

RHETORIC AND NOSTALGIA IN THE CRIMINAL JUSTICE REFORM MOVEMENT

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I. INTRODUCTION

In 1989, the hip-hop group N.W.A. released the album “Straight Outta Compton,” featuring the hit single “Fuck tha Police.”¹ In a hard-hitting six minutes, the song features group members drawing on their real-life experiences with the Los Angeles Police Department, “accusing cops of pulling them over in their cars and raiding their homes” without warrants or legal justification.² N.W.A. had long considered describing police bias against young black men, but were moved to write the track after two members were shoved face-down on the pavement of a Los Angeles freeway.³ Ice Cube, a member of the group, remembers that the LAPD chief “had declared a war on gangs . . . [which] meant a war on every black kid with a baseball hat on, with a T-shirt on, some jeans and some tennis shoes.”⁴

Predictably, the law enforcement community’s reaction to the song was harsh. “The FBI famously penned a missive to N.W.A.’s record label

* Assistant Professor, University of Akron School of Law. I am grateful to the University of Akron for hosting this important scholarly discussion, and to Professor Tracy Thomas, the John F. Seiberling Chair of Constitutional Law and Director of the Constitutional Law Center, for inviting me to participate.

1. Andre Douglas Pond Cummings, *Thug Life: Hip-Hop’s Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 515, 521 n. 27 (2010).

2. Kory Grow, *How N.W.A.’s ‘Fuck tha Police’ Became the ‘Perfect Protest Song’*, ROLLING STONE (June 9, 2020), <https://www.rollingstone.com/music/music-features/nwa-fuck-tha-police-protest-song-1010355>. N.W.A. was far from the only hip-hop group to describe discriminatory policing in vivid detail. “A frequent theme in hip-hop is that the law does not correctly select the most deserving candidates for punishment. Specifically, the law does not properly weigh the immorality posed and danger caused by white elites. Rather, it exaggerates the threat posed by the poor and by minorities.” PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 139 (2009).

3. Grow, *supra* note 2; *see also* BUTLER, *supra* note 2, at 125 (“Hip-hop culture makes a strong case for a transformation of American criminal justice: it describes, with eloquence, the problems with the current system, and articulates, with passion, a better way.”).

4. The group felt their only possible response was through their music. Grow, *supra* note 2.

protesting the content of the group’s music.”⁵ According to some retired NYPD members, officers began closely monitoring and generating dossiers on hip-hop artists like N.W.A.⁶ Though the song’s legacy ballooned in popular culture, little changed in the relationship between officers and the group’s members; in one incident, officers briefly detained the group after they performed the song at a concert in Detroit.⁷ Three decades later, N.W.A.’s members remain pessimistic that their song, or the protest and criminal justice reform movement more broadly, will change the relationship between officers and the communities they police.⁸

Today’s movement for criminal justice reform, and the attendant calls to “defund the police,” are far more nuanced and politically palatable than N.W.A.’s harsh missive. But there are lessons to be learned from N.W.A.’s experience. Calls for drastic change are vital. But the language in those calls can easily be misinterpreted as attacks on well-meaning officers, who have plenty of staunch defenders. Though it might seem hopeless to discuss the proper messaging for a movement when young men of color are dying in the streets,⁹ real change—especially change wrought through legislative responses and widespread community buy-in—requires broad constituencies to feel that they can be part of the solution. Poor messaging can undermine that sense of joint endeavor to improve the plight of communities subject to discriminatory, violent overpolicing. And poor messaging can also be misleading, both to the movement’s members and to the public the movement hopes to persuade, especially when that messaging contains elements of flawed nostalgia for better times that never were.

5. Cummings, *supra* note 1, at 531-32.

6. *Louder Than a Riot: The Conspiracy Against Hip-Hop*, NPR (Oct. 8, 2020), <https://www.npr.org/transcripts/921111245> (quoting retired NYPD officer Derrick Parker).

7. Grow, *supra* note 2.

8. *Id.*

[Police killings] will happen long after I’m gone and Cube gone: People will still be saying, ‘Fuck the police.’ You’ll see it on posters. You’ll see it on the walls. People will listen to it again, because police brutality is never gonna end in this country for black people. Hopefully something will change, but black people have been getting killed for so long. Since we came to America, we’ve been getting lynched and shit for no reason at all. It’s like, when do this shit end?

