quest for the Great Society, for justice for all, is the high adventure of our time. I hope to help us find them.<sup>44</sup>

#### *B. Who is William Barr?*

William Pelham Barr was born in 1950 in New York. The son of a conservative educator, Donald Barr, William too leaned right from an early age. His primary education was at Corpus Christi, a diverse parochial school located near Columbia University's campus. Reportedly, when he was but eight years old, he delivered a speech in class supporting the re-election of Republican incumbent President Dwight Eisenhower.<sup>45</sup>

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<sup>42</sup> SCHOTT & HAMILTON, *supra* note 29, at 91.

<sup>43</sup> MURPHY, *supra* note 34, at 295.

<sup>44</sup> Letter from Ramsey Clark to President Lyndon B. Johnson (on file with the LBJ Presidential Library, Personal Papers of Ramsey Clark, Box 121, "R. Clark, Personal, Miscellaneous Correspondence, 1961-67").

<sup>45</sup> See Marie Brenner, "I Had No Problem Being Politically Different": Young William Barr Among the Manhattan Liberals, VANITY FAIR (Oct. 7, 2019), <https://www.vanityfair.com/news/2019/10/the-untold-tale-of-young-william-barr>.

He subsequently attended Horace Mann School, an elite private institution in the Bronx,<sup>46</sup> and there, seemingly acquired and cultivated his view regarding the far-reaching authority of the President, a position that he has maintained through the present. One classmate recalls Billy—as William or Bill was known at that time—proclaiming that “All the president needs to declare war is an executive order.”<sup>47</sup> The classmate believed that Billy’s view of the Constitution was that it created a concentration of federal power in the committee chairs, cabinet members, Supreme Court, and the President.<sup>48</sup>

William attended Horace Mann during the mid-1960s, graduating in 1967, a period of unprecedented political protests and societal rebellion, related principally to the civil rights movement and the war in Vietnam. At that time, his father was headmaster at the prestigious Dalton School in Manhattan. The elder Barr’s overt conservative politics made him a controversial figure there and placed him at odds with many of the liberal-leaning students and parents, particularly with regard to civil rights and antiwar protests.<sup>49</sup> The riots across the country in the aftermath of Dr. King’s assassination also included New York City and even Dalton, which apparently infuriated Donald Barr. One former student recounted that Donald viewed this as “disrespecting the school” by encouraging impressionable kids to follow the lead of older college-age rebels who were engaging in acts of civil disobedience.<sup>50</sup> He was highly exercised over the riots at nearby Columbia and disdainful of the group Students for a Democratic Society, which he described as “radical.”<sup>51</sup> Notably, Donald attributed the unrest to a desire for anarchy and “the mob tactics of the New Left.”<sup>52</sup> He also spoke contemptuously about the Black Power movement, opposing “the black militants . . . who are tired of asking for

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<sup>46</sup> It is worth mentioning that the Roy Cohn, the infamous legal fixer for various high-profile figures, including Donald Trump, was also a graduate of Horace Mann. *See id.*; *see also infra* notes 222–24 and accompanying text.

<sup>47</sup> Brenner, *supra* note 45. *See also* David Rohde, *William Barr, Trump’s Sword and Shield*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/william-barr-trumps-sword-and-shield> (same classmate observing that Barr is a “true believer” who has long believed that “only a strong President [can] protect America from threats”).

<sup>48</sup> Brenner, *supra* note 45.

<sup>49</sup> *See id.*; *see also* Rohde, *supra* note 47 (noting that Dalton parents viewed Donald Barr “as autocratic, insular, and obsessed with adherence to rules”).

<sup>50</sup> Brenner, *supra* note 45.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

a little share and are going to take a big share of Whitey's good life and education."<sup>53</sup> His son seemed to embrace similar views regarding the unrest.

William, then a freshman at Columbia, voiced opinions that would be consistent with those he later espoused as attorney general. For example, in critiquing the government's handling of the riots, he suggested that the leadership had failed by not engaging in more forceful tactics—"If the leaders had taken a stronger stance, up front, it would not have degenerated so much."<sup>54</sup> He punctuated this statement by cryptically observing that "1968 [. . .] was formative for me."<sup>55</sup>

Barr expressed the collegiate ambition to one day lead the CIA. In keeping with this goal, he interned with the agency during two of his summer breaks, and after obtaining his master's in Chinese Studies, joined the CIA staff as an intelligence analyst.<sup>56</sup> He later began taking law school classes at night at The George Washington University, and in 1975, he left his position as an analyst to work in the CIA's Office of Legal Counsel. In this capacity, Barr would work with agency director George H.W. Bush, who was appointed to that position the following year.

After graduating from law school, Barr clerked for Judge Malcolm Wilkey on the U.S. Court of Appeals for the D. C. Circuit, and then joined the law firm of Shaw, Pittman, Potts & Trowbridge. Jimmy Carter was President during this time, but lost his re-election bid to Ronald Reagan. In 1982, Barr left Shaw Pittman for the Reagan White House, accepting a position as deputy assistant director for legal policy.<sup>57</sup> He returned to private practice at Shaw Pittman in 1985 and in 1988, following the election of George H.W. Bush as President, Barr was appointed to head the DOJ's Office of Legal Counsel, tasked with advising the chief executive.<sup>58</sup>

Consistent with his youthful musings on presidential authority, Barr used his position, to the extent that he could, to press for the supremacy of executive power, particularly with regard to potential "legislative

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<sup>53</sup> *Id.* Donald Barr's combative style and controversial actions eventually led to his being fired from his position as headmaster at Dalton. *See id.*; *see also* Rohde, *supra* note 47 (noting that Donald Barr was forced out of his job in the early 1970s "after a protracted and ugly public fight").

<sup>54</sup> Brenner, *supra* note 45.

<sup>55</sup> *Id.*

<sup>56</sup> *See* Rohde, *supra* note 47.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

encroachment.”<sup>59</sup> He wrote a controversial opinion supporting President Bush’s “inherent constitutional authority” to order arrests on foreign soil, the target here being Panamanian leader and alleged drug trafficker and money launderer Manuel Noriega.<sup>60</sup> Similarly, after Barr’s elevation to the position of deputy attorney general, he argued that the President did not need congressional authorization to declare war in the interest of protecting national security. Despite this view, Barr putatively advised the President, out of an abundance of caution, to obtain Congress’s approval to send troops to Iraq in response to Saddam Hussein’s invasion of Kuwait in 1990.<sup>61</sup> Such advice seemed more political than legal, exceeding what might be expected of a deputy attorney general under the circumstances. Nevertheless, Bush followed Barr’s counsel, obtained Congress’s blessing, and ordered military action in Kuwait in January of 1991.<sup>62</sup>

Barr ascended to the position of attorney general later in 1991,<sup>63</sup> and in that role was vocal in his condemnation of previous efforts at criminal justice reform. In the 1960s, many, including Ramsey Clark, embraced the notion that crime in America was largely a by-product of societal ills, especially poverty. Barr could not have disagreed more. According to him, “[v]iolent crime is caused not by physical factors, such as not enough food stamps in the stamp program, but ultimately by moral factors.”<sup>64</sup> Indeed, he believed that this sort of coddling would worsen the problem. And he was scornful of the view that there were innocent victims who get caught up in and harmed by the system itself: “The notion that there are sympathetic people out there who become hapless victims of the criminal-justice system and are locked away in federal prison beyond the time they deserve is simply a myth.”<sup>65</sup> True to this perspective, as attorney general, Barr took a hardline approach to sentencing for drug offenses and to illegal immigration.

Notwithstanding his tough-on-crime approach to street-level offenses and immigration, Barr was seemingly disinclined to turn an accusatory

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<sup>59</sup> *Id.* It should be noted that Barr’s view regarding the supreme authority of the President appears to be limited to when Republicans hold the nation’s highest office. *See id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> It is important to note that Barr was just forty-one years old at the time of his appointment. Only Bobby Kennedy at age thirty-five and Ramsey Clark at age thirty-nine, were younger when appointed to the same post.

<sup>64</sup> Rohde, *supra* note 47.

<sup>65</sup> *Id.*

eye inward at administration officials. Despite numerous calls for independent investigations of perceived wrongdoing, Barr steadfastly resisted such requests, including one to examine executive dealings with Iraq in advance of its Kuwaiti invasion.<sup>66</sup>

In 1993, after Bill Clinton was elected as President, Barr exited government service and returned to the private sector as executive vice president and general counsel for GTE Corporation, a position he held until 2008 when he took an early retirement. While he dabbled in politics from afar, it was mostly to espouse views on actions that were being taken by or against government officials. Although he was not initially a supporter of President Trump's candidacy, he eventually embraced him, particularly after Trump's election. Barr even offered his unsolicited written opinion to Deputy Attorney General Rod Rosenstein on the untenable nature of pursuing obstruction of justice charges against the President for alleged actions taken in response to Robert Mueller's investigation.<sup>67</sup> This memo to Rosenstein may have been an audition of sorts to become the deputy attorney general's boss.<sup>68</sup>

Whether or not that was the case, on February 14, 2019, Barr officially became President Trump's attorney general, replacing embattled Attorney General Jeff Sessions who had resigned under pressure from the President, and taking over from acting Attorney General Matthew Whitaker. Although many praised Barr's nomination and felt that he would be a steadying addition to President Trump's Cabinet, his confirmation process was not without controversy. Various concerns were raised about Barr's record and views, including his strident efforts to increase incarceration while attorney general in the early 90s,<sup>69</sup> his refusal to acknowledge racial inequities in the criminal

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<sup>66</sup> *Id.* (observing that columnist William Safire referred to Barr as "cover-up general Barr").

<sup>67</sup> See Devlin Barrett, *Attorney General Nominee Wrote Memo Criticizing Mueller Obstruction Probe*, WASH. POST (Dec. 20, 2018), [https://www.washingtonpost.com/world/national-security/attorney-general-nominee-wrote-memo-criticizing-mueller-obstruction-probe/2018/12/20/72a01304-044b-11e9-b5df-5d3874f1ac36\\_story.html](https://www.washingtonpost.com/world/national-security/attorney-general-nominee-wrote-memo-criticizing-mueller-obstruction-probe/2018/12/20/72a01304-044b-11e9-b5df-5d3874f1ac36_story.html); ANDREW WEISSMANN, *WHERE LAW ENDS: INSIDE THE MUELLER INVESTIGATION* (2020).

<sup>68</sup> See Jennifer Rubin, *What to Make of William Barr's Memo?*, WASH. POST (Dec. 21, 2018), <https://www.washingtonpost.com/opinions/2018/12/21/what-make-william-barrs-memo/>.

<sup>69</sup> See, e.g., Miles Parks, *Barr's Record on Mass Incarceration Comes Under Scrutiny in Confirmation Hearing*, NPR (Jan. 16, 2019), <https://www.npr.org/2019/01/16/683009766/barrs-record-on-mass-incarceration-comes-under-scrutiny-in-confirmation-hearing>. See also William P. Barr, *The Case for More Incarceration* (Oct. 18, 1992),

justice system,<sup>70</sup> and his documented misgivings about the Robert Mueller-led investigation of possible Russian interference in the 2016 election, President Trump's associations with Russian officials, and possible obstruction of justice by the President.<sup>71</sup>

More generally, strong objections were raised concerning Barr's long-held views on the power of the chief executive, leading some to believe that he would not be truly independent from the President. Rather, given his position that the President's authority is virtually all-encompassing, the fear was that he would simply do President Trump's bidding, so to speak, or perhaps even worse, clear the way for Trump to do whatever he deemed politically expedient. Critics believed that an attorney general with this mindset would be especially dangerous in the Trump administration. As Professor Neil Kinkopf ominously observed,

Public confidence in the rule of law depends on there being an Attorney General who will not allow the President to do whatever he wants with the Justice Department. William Barr's views of presidential power are so radically mistaken that he is simply the wrong man, at the wrong time to be Attorney General of the United States.<sup>72</sup>

Barr pushed back on such objections, insisting that he would be independent and could not be "bullied": "I feel I'm in a position in life where I can do the right thing and not really care about the consequences. In the sense that I can be truly independent."<sup>73</sup> He went on to emphasize that he "will not be bullied into doing anything [he] think[s] is wrong[.]" proclaiming that "I'm going to do what I think is

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<https://www.ncjrs.gov/pdffiles1/Digitization/139583NCJRS.pdf>; *infra* notes 175–78 and accompanying text.

<sup>70</sup> See House Judiciary Comm. Hearing on Att'y Gen. William Barr (Jul. 28, 2020), <https://www.rev.com/blog/transcripts/house-judiciary-committee-hearing-of-attorney-general-barr-transcript-july-28>.

<sup>71</sup> See WEISSMANN, *supra* note 67, at 225–42.

<sup>72</sup> Statement of Neil J. Kinkopf, Professor of Law, Georgia State University, College of Law Before the Committee on the Judiciary United States Senate Hearing on the Nomination of William P. Barr to be Attorney General of the United States (Jan. 16, 2019), <https://www.judiciary.senate.gov/imo/media/doc/Neil%20J.%20Kinkopf%20Testimony.pdf>; see also House Judiciary Comm. Hearing on Att'y Gen. William Barr (Jul. 28, 2020), <https://www.rev.com/blog/transcripts/house-judiciary-committee-hearing-of-attorney-general-barr-transcript-july-28> (quoting Professor Kinkopf).

<sup>73</sup> Aaron Blake, *9 Takeaways from William Barr's Confirmation Hearing*, WASH. POST (Jan. 15, 2019), <https://www.washingtonpost.com/politics/2019/01/15/key-early-moments-william-barrs-confirmation-hearing/>.

right.”<sup>74</sup> In the end, the Senate confirmed Barr by a vote of 54-45, and despite his reassurance that he could be “truly independent,” Barr’s record raises legitimate questions about his fealty to that attestation.<sup>75</sup>

The real question, though, is: How independent must or should an attorney general be? Is independence an all-encompassing aspect of the role, or does it depend upon the issue and circumstances presented?

### III. INDEPENDENCE AS A COMPONENT OF THE ATTORNEY GENERAL’S ROLE

The attorney general’s role is wide-ranging and complex, part political, part administrative, and part legal.<sup>76</sup> As an integral part of the President’s Cabinet, the attorney general advises on policy matters unrelated to the administration of justice and renders legal advice and opinions when requested by the President or other heads of executive departments.<sup>77</sup> As a DOJ administrator, the attorney general helps define departmental priorities, submits budgetary requests, participates in selecting and screening nominees for the federal bench, and proposes legislation pertaining to the justice system.<sup>78</sup> Apart from these responsibilities, the attorney general also serves as the nation’s chief law enforcement officer and, in that capacity, is the ultimate overseer of federal criminal prosecutions.<sup>79</sup>

In carrying out certain of these duties, it is understandable that the attorney general, as a presidential appointee, will exhibit loyalty toward the chief executive, working to ensure that the President’s lawful objectives are achieved.<sup>80</sup> Indeed, in providing legal advice, while the attorney general should exercise independent professional judgment

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<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., Rebecca Roiphe, *A Typology of Justice Department Lawyers’ Roles and Responsibilities*, 98 N.C.L. REV. 1077, 1122–30 (2020); Lonnie T. Brown, Jr., *What William Barr Can Learn from Ramsey Clark*, STAN. UNIV PRESS BLOG (Jan. 23, 2020), <https://stanfordpress.typepad.com/blog/2020/01/lonnie-brown-on-william-barr-ramsey-clark-and-the-necessity-of-independence-lonnie-t-brown-words-words-words-during.html>.

<sup>76</sup> See Roiphe, *supra* note 75, at 1092.

<sup>77</sup> See *id.* at 1093; Arthur Selwyn Miller, *The Attorney General as the President’s Lawyer*, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 45 (Am. Enterprise Inst. Public Pol’y Res., 1968).

<sup>78</sup> See Roiphe, *supra* note 75, at 1092.

<sup>79</sup> See *id.* at 1092–93.

<sup>80</sup> See Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 37 (2018) (acknowledging that the attorney general, as a Cabinet officer, “plainly answers to the President as to certain matters”); *id.* at 66 (noting that the attorney general “will likely be a political ally of the President”); Roiphe, *supra* note 75, at 1097 (“if the Attorney General is to work so closely with the President that appointed him, we can’t fully expect a neutral performance of the job”).



like any other lawyer, he or she will undoubtedly endeavor to provide the President with the type of guidance that he wants to hear, if at all possible.

However, in carrying out the responsibilities related to being the nation's chief prosecutor, the attorney general should exercise a higher degree of independence in striving to guarantee fairness and justice. Partisan politics or the personal interests of the President should not come into play.<sup>81</sup> While the federal prosecutorial function is vested in the executive branch, there is apparently no constitutional support for the proposition that the President has authority to make prosecutorial decisions.<sup>82</sup> Rather, the extent of the President's authority in this regard is limited to appointing the attorney general and issuing pardons.<sup>83</sup>

Admittedly, there is a lack of concrete constitutional or legislative authority requiring the attorney general to act independently in carrying out the prosecutorial function.<sup>84</sup> It is, however, undeniably a long-accepted norm for prosecutors more generally, and if there was an expectation that the attorney general should behave differently, one would have expected Congress to affirmatively legislate to make this clear.<sup>85</sup> Nevertheless, there are those who embrace the position that the President possesses ultimate authority to direct prosecutorial decision-making,<sup>86</sup> but this argument too is lacking in firm legal authority.<sup>87</sup>

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<sup>81</sup> See Green & Roiphe, *supra* note 80, at 7 (noting that some scholars maintain that the attorney general or any other federal prosecutor "has a legal obligation to resist presidential control and to exercise independent professional judgment"); *id.* at 22 (observing that attorney general nominees and senators have emphasized the importance of the attorney general acting independently of the President).

<sup>82</sup> See *id.* at 8.

<sup>83</sup> See *id.* at 9–10 (noting that "the power to hire and fire does not necessarily imply the power to instruct subordinate officials how to do their jobs").

<sup>84</sup> See *id.* at 33 (observing that "some senators and attorney general nominees seemingly assumed that the Attorney General may not defer to the President in individual criminal cases, but the source of that assumption is unclear").

<sup>85</sup> See *id.* at 37 (observing that "[c]ongressional silence in response to sustained or repeated conduct may express congressional acquiescence in the exercise of authority").

<sup>86</sup> See, e.g., Allison Frankel, *DOJ Independence Entrenched and Ingrained, Will Survive Trump: Historian, Law Prof*, REUTERS (May 21, 2018), <https://www.reuters.com/article/us-otc-independence/doj-independence-entrenched-and-ingrained-will-survive-trump-historian-law-prof-idUSKCN11M2DP> (recounting Professor Alan Dershowitz's opinion that the Constitution authorizes the President "to tell the Justice Department who to investigate, who to prosecute, and who not to investigate, and who not to prosecute").

<sup>87</sup> See generally Green & Roiphe, *supra* note 80, at 23–26.

Objectively and practically, the case for independence seems stronger. The President always has the power to discharge the attorney general if dissatisfied with his or her performance, and this authority carries with it a certain degree of control.<sup>88</sup> Despite this power, one would expect a conscientious, rational chief executive to take such action only in response to instances of misfeasance or malfeasance, not in reaction to an attorney general acting independently in the name of justice and fairness, though contrary to the President's political desires.

It is also important to recall that even though William Barr has been a lifelong, staunch proponent of the supreme authority of the President,<sup>89</sup> in his 2019 confirmation hearing, he stressed that he could and would be "truly independent."<sup>90</sup> Furthermore, in 1991, he similarly proclaimed in unequivocal terms that the DOJ must remain independent and free from political influence—"nothing could be more destructive of our system of government, of the rule of law, or Department of Justice as an institution, than any toleration of political interference with the enforcement of the law."<sup>91</sup> Why emphasize this, if independence is not an expected component of the role?

For his part, Ramsey Clark's actions as attorney general speak for themselves in terms of his commitment to being independent. He was independent to a fault, bordering on insubordinate, perhaps.<sup>92</sup> President Johnson's special counsel, Larry Temple, observed that "[e]ven when [the President] strongly expressed certain views, if Ramsey disagreed, he did what he thought was right."<sup>93</sup> Although Clark remained Johnson's attorney general until the end of the President's term, there is little question that the possibility of firing him crossed LBJ's mind on a number of occasions.

Hence, from these two attorneys general's points of view, independence was an important aspect of their role, at least with regard to the prosecutorial function. In addition, ample historical support

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<sup>88</sup> *See id.* at 23.

<sup>89</sup> *See, e.g., supra* notes 47–48 and accompanying text.

<sup>90</sup> *See supra* notes 73–75 and accompanying text.

<sup>91</sup> *William Barr Believes in Justice Department Independence. He Might Have to Fight for it*, WASH. POST (Dec. 7, 2018), [https://www.washingtonpost.com/opinions/william-barr-believes-in-justice-department-independence-he-might-have-to-fight-for-it/2018/12/07/1c1fa01c-fa5a-11e8-863c-9e2f864d47e7\\_story.html](https://www.washingtonpost.com/opinions/william-barr-believes-in-justice-department-independence-he-might-have-to-fight-for-it/2018/12/07/1c1fa01c-fa5a-11e8-863c-9e2f864d47e7_story.html).

<sup>92</sup> *See* BROWN, DEFENDING THE PUBLIC'S ENEMY, *supra* note 20, at 99–116 (discussing various incidents in which Ramsey Clark acted contrary to the President's wishes).

<sup>93</sup> *Id.* at 25.

reinforces this perspective.<sup>94</sup> With this in mind, the next section documents each man's handling of dramatic episodes of racial unrest spawned by police excess directed toward Black citizens and considers their actions in comparison to how their respective Presidents wanted to respond. How independent were Clark and Barr?

#### IV. CIVIL UNREST AND THE ATTORNEY GENERAL

In terms of responding to civil unrest, there are two primary components. The first is determining the appropriate response from a law enforcement perspective. The civil unrest of the 1960s, 1990s, and 2000s all involved physical violence and property destruction. Regardless of one's opinion of the legitimacy of such reactions, the government must act to ensure the safety of its citizens and restore and maintain calm to the maximum extent possible. Local authorities have a significant responsibility in this regard, but the magnitude of the unrest during these periods warranted federal involvement, led by the attorney general as the nation's chief law enforcement official. In carrying out this charge, it is understandable that the attorney general will consult with and take some degree of direction from the President, and in the end, it will be the President who makes the final decision concerning what strategy should be taken to protect the American public.

However, the attorney general's role is still to act independently in advising the President regarding the proper response. He or she should not blindly take direction from the President, but rather must offer sound advice and counsel to ensure that the chief executive makes a fully informed decision. In addition, if the President ultimately takes a position with which the attorney general strongly disagrees, it may be his or her professional responsibility to refuse to carry out the President's instructions.<sup>95</sup>

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<sup>94</sup> See Green & Roiphe, *supra* note 80, at 75 ("The history and policy strongly suggest that . . . the Attorney General . . . may not accept direction from the President but must make the ultimate decisions about how to conduct individual investigations and prosecutions, even at the risk of being fired for disobeying the President.").

<sup>95</sup> Cf. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR. ASS'N 2020) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law"); *Id.* r. 1.16 (providing that a lawyer may withdraw from representing a client if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

The second aspect of the attorney general's role in responding to civil unrest is purely prosecutorial. In each instance that will be discussed, the precipitating event was an act of police aggression directed toward Black citizens. As a result, it was incumbent upon the attorney general to exercise independent discretion in determining whether federal charges should be brought against the officers involved. In addition, with regard to the citizens who instigated or actively engaged in the unrest, the attorney general similarly had to decide, independently, whether federal prosecution was warranted.

The manner in which Attorneys General Clark and Barr navigated these two critical components of their role in responding to the racial discord of their times is divergent and revealing.

#### *A. Ramsey Clark and the Watts Riots*

In the aftermath of the violent arrests in Watts of Marquette Frye, his mother, and stepbrother in South Los Angeles by the California Highway Patrol, Black residents vented their anger and frustration through six days of burning, looting, and battling law enforcement officials. The initial police strategy to quell the unrest was to retreat entirely in the hope that things would naturally subside.<sup>96</sup> When this tactic failed, officers returned with a vengeance, intent on forcefully bringing the situation under control. Official violence, however, was met with hostility, and rather than reducing the riotous behavior, the police's heavy-handed tactics escalated the disturbance.<sup>97</sup> Once it became apparent that the Los Angeles police were incapable of ending the strife alone, the California National Guard was called in for assistance. Unexpectedly, this too initially resulted in an increase in burning, looting, and violence. Eventually, fatigue appeared to set in, and that, combined with the presence of the National Guard, brought the riots to an end.<sup>98</sup>

While the riots were undoubtedly a manifestation of a serious police-community relations problem with the citizens of South Los Angeles, many local and national leaders reacted by defending law enforcement and casting the lion's share of the blame for the unrest on those citizens. Los Angeles Police Chief William Parker believed that the concept of civil disobedience had created a disrespect for the law and

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<sup>96</sup> See HORNE, *supra* note 10, at 56 ("Police tried pulling back and closing off the area where the rioting was worst on the theory that their absence might calm things down.").

<sup>97</sup> See Brown, *Different Lyrics*, *supra* note 10, at 315. See also COHEN & MURPHY, *supra* note 7, at 68–72.

<sup>98</sup> See Brown, *Different Lyrics*, *supra* note 10, at 316.

contributed significantly to this mass showing of contempt for law enforcement by Black citizens.<sup>99</sup> He warned that “if the citizens of Los Angeles haven’t learned from the riot that they must support strong law enforcement, ‘next time they’ll blow up the whole city.’”<sup>100</sup>

Los Angeles Mayor Sam Yorty echoed his police chief’s sentiment and mocked the narrative that police brutality was at the heart of the unrest, referring to that notion as the “big lie” perpetrated by outside antagonists.<sup>101</sup> According to Yorty:

Communists, fellow travelers, dupes, and demagogues have . . . deliberately foment[ed] antagonism to law enforcement officers, inciting the residents to resent and resist officers in the proper professional performance of their always difficult and often dangerous duty to protect the rights of law-abiding citizens to be secure in their persons and property.<sup>102</sup>

Many national leaders responded in a similar fashion, pointing an accusatory finger at Martin Luther King and his followers for cultivating a culture of disobeying the law within the Black community. South Carolina Representative Albert Watson maintained that: “Repeatedly [King] has advocated the violation of local law, and he and his cohorts have led thousands of Americans into a life of civil disobedience.”<sup>103</sup> Alabama Representative James Martin came to the defense of the police and argued for responsible leaders to reestablish respect for law and order.<sup>104</sup> He further demanded a halt to the “verbal lynching of policemen who are being used as an excuse for every robber, rapist, and murderer who sets himself against society and the civilized rules which must govern society.”<sup>105</sup>

Even President Johnson initially responded with biting criticism directed toward the rioters, equating their actions with those of white supremacists:

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<sup>99</sup> See COHEN & MURPHY, *supra* note 7, at 69 (“You cannot tell people to disobey the law and not expect them to have disrespect for the law.”); *Id.* at 277 (“Those who advocate the violation of laws that have neither been repealed nor declared unconstitutional advocate anarchy.”).

<sup>100</sup> *Id.* at 277–78.

<sup>101</sup> *Id.* at 280–81.

<sup>102</sup> *Id.*

<sup>103</sup> 85 CONG. REC. H20793 (daily ed. Aug. 17, 1965) (statement of Rep. Watson).

<sup>104</sup> See 85 CONG. REC. H20757 (daily ed. Aug. 17, 1965) (statement of Rep. Martin).

<sup>105</sup> *Id.*

A rioter with a 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. They are both . . . lawbreakers, destroyers of constitutional rights and liberties, and ultimately destroyers of a free America.<sup>106</sup>

This statement, however, was for public consumption. Privately, the President authorized government action to aid Black families in Watts,<sup>107</sup> and he appointed a small task force to investigate the causes of the riots and propose solutions. This is where Ramsey Clark came in—Johnson made him chair of the task force.

Then deputy attorney general, Clark's work in connection with this task force would profoundly influence his perspectives on race, law enforcement, and criminal justice, which in turn would animate the manner in which he responded to the racial unrest that continued to erupt throughout the balance of the 1960s. Clark employed a grassroots strategy in carrying out his duties as chair, conducting numerous townhall-type meetings with groups of Black residents of Watts, affording virtually anyone who wanted to speak the opportunity to be heard.<sup>108</sup> The reception that Clark received from the people was mostly harsh and accusatory.<sup>109</sup> Notably, he was not simply offering them the chance to vent their frustrations. Clark approached them with an open mind and sincerely empathetic disposition. He listened intently and learned much from what the participants shared.<sup>110</sup>

Despite the strong language and anger directed towards Clark, he never lost his composure and always treated the citizens with dignity and respect.<sup>111</sup> Fellow task force member Roger Wilkins observed that this was the first time that he had ever witnessed "a powerful white man take poor black strangers seriously . . . [Clark] was more sensitive

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<sup>106</sup> DAVID C. CARTER, *THE MUSIC HAS GONE OUT OF THE MOVEMENT: CIVIL RIGHTS AND THE JOHNSON ADMINISTRATION, 1965–1968* 60–61 (2009).

<sup>107</sup> *Id.* at 61.

<sup>108</sup> UNITED STATES PRESIDENT'S TASK FORCE ON THE LOS ANGELES RIOTS, REPORT OF THE PRESIDENT'S TASK FORCE ON THE LOS ANGELES RIOTS, AUGUST 11–15, 1965 61 (Sept. 17, 1965) [hereinafter CLARK REPORT].

<sup>109</sup> *Id.* at 16 (observing that the citizens' views were "expressed with emotion, urgency and eloquence—but in many instances, with simple harshness").

<sup>110</sup> See CARTER, *supra* note 106, at 172 (observing that Clark "listened" and "took copious notes while those in attendance, their indignation often coming out, shared accounts of all the problems—most notably police brutality—they faced in Watts").

<sup>111</sup> See ROGER WILKINS, *A MAN'S LIFE: AN AUTOBIOGRAPHY* 172 (1982) ("[Ramsey] didn't get flustered by the rage. It went on hour after hour. He was never angry or self-righteous, never lost his manners or his interest.").

to the problems of poor blacks than [Wilkins] imagined any white man could be.”<sup>112</sup>

The ultimate written report that the task force produced was powerful and unfiltered, using verbatim quotes from Watts citizens about their plight.<sup>113</sup> The most prominent concerns exposed by the task force related to unemployment, inferior education, and hostile police-community relations.<sup>114</sup> The demoralizing combination of these three societal ills created a deep sense of isolation, hopelessness, and anger within the Black community. According to the report, the violent arrests of the Fryes were not the cause of the riots. Rather, they served merely as the spark or catalyst for igniting the rage and frustration that had long been simmering throughout Watts.<sup>115</sup>

The persistent employment and education woes alone were enough to create a sense of desperation and unrest, but the accompanying antagonistic police presence made matters significantly worse. The perception in Watts was that law enforcement viewed the Black community as “hostile territory to be kept in check by a continuous show of force.”<sup>116</sup> The citizens believed that the police were “unnecessarily impolite and even insulting” in their routine encounters with one another,<sup>117</sup> not to mention, overtly brutal in ostensibly carrying out their duties.<sup>118</sup> This destructively generated distrust and fear on both sides.<sup>119</sup>

The ultimate conclusion of the task force’s report was that future unrest could only be prevented by addressing the underlying social issues, particularly the problematic relationship between the Black community and the police. The task force recognized that this was a tall but not impossible order, requiring “patient, determined, and massive

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<sup>112</sup> *Id.* at 172–73.

<sup>113</sup> For a detailed discussion of the Clark Report, see Brown, *Different Lyrics*, *supra* note 10, at 324–28.

<sup>114</sup> Although these concerns were the most significant, the report addressed nine separate issues that the task force deemed critical to addressing the underlying causes of the civil unrest. See CLARK REPORT, *supra* note 108, at 27–60.

<sup>115</sup> See *id.* at 50 (observing that the “arrests of August 11 were only the spark that ignited a highly combustible environment”).

<sup>116</sup> *Id.* at 57.

<sup>117</sup> *Id.* at 58; see also *id.* at 57 (noting reports of encounters between police and Black citizens as being perceived as “unnecessarily brusque.”).

<sup>118</sup> See *id.* at 57 (recounting that the “charge of police ‘brutality’ is a dominant theme of conversation and editorial comment in the Negro community.”); *id.* at 58.

<sup>119</sup> See *id.* at 57 (noting the existence of “reciprocal distrust and fear” between Black citizens and the police).

effort”<sup>120</sup> from “every component of the government” and individual citizens, including Black citizens.<sup>121</sup>

The task force’s report was unfiltered and moving. It brought to light the reality of the pain, suffering, and indignities that were endemic within the Black community, but it was also optimistic about the future if the government and broader society made the necessary commitment. The latter turned out to be whimsical thinking. President Johnson received the report on September 17, 1965, and besides being distributed among a narrow group of government officials, no one ever saw it. Apparently, unhappy with its content, Johnson declined to release the report publicly.<sup>122</sup>

While this was undoubtedly frustrating for Ramsey Clark, his Watts experience taught him much about the Black community. He came to understand and accept the legitimacy of the concerns expressed by Black citizens, and firmly believed that it was essential to treat them with dignity and respect.<sup>123</sup> It is with this compassionate perspective that Attorney General Clark would lead the federal government’s response to the historic civil unrest that would continue for the balance of the 1960s.

#### *B. Ramsey Clark and Subsequent Civil Unrest*

Devastating riots triggered by aggressive police conduct directed toward Black Americans occurred in 1966 and 1967, the most severe of which took place in Cleveland, Newark, and Detroit.<sup>124</sup> The latter two erupted on Ramsey Clark’s watch as attorney general and gave him the opportunity to put his Watts experience into practice. However, in his new role, Clark would not be able to simply take a riot-prevention

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<sup>120</sup> *Id.* at 24.

<sup>121</sup> *Id.* at 3.

<sup>122</sup> See CARTER, *supra* note 106, at 173 (noting that the report was ultimately filed way in an undated envelope, bearing the legend “Confidential Reports which we have announced have never been prepared. Do not give out to anyone, or acknowledge we have”); see also Ramsey Clark Oral History Interview III (Mar. 21, 1969), LBJ Presidential Library, [http://lbjlibrary.net/assets/documents/archives/oral\\_histories/clark\\_r/clark-r3.pdf](http://lbjlibrary.net/assets/documents/archives/oral_histories/clark_r/clark-r3.pdf) (observing that “the report didn’t pull any punches; it demonstrated the existence of really immensely difficult problems . . . ; it was not tender in its treatment of many important interests”).

<sup>123</sup> See CLARK REPORT, *supra* note 108, at 56. (“The task of thinking of the minority poor as a vital and important part of the national scene and treating them with the dignity and decency they deserve as people—American people—must be mastered if we are to succeed in dealing with the problems.”)

<sup>124</sup> See CARTER, *supra* note 106, at 201–08.



approach; he would have to deal directly with the violence and destruction in the streets, and there really is not a gentle, nonconfrontational way to contain a riot. Nevertheless, Clark remained ever mindful of ensuring that the intensity of the government's response was limited only to that which was necessary. He understood that the police could go too far in their efforts to calm the unrest, as turned out to be the case in Detroit, where some described the official response as "a riot of police against blacks."<sup>125</sup>

While Clark was committed to curtailing deadly and destructive conduct by protesters, he stressed the need for "very careful control."<sup>126</sup> When officers overreacted, inflicting unnecessary violence on Black citizens, Clark responded by authorizing federal charges against them for civil rights violations.<sup>127</sup> Even when the available evidence was insufficient to establish a charge beyond a reasonable doubt, he still authorized such prosecutions. One notable example is the prosecution of three police officers and one security guard in connection with the torture and killing of three Black men in the Algiers Motel in Detroit.<sup>128</sup> They were indicted and tried for conspiracy to injure others in "the free exercise and enjoyment of their constitutional rights by inflicting punishment [on them] by injury and death . . . without due process of law."<sup>129</sup> Although the four men were ultimately acquitted, Clark was satisfied with the message that he sent: the excessive use of force by law enforcement to quell civil unrest would not be tolerated.<sup>130</sup>

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<sup>125</sup> SIDNEY FINE, *VIOLENCE IN THE MODEL CITY: THE CAVANAUGH ADMINISTRATION, RACE RELATIONS, AND THE DETROIT RIOTS OF 1967* 195 (1989).

<sup>126</sup> HAMPTON SIDES, *HELLHOUND ON HIS TRAIL: THE STALKING OF MARTIN LUTHER KING, JR. AND THE INTERNATIONAL HUNT FOR HIS ASSASSIN* 248 (2010).

<sup>127</sup> See FINE, *supra* note 125, at 244.

<sup>128</sup> See *id.* at 271–81.

<sup>129</sup> *Id.* at 289; 4 in *Motel Freed in Michigan*, N.Y. TIMES (Feb. 26, 1970), <https://www.nytimes.com/1970/02/26/archives/4-in-motel-trial-freed-in-michigan-police-and-a-guard-cleared-in-67.html>.

<sup>130</sup> Clark also authorized the prosecution of nine police officers in connection with the so-called Orangeburg Massacre, in which South Carolina police opened fire on unarmed Black students from South Carolina State University who were protesting their exclusion from a local bowling alley. See JACK BASS & JACK NELSON, ORANGEBURG MASSACRE 65–77, 180 (1970); see also Frank Beacham, *Orangeburg, America's Forgotten Tragedy*, L.A. TIMES (Feb. 5, 1993), <https://www.latimes.com/archives/la-xpm-1993-02-05-me-797-story.html>. Although this prosecution was likewise ultimately unsuccessful, Clark observed afterward that "[f]rom a law enforcement standpoint, [the case] would have a sobering effect." BASS & NELSON, *supra*, at 101, 180. In other words, officers would think twice before engaging in such conduct in the future. For an in-depth treatment of the Orangeburg Massacre, see generally BASS & NELSON, *supra*.

He remained true to this commitment throughout the balance of his tenure as attorney general, authorizing other similar prosecutions, usually for abusive conduct by police officers directed toward Black citizens. It was Clark's opinion that such actions by law enforcement only served to generate resentment, anger, and increased unrest:

Police who act by force, violence, and cunning stamp the imprimatur of the people on such practices, and leave those they seek to subjugate with little alternative but to reply in kind. In this way, by acting violently and criminally, the police are the cause of further crime and violence.<sup>131</sup>

He issued an even more stinging indictment of overzealous law enforcement in the aftermath of the police response to unrest in Orangeburg, South Carolina in 1968, characterizing the officer's actions leveled at unarmed Black student protesters as the cause of the violence—"The cause of the incident was police criminal acts; the provocation for the incident was an absurd, provocative display of force."<sup>132</sup> Clark went on to denounce the divisive role that politics played in the tragedy that resulted in three deaths and numerous injuries, with leaders seeking to cast the students as somehow deserving of the strong official reaction. Clark darkly noted that "[f]ear, anger, a sense of self-righteousness to justify hating began to be seen clearly as successful politics."<sup>133</sup>

Speaking of this sort of political posturing, Mayor Richard Daley engaged in some of the most irresponsible and dangerous law-and-order rhetoric in the build-up to the 1968 Democratic National Convention (DNC) in Chicago. Following the assassination of Martin Luther King, Jr. on April 4, 1968, the pain, anger, and frustration of Black Americans ignited rioting throughout the nation in over 100 cities, including Washington, D.C.<sup>134</sup> In response to the rioting that had occurred in Chicago, and in anticipation of civil unrest that was sure to accompany the upcoming DNC in the form of anti-Vietnam War protests, Mayor Daley publicly stated that police officers should have been ordered to

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<sup>131</sup> Ramsey Clark, *Police That Serve Society*, in *THE GREAT IDEAS TODAY* 5-6 (Robert M. Hutchins, et al eds., 1972).

<sup>132</sup> Beacham, *supra* note 130. See also BASS & NELSON, *supra* note 130.

<sup>133</sup> Beacham, *supra* note 130.

<sup>134</sup> See JOHN T. ELLIFF, *CRIME, DISSENT, AND THE ATTORNEY GENERAL: THE JUSTICE DEPARTMENT IN THE 1960'S* 112 (1971); GEROLD FRANK, *AN AMERICAN DEATH: THE TRUE STORY OF THE ASSASSINATION OF MARTIN LUTHER KING, JR. AND THE GREATEST MANHUNT OF OUR TIME* 120-21 (1972); SIDES, *supra* note 126, at 260.

shoot looters to maim and arsonists to kill.<sup>135</sup> Ramsey Clark promptly issued a sharp rebuke of the mayor, condemning his incendiary words. In a speech at the University of North Carolina at Chapel Hill, Clark bluntly expressed his view on the topic of shooting looters:

A reverence for life is the sure way of reducing violent death. There are few acts more likely to cause guerilla warfare in our cities and division and hatred among our people than to encourage police to shoot looters or other persons caught committing property crimes. How many dead twelve-year-old boys will it take for us to learn this simple lesson?<sup>136</sup>

In addition, Clark essentially threatened Daley with prosecution if any looters were shot in connection with the DNC.<sup>137</sup>

Ultimately, there was no shooting of looters or killing of arsonists; however, the Chicago police unleashed a brutal display of force against the antiwar protesters. According to author Norman Mailer's graphic description,

The police attacked with tear gas, with Mace, and with clubs, they attacked like a chainsaw cutting into wood, the teeth of the saw the edge of their clubs, they attacked like a scythe through grass, lines of 20 and 30 policemen striking out in an arc, their clubs beating, demonstrators fleeing.<sup>138</sup>

Ramsey Clark reacted strongly to the police violence, assigning the brunt of the blame for the unrest to them, while refusing to denounce or demonize the protesters. This was in stark contrast to Mayor Daley's assessment, which attributed the violence to "outside agitators" whose sole purpose was to instigate a confrontation with law enforcement.<sup>139</sup> Daley wanted the demonstrators prosecuted, as did President

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<sup>135</sup> MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 155 (2005).

<sup>136</sup> RICHARD HARRIS, JUSTICE: THE CRISIS OF LAW, ORDER, AND FREEDOM IN AMERICA 17 (1970) (quoting Ramsey Clark).

<sup>137</sup> Ramsey Clark, *How Can You Represent that Man?: Ethics, the Rule of Law, and Defending the Indefensible*, 44 GA. L. REV. 921, 926 (2010).

<sup>138</sup> FLAMM, *supra* note 135, at 157 (quoting NORMAN MAILER, MIAMI AND THE SIEGE OF CHICAGO: AN INFORMAL HISTORY OF THE REPUBLICAN AND DEMOCRATIC NATIONAL CONVENTIONS OF 1968 (1969)). For a motion picture account of the clash between police and protesters, as well as the famous criminal prosecutions that followed, see *The Trial of the Chicago 7* (Netflix 2020).

<sup>139</sup> Bruce R. Ragsdale, *The Chicago Seven: 1960s Radicalism in the Federal Courts* (2008), <https://www.fjc.gov/sites/default/files/trials/chicago7.pdf>.

Johnson.<sup>140</sup> Attorney General Clark, however, pressed for the prosecution of the offending police officers, having no interest in pursuing those whom he viewed as victims of the official violence.<sup>141</sup> While eight police officers were eventually indicted, the prosecution would not occur until after Ramsey Clark's departure from the DOJ. His successor John Mitchell would oversee this case, as well as the more desirable prosecution—at least from Richard Nixon and Mitchell's perspectives—of the so-called Chicago Seven, the perceived leaders of the demonstrations and instigators of the violence.<sup>142</sup>

Interestingly, Clark's empathetic handling of the DNC-related unrest, combined with his earlier measured responses to civil disorder, became the principal target of Nixon's successful campaign for the presidency.<sup>143</sup> Nixon and Independent Party Candidate George Wallace ran on a law-and-order platform and promised to get rid of Clark, whom they characterized as a soft-on-crime coddler of criminals. They blamed Clark for the continuing unrest and assured the American public that, if elected, they would crack down on those fomenting violence and disruption.<sup>144</sup> Even Democratic nominee Hubert Humphrey succumbed to the law-and-order rhetoric and, as a part of his campaign, likewise pledged to replace Ramsey Clark.<sup>145</sup>

Not surprisingly, Clark also had to endure the ire of Lyndon Johnson. Johnson had long pressed for the prosecution of Black Power activists Stokely Carmichael and H. Rap Brown, contending that they were at the heart of the nationwide unrest.<sup>146</sup> If Clark would just go after them, then the rioting would stop, and LBJ could devote his full attention to winning the war in Vietnam, which was his obsession. There was even an entire Cabinet meeting devoted to the subject of Carmichael and Brown's prosecution.<sup>147</sup> In the face of intense pressure from the President and others within the administration, Ramsey Clark persisted in refusing to indict either Black leader, ostensibly because

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<sup>140</sup> See HARRIS, *supra* note 136, at 69.

<sup>141</sup> See DAVID J. LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA 103 (1999).

<sup>142</sup> See HARRIS, *supra* note 136, at 69; Ragsdale, *supra* note 139.

<sup>143</sup> See Peter Carlson, *The Crusader*, WASH. POST (Dec. 15, 2002), <https://www.washingtonpost.com/archive/lifestyle/2002/12/15/the-crusader/9de49dd7-43fd-45e0-a4ef-3df4475cb4a0/>.

<sup>144</sup> See HARRIS, *supra* note 136, at 144.

<sup>145</sup> See *id.* at 172.

<sup>146</sup> See BROWN, DEFENDING THE PUBLIC'S ENEMY, *supra* note 20, at 87–89.

<sup>147</sup> See *id.* at 88.

the evidence was lacking.<sup>148</sup> More likely, Clark simply believed that such a prosecution was not the right thing to do; he almost certainly viewed it as a misguided attempt to obfuscate the real problems that needed to be addressed.

Clark's resistance to political influences related to his handling of civil unrest earned him an avalanche of criticism from the public,<sup>149</sup> but more so from political leaders. Despite this, Clark remained steadfast, understanding the complexity of the underlying issues and recognizing that the social rebellion occurring across the nation was a symptom to be treated, not a disease to be eradicated. The law-and-order posturing by politicians ignored this reality, and instead focused on demonizing the protestors as lawless criminals who needed to be brought under control through a powerful display of force and domination.<sup>150</sup>

In assessing the devastating societal effect that an unyielding law-and-order approach would have, Ramsey Clark presciently and ominously observed:

How is [crime] controlled and reduced? . . . Not by exhortations to "law and order," which may mean many things but to most today signify force, order as an end in itself, repressiveness. It nurtures fear by conjuring terrible crimes. It fires anger by implying authoritarian power. It divides black from white, young from old, rich from poor, educated from ignorant . . . . It somehow calls for force to prevent the act of crime while ignoring the heart prepared to commit it.<sup>151</sup>

Clark exited the attorney general's office in January of 1969, ceding the position to Nixon's choice for the job, John Mitchell, a man who fully embraced the President's desire for law and order.<sup>152</sup> Hence, the

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<sup>148</sup> See *id.*; Lonnie T. Brown, Jr., *A Tale of Prosecutorial Indiscretion: Ramsey Clark and the Selective Non-Prosecution of Stokely Carmichael*, 62 S.C. L. REV. 1 (2010).

<sup>149</sup> See BROWN, DEFENDING THE PUBLIC'S ENEMY, *supra* note 20, at 74–75.

<sup>150</sup> See, e.g., *id.* at 74, 110, 114.

<sup>151</sup> HARRIS, *supra* note 136, at 29 (quoting Ramsey Clark).

<sup>152</sup> See BROWN, DEFENDING THE PUBLIC'S ENEMY, *supra* note 20, at 78; see also John H. Richardson, *How the Attorney General of the United States Became Saddam Hussein's Lawyer*, ESQUIRE (Feb. 1, 2007), <https://archive.esquire.com/article/2007/1/1/how-the-attorney-general-of-the-united-states-beacem-saddam-husseins-lawyer>. Ironically, Nixon's law-and-order attorney general was later convicted and served prison time for conspiracy, obstruction of justice, and lying under oath in endeavoring to cover up the Watergate scandal. See Leslie Oelsner, *Mitchell, Haldeman, Erlichman are Sentenced to 2 ½ to 8 Years, Mardian to 10 Months to 3 Years*, N.Y. TIMES (Feb. 22, 1975), <https://www.nytimes.com/1975/02/22/archives/mitchell-haldeman-erlichman-are-sentenced-to-2-to-8-years-mardian.html>.

problems of unemployment, inferior education, and hostile police-community relations that plagued Black Americans and catalyzed much of the civil unrest would remain on the backburner, making future rebellion all but inevitable.

*C. William Barr and the Los Angeles Riots*

Fast forward to March of 1991. Another violent encounter between the police and a Black citizen, Rodney King, garnered national and international attention. The conduct of the Los Angeles police officers involved was as brutal as that depicted by Norman Mailer in Chicago during the 1968 DNC,<sup>153</sup> and it was captured on video for the world to see. Notwithstanding this, the four offending officers were acquitted of all charges on April 29, 1992.<sup>154</sup> This verdict, coupled with the recent lenient sentencing of a Korean convenience store owner who had shot and killed an unarmed Black teenager, Latasha Harlins,<sup>155</sup> resulted in an almost immediate explosion of anger and violence in the streets of Los Angeles.<sup>156</sup> Eerily reminiscent of the Watts riots, there was burning and looting, as well as sniper attacks on fire fighters and assaults on any motorists who unluckily ventured into the area.<sup>157</sup> The level of unrest and destruction, however, greatly exceeded the riots of 1965.<sup>158</sup>

Local law enforcement was unprepared and overwhelmed. California Governor Pete Wilson activated the National Guard and sought assistance from the federal government. William Barr was President George H.W. Bush's attorney general at the time, and he initially deployed the FBI and other federal agents to the area to aid in trying to calm the violence. Later, as the unrest worsened, the President, at the

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<sup>153</sup> See *supra* text accompanying note 138.

<sup>154</sup> See Anjuli Sarstry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

<sup>155</sup> See *Court Refuses to Review Korean Grocer's Sentence*, WASH. POST (July 16, 1992), <https://www.washingtonpost.com/archive/politics/1992/07/17/court-refuses-to-review-korean-grocers-sentence/9956b135-4a3c-4c41-8b8b-799cd456686a/>.

<sup>156</sup> See Angel Jennings, *How the Killing of Latasha Harlins Changed South L.A., Long Before Black Lives Matter*, L.A. TIMES (Mar. 18, 2016), <https://www.latimes.com/local/california/la-me-0318-latasha-harlins-20160318-story.html>.

<sup>157</sup> See Sarstry & Bates, *supra* note 154.

<sup>158</sup> See Daniel Bukszpan, *America's Most Destructive Riots of All Time*, CNBC (Feb. 1, 2011), <https://www.cnbc.com/2011/02/01/Americas-Most-Destructive-Riots-of-All-Time.html> (observing that the L.A. riots were the "costliest episode by far of civil unrest in United States history.").

request of Governor Wilson and apparently on Barr's advice, invoked the "antiquated" Insurrection Act in order to make active-duty military forces available.<sup>159</sup> Marine and Army troops eventually arrived to assist local law enforcement and the National Guard restore order. Not trained to deal with such domestic disturbances, the military was less than effective and overly heavy-handed in its efforts. Though the violence ultimately dissipated, some viewed the federal soldiers as playing a minimal and largely unnecessary role in this regard.<sup>160</sup>

Admittedly, the severity of the unrest was extreme, and much of the violence and destruction could plausibly be viewed as purely criminal, with no rational justification. As such, a strong government response was warranted to restore peace and order to the area.<sup>161</sup> However, despite the egregious nature of the rioter's conduct, it would be a mistake to dismiss summarily the reality that undoubtedly contributed to the outrage. As scholar Dr. Cornell West observed: "What we witnessed in Los Angeles was a consequence of a lethal linkage of economic decline, cultural decay, and political lethargy in American life."<sup>162</sup> The Bush administration did not acknowledge or appreciate such a possibility, and its reaction failed to manifest any semblance of empathy toward those involved in the riots or any recognition of the persistent inequitable circumstances that contributed to Black citizens' rage and frustration. Instead, evocative of government leaders' sentiment in the aftermath of civil unrest during the 60s,<sup>163</sup> official public commentary in 1992 condemned the demonstrators and denied the existence of any legitimacy for their actions. President Bush said the violence was "not about civil rights" or "the great issues of equality"

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<sup>159</sup> See Jim Newton, *Did Bill Barr Learn the Wrong Lesson from the L.A. Riots?*, POLITICO (June 9, 2020), <https://www.politico.com/news/magazine/2020/06/09/william-barr-los-angeles-riots-307446>; Natalie Ermann Russell, *Riots in the City of Angels*, UVA MILLER CENTER, (Apr. 24, 2017), <https://millercenter.org/riots-city-angels>; see also Alicia Victoria Lozano, *The Insurrection Act was last used in the 1992 Los Angeles riots. Invoking it again could undo years of police reform, some warn*, NBC NEWS (June 4, 2020), <https://www.nbcnews.com/news/us-news/insurrection-act-was-last-used-1992-los-angeles-riots-invoking-n1224356> (noting that the Insurrection Act was last used during the 1992 L.A. riots).

<sup>160</sup> See Newton, *supra* note 159.

<sup>161</sup> See Lozano, *supra* note 159 (observing that by the time the Insurrection Act had been invoked, twelve individuals were already dead and entire city blocks had been "reduced to rubble.").

<sup>162</sup> CORNELL WEST, RACE MATTERS 1 (25th Anniv. ed. 2017).

<sup>163</sup> See *supra* text accompanying notes 99–106.

but rather “the brutality of a mob, pure and simple.”<sup>164</sup> In addition, he maintained that “[t]he wanton destruction of life and property is not a legitimate expression of outrage with injustice. It is itself injustice. And no rationalization, no matter how heartfelt, no matter how eloquent, can make it otherwise.”<sup>165</sup>

To be sure, like much of the nation, Bush was surprised and troubled by the jury’s verdict and was committed to having his DOJ, led by Attorney General Barr, investigate the police conduct at issue and pursue federal charges if warranted.<sup>166</sup> While Barr did proceed with the investigation, which ultimately resulted in a grand jury indicting the four officers,<sup>167</sup> his public statements about the rioting principally focused on harshly condemning the participants. His view was that the violence in Los Angeles was mostly attributable to gang violence—“My basic take was that this was not civil unrest or the product of some festering injustice. This was gang activity, basically opportunistic.”<sup>168</sup> Concordant with this perspective, Barr would later equate the actions of the rioters with those of the police officers responsible for King’s beating, suggesting that the rioters should have been subjected to federal prosecution,<sup>169</sup> like the officers.<sup>170</sup>

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<sup>164</sup> Paul Taylor & Carlos Sanchez, *Bush Orders Troops into Los Angeles*, WASH. POST (May 2, 1992), <https://www.washingtonpost.com/archive/politics/1992/05/02/bush-orders-troops-into-los-angeles/4c4711a6-f18c-41ed-b796-6a8a50d6120d/>.

<sup>165</sup> Maggie Astor & Zach Montague, *Past Presidents Faced Police Brutality and Protests. They Handled It Differently*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/05/30/us/politics/george-floyd-trump-obama-bush-clinton.html>.

<sup>166</sup> See Jack W. Germond & Jules Witcover, *The Ball is in Bush’s Court on Response to L.A. Riots on Politics*, BALT. SUN (May 5, 1992), <https://www.baltimoresun.com/news/bs-xpm-1992-05-05-1992126127-story.html>.

<sup>167</sup> The officers were indicted for violating Rodney King’s constitutional rights under the fourth and fourteenth amendments. See Robert Reinhold, *U.S. Jury Indicts 4 Police Officers in King Beating*, N.Y. TIMES (Aug. 6, 1992), <https://archive.nytimes.com/www.nytimes.com/books/98/02/08/home/rodney-indict.html>. In April of 1993, Sergeant Stacey Coon and Officer Laurence Powell were convicted, but the other two officers—Theodore Briseno and Timothy Wind—were acquitted. See *Rodney King Riot: Timeline of Key Events*, AP NEWS (Apr. 26, 2017), <https://apnews.com/article/fa4d04d8281443fc8db0e27d6be52081>.

<sup>168</sup> Russell, *supra* note 159 (Barr contending that “the violence was largely street gang activity, big-time gang, not like street gangs in the 1950s—Crips-type gangs”).

<sup>169</sup> See David Rohde, *William Barr, Trump’s Sword and Shield*, NEW YORKER (Jan. 13, 2020) (“Unfortunately, we just brought the federal case against the cops and never pursued the gangsters.”).

<sup>170</sup> See *supra* note 167 and accompanying text.



Barr's reaction to the unrest in Los Angeles was consistent with two of his principal goals for the DOJ, which were to address increasing crime and gang violence.<sup>171</sup> He was unwilling to accept that there was any racial inequity in the administration of the criminal justice system. Such arguments were unsupported excuses, in his mind, rather than legitimate explanations. In particular, Barr stated that any disparity in terms of the incarceration of Black versus white Americans was a product of factors unrelated to race—"our system is fair and does not treat people differently."<sup>172</sup> He went on to note:

if a black and a white are charged with the same offense, generally they will get the same treatment in the system, and ultimately the same penalty. There are some laws that may have a disparate impact on minorities—laws that are not intentionally discriminatory, but as a practical matter, impact minority populations more than others.<sup>173</sup>

An example of one such law that Barr gave was the mandatory minimum sentence of five years for possessing five grams of crack cocaine. To him, the fact that Black citizens were overwhelmingly the recipients of such harsh sentences was a function of the letter of the law, and not any sort of systemic racism, ignoring, of course, the obvious possibility that perhaps the law itself was racially skewed by design.<sup>174</sup>

In keeping with his strict law-and-order approach to criminal justice, Barr was (and remains) a strong proponent of incarceration. While still attorney general in 1992, he drafted a report in this regard titled *The Case for More Incarceration*<sup>175</sup> in which he is sharply critical

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<sup>171</sup> See *Confirmation Hearings on Federal Appointments—William P. Barr: Hearing before the S. Comm. on the Judiciary*, 102d Cong. 51 (1991) (statement of William P. Barr), <http://civilrightsdocs.info/pdf/ag-vacancy/1991-AG-Nomination-Hearing-Transcript.pdf> (when stating his priorities, Barr listed "violent crime" and "attacking criminal organizations, that is, gangs").

<sup>172</sup> Ronald J. Ostrow, *William Barr: A "Caretaker" Attorney General Proves Agenda-Setting Conservative*, L.A. TIMES (June 21, 1992), <https://www.latimes.com/archives/la-xpm-1992-06-21-op-1236-story.html>.

<sup>173</sup> *Id.*

<sup>174</sup> See *id.*

<sup>175</sup> William P. Barr, *The Case for More Incarceration* (Oct. 18, 1992), <https://www.ncjrs.gov/pdffiles1/Digitization/139583NCJRS.pdf>. See also *Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice*, Memorandum from William P. Barr, U.S. Att'y Gen. on Recommendations for State Criminal Justice Systems to George H.W. Bush, U.S. President (July 28, 1992) 19 (on file with the National Criminal Justice Reference System), <https://www.ncjrs.gov/pdffiles1/Digitization/137713NCJRS.pdf> (noting that "[l]aw-abiding

of political efforts in the 1960s to address crime through the implementation of social policies rather than increased incarceration. In his view, this strategy actually exacerbated the problem by expanding the crime rate.<sup>176</sup> Barr rather simplistically concluded that locking more people up would invariably lead to a reduction in crime—violent crime in particular.<sup>177</sup> To the extent that this might lead to an overcrowding problem, Barr had an easy remedy: build more prisons.<sup>178</sup>

Furthermore, as already noted, Barr denied that racial bias existed against Black citizens in terms of incarceration, stating that: “The charge that systemic racial discrimination results in disproportionate incarceration of blacks and in longer sentences, a charge that is often accompanied by misleading statistics, is simply not sustainable.”<sup>179</sup> Indeed, he made the case—as he still does today—that the real problem is Black-on-Black crime, and that increased incarceration would, in fact, benefit the Black population more than any other racial group.<sup>180</sup>

It is important to observe here that Ramsey Clark’s views on crime and incarceration could not have been more different. He firmly believed that social conditions, such as poverty and racism, were the “fountainheads of crime” and that the American prison system was badly broken and unfairly skewed against Black citizens.<sup>181</sup> Rather than increasing incarceration, Clark favored incentivizing rehabilitation through the creative concept of indeterminate sentencing. Under this model, sentences would be based on a range instead of imposed as a specified length. Inmates who demonstrate sufficient progress toward rehabilitation would be eligible for conditional or

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citizens have a right to expect that those who have violated the law will not lead a life of leisure in prison”).

<sup>176</sup> See William P. Barr, *The Case for More Incarceration* 1–2 (Oct. 18, 1992), <https://www.ncjrs.gov/pdffiles1/Digitization/139583NCJRS.pdf>.

<sup>177</sup> See *id.* at 5 (contending that “[i]t strains credulity to believe that the lowered crime rates have been unrelated to the unprecedented increases in the nation’s incarceration rates, even if there may have been other causes as well”).

<sup>178</sup> See *id.* at 11.

<sup>179</sup> See *id.* at app. B, B-1.

<sup>180</sup> See *id.* at vi (“The benefits of increased incarceration would be enjoyed disproportionately by black Americans living in inner cities, who are victims of violent crime at far higher rates than white persons who live outside the inner cities”); *id.* at 20 (observing that “while increasing incarceration might result in higher *numbers* of black men in prison (just as it would with white men), it would disproportionately benefit innocent black victims of their crimes”) (emphasis in original).

<sup>181</sup> RAMSEY CLARK, *CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL* 17 (1970).

unconditional release.<sup>182</sup> From Clark's perspective this type of opportunity would have provided prisoners with a sense of hope and would create an atmosphere more conducive to rehabilitation. Without this, according to Clark, incarceration only serves to produce more crime.<sup>183</sup>

William Barr's tough-on-crime mindset was on full display in his response to the L.A. riots of 1992, and his words and actions seemed wholly in sync with those of President Bush. He would get another opportunity to address similar social disorder in 2020. How would he respond this time?

#### *D. William Barr and the George Floyd Protests*

George Floyd, suspected of having committed a minor, nonviolent crime, ended up dying beneath the casual knee of a Minneapolis police officer, Derek Chauvin. With a hand in his pocket and sunglasses pushed back atop his head, Chauvin ignored Floyd's desperate indication that he could not breathe.<sup>184</sup> It was obvious that Chauvin was killing George Floyd, and perhaps even more patent that he did not seem to care. When word and video images of this horrifying incident spread across Minneapolis and beyond, the shock and outrage was immediate and understandable, especially with Floyd's death closely succeeding troubling killings of Black Americans—Breonna Taylor in Kentucky and Ahmaud Arbery in Georgia.<sup>185</sup>

President Trump initially reacted in a manner that seemed appropriate in light of the tragic and highly disturbing nature of Floyd's killing. Although he stopped short of condemning the police directly, the President acknowledged that what he saw was "very bad"; he indicated that the FBI and attorney general were going to "take a very strong look and see what went on"; and he extended his remorse to "George's

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<sup>182</sup> *Id.* at 222.

<sup>183</sup> See BROWN, DEFENDING THE PUBLIC'S ENEMY, *supra* note 20, at 229. For a contrary view, see William P. Barr, *The Case for More Incarceration* 9–11 (Oct. 18, 1992), <https://www.ncjrs.gov/pdffiles1/Digitization/139583NCJRS.pdf> (arguing that prisons do not create crime).

<sup>184</sup> See David K. Li, *George Floyd Told Police He was Struggling to Breathe Before an Officer Put a Knee on His Neck*, NBC NEWS (May 29, 2020), <https://www.nbcnews.com/news/us-news/george-floyd-told-police-he-was-struggling-breathe-officer-put-n1218556>.

<sup>185</sup> See Lauren Aratani, *George Floyd Killing: What Sparked the Protests – and What has been the Response?*, THE GUARDIAN (May 29, 2020), <https://www.theguardian.com/us-news/2020/may/29/george-floyd-killing-protests-police-brutality>.

family and friends.”<sup>186</sup> As time went on, however, the protests in Minneapolis, and elsewhere, intensified, and so did the content and tone of the President’s official rhetoric. Reminiscent of Mayor Daley in 1968,<sup>187</sup> President Trump tweeted:

These THUGS are dishonoring the memory of George Floyd, and I won’t let that happen. Just spoke to Governor Tim Walz and told him that the Military is with him all the way. Any difficulty and we will assume control but, when the looting starts, the shooting starts.<sup>188</sup>

Trump subsequently tried to recast his tweet by explaining that the reference to shooting looters was really only meant to point out a natural consequence of looting; it was not a threat regarding what authorities would or should do to looters.<sup>189</sup> Given the overall content of the tweet, particularly the “THUGS” reference, it is difficult to accept the President’s after-the-fact rationale. It seems apparent that he was warning protesters that if looting started, such actions would be met with deadly force.

Although he was not as overt as Mayor Daley, President Trump’s message was essentially the same. However, in 1968, Daley’s irresponsible grandstanding was met head on with an official rebuke from the nation’s chief law enforcement official, Ramsey Clark, who made it clear that lethal force should not and would not be used in response to acts creating property damage.<sup>190</sup> In 2020, Attorney General William Barr made no such public statement.<sup>191</sup> Perhaps he felt that the President’s post-hoc explanation was sufficient, but even so, it would have been reassuring for the attorney general, at a minimum, to have publicly clarified that the level of force suggested in the President’s tweet would not be appropriate for property-related offenses, or some statement to that effect. After all, grossly over-the-top police aggression is what precipitated the unrest in the first place.

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<sup>186</sup> Astor & Montague, *supra* note 165.

<sup>187</sup> See *supra* text accompanying note 135.

<sup>188</sup> Astor & Montague, *supra* note 165.

<sup>189</sup> See *id.*

<sup>190</sup> See *supra* text accompanying note 136.

<sup>191</sup> It is important to note that on at least one occasion, Barr complained about the President’s tweets, lamenting that they made it impossible for him to do his job. See Matt Zapotosky & Josh Dawsey, *et al.*, *Barr Has Told Those Close to Trump He is Considering Quitting Over the President’s Tweets About Justice Department Investigations*, WASH. POST (Feb. 18, 2020), [https://www.washingtonpost.com/politics/trump-raises-possibility-of-suing-those-involved-in-prosecuting-roger-stone/2020/02/18/238279fc-5250-11ea-9e47-59804be1dcfb\\_story.html](https://www.washingtonpost.com/politics/trump-raises-possibility-of-suing-those-involved-in-prosecuting-roger-stone/2020/02/18/238279fc-5250-11ea-9e47-59804be1dcfb_story.html).

This is but one example of Attorney General Barr's silence in relation to the President's words or actions regarding civil unrest or to other disturbing events that occurred on his watch. It is of course possible, that though publicly silent, the attorney general was working behind the scenes to address issues in an appropriate manner. However, Barr is by no means one who makes a practice of remaining silent and letting his actions speak for themselves. As attorney general, he often spoke out, emphatically at times, making it noteworthy and revealing to examine the matters on which Barr issued public statements as compared to those on which he held his tongue.

Notably, Attorney General Barr was quite vocal with regard to his official views related to the protests following the George Floyd killing. Unlike Ramsey Clark, but much like his earlier commentary on the L.A. riots, Barr condemned the actions of the protesters and suggested that they were being led and turned violent by subversive elements. In a prepared statement, he maintained that "voices of peaceful protest [were] being hijacked by violent radical elements" and that "[g]roups of outside radicals and agitators [were] exploiting the situation to pursue their own separate and violent agenda."<sup>192</sup> Furthermore, he went on to suggest that "[i]n many places it appear[ed] the violence [was] planned, organized, and driven by anarchistic and far-left extremists, using Antifa-like tactics, many of whom travel[ed] from out of state to promote the violence."<sup>193</sup> He ended by threatening prosecution, emphasizing that it is a federal crime to cross state lines or use interstate facilities to incite or participate in violent rioting, and proclaiming that: "We will enforce these laws,"<sup>194</sup> and later heightened his condemnation of such actors, characterizing them as "domestic terrorists."<sup>195</sup> It is important to note that while Barr spent much time focusing on the alleged involvement of these violent extremists, in reality, the protests were largely peaceful.<sup>196</sup> Hence, this incantation of

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<sup>192</sup> Barr's Statement on the Death of George Floyd, *supra* note 14.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* Ironically, the Act that contains these prohibitions is known as the "Rap Brown law," because it was enacted to address the behavior that Rap Brown and Stokely Carmichael were allegedly engaged in during the 60s, the conduct that Ramsey Clark refused to deem as criminal. See *supra* notes 146–47 and accompanying text.

<sup>195</sup> Barr's Statement on Riots, *supra* note 14.

<sup>196</sup> See Lozano, *supra* note 159; see also Barr's Remarks on Civil Unrest, *supra* note 16 (acknowledging that the "large preponderance" of protesters were peaceful, but nevertheless focused attention principally on those he characterized as "extremist agitators who are hijacking the protests").

civil unrest was clearly unlike the violence that Barr faced in 1992.<sup>197</sup> Nevertheless, his reaction was much the same.

Barr persisted in demonizing protesters even after the demonstrations slowed. For example, in an appearance at Hillsdale College, he tersely criticized the Black Lives Matter Movement, asserting that its followers are not interested in Black lives but rather “in props, a small number of Blacks who are killed by police during conflicts with police . . . who they can use as props to achieve a much broader political agenda.”<sup>198</sup> During the same appearance, Barr decried the COVID-19 lockdowns as the “greatest intrusion on civil liberties in American history,” other than slavery.<sup>199</sup> Barr’s ignoring of such historic civil liberties deprivations as legalized segregation, the Japanese internment during World War II, and the institutionalized withholding of Black citizens’ right to vote, among others, was astonishing.

In terms of his critique of law enforcement following George Floyd’s death, Barr was reluctant to criticize the police, despite widespread calls for dramatic reform, and he insisted that there is no systemic racism in policing.<sup>200</sup> Although he unavoidably conceded that there are some officers who may be racially biased, he refused to acknowledge that the system as a whole may have a racial-bias problem—“I think that there are instances of bad cops. And I think we have to be careful

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<sup>197</sup> See Lozano, *supra* note 159 (noting that the circumstances surrounding the 1992 Los Angeles riots differed greatly from those of the George Floyd-related protests—they “weren’t the peaceful protests seen recently throughout the country and around the world”).

<sup>198</sup> Carrie Johnson, *Barr Blasts His Own Prosecutors: “All Power is Vested in the Attorney General”*, NPR (Sept. 17, 2020), <https://www.npr.org/2020/09/17/913891515/in-fiery-speech-barr-assails-his-own-prosecutors-for-political-headhunting>. See also Debra Cassens Weiss, *AG Barr Defends Authority to Overrule Career Prosecutors, Says BLM Uses Deaths as “Props”*, A.B.A. J. (Sept. 17, 2020) (observing that “Barr has urged aggressive prosecution of protesters who are violent, reportedly telling prosecutors . . . they should consider charging [the protesters] with sedition”).

<sup>199</sup> Johnson, *supra* note 198.

<sup>200</sup> See Katie Benner, *Barr Says There Is No Systemic Racism in Policing*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/politics/justice-department-barr-racism-police.html>; see also Interview by Margaret Brennan with William Barr, U.S. Att’y Gen., CBS NEWS (June 7, 2020), <https://www.cbsnews.com/news/hill-barr-george-floyd-protests-blm-face-the-nation-transcript/> (Barr stating “I think there is racism in the United States still but I don’t think that the law enforcement system is systemically racist”).

about automatically assuming that the actions of an individual necessarily mean that their organization is rotten.”<sup>201</sup>

In Barr’s view, the police actually seem to be the victims. Commenting on the public reaction to George Floyd, he stated:

We had that terrible death in Minneapolis . . . , but then we had this extreme reaction that has demonized police and called for the defunding of police departments. And what we have seen then is a significant increase in violent crime in many cities. And this rise is a direct result of the attack on the police forces and the weakening of police forces.<sup>202</sup>

Along the same lines, in testimony before the House Judiciary Committee, he contended that the “demonization of the police is not only unfair and inconsistent with the principle that all people should be treated as individuals, but gravely injurious to our inner city communities . . . . When a community turns on and pillories its own police, officers naturally become more risk averse and crime rates soar.”<sup>203</sup> Barr went on to proclaim that the “threat to black lives posed by crime on the streets is massively greater than any threat posed by police misconduct.”<sup>204</sup>

While Barr was willing to speak out about the George Floyd-related protests, largely by condemning the protesters and defending law enforcement, he stood by silently in the face of numerous other troubling instances of civil disorder. For example, when anti-lockdown protesters, many with firearms, violently stormed government buildings, including the Michigan statehouse,<sup>205</sup> Attorney General Barr

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<sup>201</sup> See Interview by Margaret Brennan with William Barr, U.S. Att’y Gen., CBS NEWS (June 7, 2020) (“I frankly think that we have generally the vast, overwhelming majority of police are good people”) (quoting Barr).

<sup>202</sup> Rebecca Klar, *Barr: Floyd’s Death was “Terrible,” But the Reaction to It Has Been “Extreme,”* THE HILL (July 22, 2020), <https://thehill.com/homenews/administration/508594-barr-floyds-death-was-terrible-but-the-reaction-to-it-has-been>.

<sup>203</sup> William P. Barr, *Written Statement*, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES (July 28, 2020), *available at* <https://thehill.com/homenews/administration/509304-read-attorney-general-william-barrs-written-testimony-to-the-house>.

<sup>204</sup> *Id.* Cf. *supra* note 180 and accompanying text.

<sup>205</sup> See Katie Shepherd & Moriah Balingit, *A Noose, an Axe, and Trump-Inspired Insults: Anti-Lockdown Protesters Ratchet Up Violent Rhetoric*, WASH. POST (May 15, 2020), <https://www.washingtonpost.com/nation/2020/05/15/noose-fight-coronavirus-protest/>.

apparently had nothing to say by way of condemnation.<sup>206</sup> On August 23, 2020, a Kenosha, Wisconsin police officer shot Jacob Blake seven times in the back during an encounter, leaving Blake paralyzed and igniting civil unrest in Wisconsin and across the country.<sup>207</sup> In response, Barr had no condemning words for the facially excessive display of official force, but rather, spoke out cryptically in defense of the officer, suggesting that he knew additional facts that he would not reveal and stating that the case was an example of “when people should wait until they know the facts” before they “crucify the officer.”<sup>208</sup>

One final dichotomy in terms of how Attorney General Barr chose to address different forms of civil unrest seems especially revealing. On June 4, 2020, a diverse crowd of demonstrators in Lafayette Square near the White House, who were protesting police mistreatment of Black Americans, were forcibly “pushed back” after they purportedly refused to disperse and were becoming unruly.<sup>209</sup> Barr gave the orders to the police and federal forces to clear the area, using shields, nightsticks, and pepper spray.<sup>210</sup> Once accomplished, the President was able to take advantage of a photo opportunity holding a Bible in front of St. John’s Episcopal Church.<sup>211</sup>

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<sup>206</sup> See House Judiciary Comm. Hearing on Att’y Gen. William Barr (Jul. 28, 2020), <https://www.rev.com/blog/transcripts/house-judiciary-committee-hearing-of-attorney-general-barr-transcript-july-28> (exchange between Barr and Representatives Jamie Raskin and Pramila Jayapal, during which Barr acknowledged this awareness of the protests but not their gravity and suggested that it was a matter for the “Michigan authorities.”).

<sup>207</sup> See Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Sept. 10, 2020), <https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html>.

<sup>208</sup> Interview by Pete Williams with William Barr, NBC NEWS (Sept. 10, 2020), <https://www.nbcnews.com/video/watch-full-a-g-william-barr-interview-91387461997>.

<sup>209</sup> Matthew S. Schwartz, *Security Perimeter Around White House Expanded by Several Blocks*, NPR (June 5, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/05/870760404/security-perimeter-around-white-house-expanded-by-several-blocks>.

<sup>210</sup> See Interview by Margaret Brennan with William Barr, U.S. Att’y Gen., CBS News (June 7, 2020), <https://www.cbsnews.com/news/bill-barr-george-floyd-protests-blm-face-the-nation-transcript/> (Barr defending methods used, calling them “appropriate . . . when they met resistance”); Phillip Bump, *Attorney General Barr’s Dishonest Defense of the Clearing Defense of LaFayette Square*, WASH. POST (June 8, 2020), <https://www.washingtonpost.com/politics/2020/06/08/attorney-general-barrs-dishonest-defense-clearing-lafayette-square/>; (noting Barr’s defense of the use of pepper spray by explaining that it is not a chemical but rather a strong irritant).

<sup>211</sup> Bump, *supra* note 210.



In contrast, on October 31, a small group of white protesters carrying Trump signs outside of Barr's residence in McLean, Virginia were personally greeted by the attorney general. He spoke with them, explained the DOJ's role, shook their hands, and posed for pictures.<sup>212</sup> The protesters were treated with dignity and respect, notwithstanding that they were trespassing and issuing demands for Barr to lock up Joe Biden. No police were called. No nightsticks. No pepper spray.

The lack of consistency between the attorney general's actions and choices regarding when to speak out publicly conveyed a message, intended or not, that was loud and clear. Statements and actions that were in sync with the President's politically expedient law-and-order rhetoric and campaign-related messaging were not merely accepted but embraced; while those actors who might somehow have been portrayed as opposed to the law-and-order platform, or otherwise outside the President's political mainstream, were criticized, marginalized, and maybe even subjected to physical force.

Attorney General Barr's silence and inaction spoke louder than words. They signified that justice is not equal, all lives are not the same, and DOJ independence is an ideal to be verbally deployed when advantageous but not necessarily an objective that defined how the attorney general carried out his role.<sup>213</sup>

#### V. CONCLUSION: RAMSEY CLARK OR WILLIAM BARR?

As attorneys general go, Ramsey Clark and William Barr were about as different as two men could be. However, despite their many differences, they both shared a common respect and admiration for the

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<sup>212</sup> See Matthew Brown, *Pro-Trump Protesters Picket Attorney General Barr's House in Virginia, Demand He "Lock Up" Joe Biden*, USA TODAY (Nov. 1, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/11/01/protesters-william-barrs-virginia-home-demand-joe-biden-arrest/6112424002/>.

<sup>213</sup> It should be noted that in the aftermath of President Trump's election loss to Joe Biden, he and his attorney general ultimately parted ways on the subject of alleged widespread voter fraud. Although Barr had fueled speculation regarding the potential for voter fraud in the lead-up to the election, the absence of actual evidence to support plausible claims that substantial voter fraud in fact occurred caused the attorney general to publicly disagree with the President and eventually resign. See Katie Benner & Michael S. Schmidt, *Barr Acknowledges Justice Department Has Found No Widespread Voter Fraud*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/us/politics/william-barr-voter-fraud.html>. But even in resigning, Barr glowingly praised Trump, thereby undermining the significance of the voter-fraud schism. See Norman Eisen & Donald Ayer, *William Barr's Resignation is a Final, Parting Shot to the Rule of Law*, WASH. POST (Dec. 15, 2020), <https://www.washingtonpost.com/outlook/2020/12/15/barr-resignation-rule-law/>.

job of law enforcement. It may come as a surprise that Attorney General Clark was actually quite popular with the police during the 60s. This is so because, notwithstanding his harsh denouncement of individual instances of police abuse and systemic racial insensitivity, he believed that a partial answer to these problems was to improve the quality of the officers through enhanced training and better pay.<sup>214</sup> Hence, my guess is that Clark, like Barr, would not support the “defund the police” movement, at least not during his time as attorney general.

Another area where one might conclude that Clark and Barr agreed is with regard to their views on the importance of independence in executing the duties of the attorney general, particularly the prosecutorial function. For his part, Clark’s actions speak for themselves. He defied President Johnson on numerous significant matters, to the point of permanently damaging the men’s personal and working relationship. The integrity of the office and the rule of law came first for Clark, and that priority could only be maintained, if he exercised independent professional judgment in this area, devoid of any and all political influence.

As for Attorney General Barr, he certainly talked a good game, expressing a commitment to all of the things that Ramsey Clark, in fact, did as attorney general. Specifically, as already noted, during his confirmation hearing in 2019, Barr emphasized his ability to be “truly independent” and maintained that he could not be bullied into doing anything that he thinks is wrong. He pledged that he would do what he thinks is right as attorney general. Further, he hearkened back to his previous confirmation hearing in 1991, and again emphasized, as he did then, that the “Attorney General . . . holds in trust the fair and impartial administration of justice.”<sup>215</sup> In accord with this, Barr represented that he would “ensure that the administration of justice, the enforcement of the law, is above and away from politics. Nothing could be more destructive of our system of Government, of the rule of law, or the Department of Justice as an institution, than any toleration of political interference with the enforcement of the law. I believe this as strongly today as I did 27 years ago, indeed, more strongly.”<sup>216</sup>

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<sup>214</sup> See BROWN, DEFENDING THE PUBLIC’S ENEMY, *supra* note 20, at 112–14.

<sup>215</sup> Senate Judiciary Comm. Hearing on Hon. William Barr to be Att’y Gen. William Barr (Jan. 15 2019), <https://www.congress.gov/116/chrg/CHRG-116shrg36846/CHRG-116shrg36846.htm>.

<sup>216</sup> *Id.* See also Interview by Pierre Thomas with William Barr, U.S. Att’y Gen., ABC News (Feb. 13, 2020), <https://abcnews.go.com/Politics/transcript-attorney-general-bill-barrs-exclusive-interview-abc/story?id=68975178> (Barr stating that “the essential role of

In February of 2020 William Barr asserted that the President had never asked him to do anything in a criminal case.<sup>217</sup> Even then, this statement rang somewhat hollow, and it was unclear whether it included Trump asking Barr to initiate prosecutions or was simply limited to the President intervening in pending cases. Maybe the attorney general was acting in a truly independent fashion, “above and away from politics,” but the timing of some of his official acts in relation to presidential tweets, at least created the appearance that he may have been doing the President’s bidding.<sup>218</sup>

Whatever plausibility there may have been regarding Barr’s February pronouncement seems to have dissipated considerably by the fall. In October, the President did not simply ask his attorney general to take action in criminal cases, he all but directed him to do so, calling Barr out publicly for failing to indict President Barack Obama and Joe Biden.<sup>219</sup> In an interview on Fox Business, Trump lamented: “Unless Bill Barr indicts these people for crimes—the greatest political crime in the history of our country—then we’ll get little satisfaction, unless I win.”<sup>220</sup> Of course this was outrageous—a sitting President demanding

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the Attorney General is to keep law enforcement [and] the criminal process sacrosanct to make sure there is no political interference”).

<sup>217</sup> David E. Sanger, *Taking Page from Authoritarians, Trump Turns Power of State Against Political Rivals*, N.Y. TIMES (Oct. 10, 2020), <https://www.nytimes.com/2020/10/10/us/politics/trump-barr-pompeo.html> (noting Barr’s February statement to ABC News that Trump “has never asked me to do anything in a criminal case”).

<sup>218</sup> See, e.g., Zapotosky & Dawsey, *et al.*, *supra* note 190 (noting that after Trump tweeted about the unfairness of Roger Stone’s sentencing recommendation, Barr intervened to reduce that recommendation, although he contends his decision was made independently); see also *Open Letter Supporting the 100,000 Lawyers, Agents, and Staff Members of the U.S. Department of Justice* (Oct. 1, 2020), <https://lawyersdefendingdemocracy.org/open-letter-supporting-the-us-doj/> (contending that “Barr’s prosecutorial actions supporting the President’s friends and partisan interests [e.g., Roger Stone and Michael Flynn] have eroded confidence in his commitment to impartial justice for all people”); Roiphe, *supra* note 75, at 1128 (discussing Barr’s efforts related to Stone’s sentencing and the criticism he received for it from 2,000 former members of the DOJ).

<sup>219</sup> See *id.* (recounting tweet by Trump in which he demanded that Barr “immediately arrest and jail” President Obama, Joe Biden, and Hillary Clinton).

<sup>220</sup> Sanger, *supra* note 217. See also Andrew Desiderio, *Trump Hits Barr for not Delivering Russia Probe Bombshells*, POLITICO (Oct. 9, 2020), <https://www.politico.com/news/2020/10/09/trump-hits-barr-russia-probe-bombshells-428355> (noting that Trump reacted to news that indictments related to the Russia probe investigation would not occur before the election by stating “[i]f that’s the case, I’m very disappointed. I think it’s a terrible thing. And I’ll say it to [Barr’s] face”).

that his predecessor and a political opponent be indicted before an upcoming election for the obvious purpose of influencing the outcome.

If Ramsey Clark were the attorney general, it seems difficult to conclude that he would not have felt compelled to have said something in response to such extreme remarks by the President. My educated speculation is that he would not have been comfortable allowing the integrity and independence of his position to be called into question. It was important to him that the American people believe in the fairness and justness of the system, and that they have faith in the rule of law. Clark's empathic and integrity-laden handling of civil unrest in the 60s revealed how he viewed his responsibility as attorney general. His ultimate responsibility was to the United States and its citizens, not the President. Accordingly, just as he stood firm against President Johnson, he would almost certainly have done likewise with respect to President Trump and would have resigned if pressured to do something that was contrary to his sacred duty.

One would have hoped that William Barr would have responded in a similar fashion, but as this Article demonstrates, the fact that he failed to speak out should come as no real surprise. While his silence may have been designed to simply let the issue fade into the background,<sup>221</sup> such reticence creates a problem when considered against the backdrop of matters on which Barr chose to speak—like the illegitimacy of the Black Lives Matter Movement, or the need for increased incarceration, or his position that there is no systemic racism in policing. What he chose to talk about and what he determined to have been unworthy of comment telegraphed to the public the priorities of the Trump DOJ and the substance of the person at its head. Although he would surely claim otherwise, a persuasive case can be made that Attorney General Barr considered himself to be the President's lawyer and acted, almost invariably in a manner consistent with his perceived client's political objectives.

Fairly early in his presidency, when he was reeling from attacks about the alleged Russian interference in his 2016 election, and Attorney General Jeff Sessions and FBI Director James Comey seemed unwilling to protect him with fierce, blind loyalty, President Trump

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<sup>221</sup> It should be noted that no indictment of President Obama or now-President Biden was issued before or after the election. One could argue that this was answer enough to the President's comments, but there is still something troubling about Barr's silence when assessed in the context of his overall actions and other public statements.

longingly and rhetorically asked: “Where’s my Roy Cohn?”<sup>222</sup> Cohn had been a legal advisor for Senator Joseph McCarthy during his search for communists in the 1950s and the personal lawyer and fixer to a host of high-profile clients, such as Yankee owner George Steinbrenner, organized crime boss John Gotti, and, most notably, Donald Trump, with whom Cohn developed a close relationship.<sup>223</sup> Cohn, who died in 1986, would do whatever it took to serve his client’s desires. He was ruthless, relentless, and unfailingly loyal.<sup>224</sup> That is what Donald Trump wanted, but that is not what the American people needed. Rather than asking “where’s my Roy Cohn,” a President who truly cared about our justice system and the sanctity of the rule of law would have been better served to ask, “where’s my Ramsey Clark?”

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<sup>222</sup> See Ron Elving, *President Trump Called for Roy Cohn, But Roy Cohn Was Gone*, NPR (Jan 7, 2018), <https://www.npr.org/2018/01/07/576209428/president-trump-called-for-roy-cohn-but-roy-cohn-was-gone>.

<sup>223</sup> See *id.* See also *Where’s My Roy Cohn* (Altimeter Films 2019).

<sup>224</sup> See Elving, *supra* note 222 (“If he was your lawyer, he was prepared to do anything for you; if he was your adversary, no holds were barred.”). See generally *Where’s My Roy Cohn*, *supra* note 223.