Id.

9. Marley K., *Who Cares If It’s Defund the Police or Fuck The Police?*, MEDIUM (Dec. 4, 2020), <https://medium.com/an-injustice/7442a1d77ef1> (“We don’t care about that damned slogan because it’s not ours. What we care about is whether candidates running for public office are not afraid to say community policing in Black communities needs to be addressed while providing specific, tangible plans to address racism for the people they are pledging to serve.”).

To be clear, I steadfastly support calls for change in the relationship between the police and the communities they serve, especially in neighborhoods populated by people of color where a variety of biases—implicit and explicit, systemic and individualized—have torn apart far too many families for far too many years.¹⁰ Criminal justice reform is absolutely vital to the future of our increasingly diverse nation. Yet while conversations about the role of police are essential, rhetoric that focuses national attention on that issue alone can undermine progress towards a more just system of criminal investigation and adjudication.

Well-intentioned calls to defund the police are not literal appeals for a Hobbesian dystopia that ends the government's monopoly on the legally permissible use of force. But they remain flawed in two ways. First, they repeat many of the mistakes made by protest anthems of the past. For too many Americans enduring today's all-too-real dystopia, calls to defund sound like calls to anarchy, not arguments for peaceable, sensible reforms. Second, defunding rhetoric contains an element of historical nostalgia, suggesting that a return to underpoliced neighborhoods will allow young men of color to flourish. But there are risks in discriminatory underpolicing as well as discriminatory overpolicing; the former led many liberal and African American activists in the 1960s and 70s to call for greater crime control and police presence,¹¹ which had disastrous consequences still playing out today.

Activists for criminal justice reform must think both broadly and equitably. There is little doubt that overpolicing in some communities contributed to mass incarceration and widespread distrust of officers, which in turn limited officers' ability to solve crimes in all neighborhoods.

10. Just a few frequently cited statistical examples demonstrate the point. In 2020 the United States prison population was roughly 2.3 million, by far the largest in the world. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>; *World Prison Populations*, BBC NEWS, <http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/nn2page1.stm>. Though the United States hosts less than 5% of the world's population, it hosts over 20% of its prisoners, incarcerating nearly 700 of every 100,000 residents. Sawyer & Wagner, *supra*; Michelle Ye He Lee, *Does the United States Really Have 5 Percent of the World's Population and One Quarter of the World's Prisoners?*, WASH. POST (Apr. 30, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/>. The burden of incarceration falls disproportionately on populations of color; "African Americans are held in state prisons at a rate five times that of whites. In eleven states, at least one in twenty adult black men is in prison." JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 218 (2017) (citing Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, THE SENTENCING PROJECT, 2016; *Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System* (2013)).

11. See, e.g., FORMAN, *supra* note 10, at 10-13.

But calls to defund focus too narrowly on overpolicing alone. Ending any interaction between government investigators and people of color is not a panacea for the myriad injustices in our system of criminal adjudication. It may leave the victims of crime in low-income neighborhoods to either accept their plight or resort to self-help, an avenue that leads to disastrous cycles of violence. And it may limit change to a narrow problem, rather than pursuing the broader course of reforms needed to tear down the myriad mistakes of the past, brick by unjust brick.

II. WHAT DOES “DEFUND THE POLICE” MEAN?

The call to defund the police has intellectual origins in the prison abolitionist movement, which seeks alternatives to the modern prison industrial complex that would immediately reduce, and eventually eliminate, the American prison population.¹² Prison abolitionists argue that today’s American criminal justice system assures white Americans will remain dominant in the social order by controlling, and even suffocating, young men of color.¹³ For prison abolitionists, policing itself is a systemic means of subjugation.¹⁴

In the wake of George Floyd’s death, calls to defund the police garnered national attention and widespread public support amongst advocates.¹⁵ The phrase’s meaning is nuanced; in addition to reducing

12. The history of prison abolition is often traced to Angela Davis, a political activist and counter-culturalist who challenged the utility of the modern prison system and started a conversation about “decarceration” that would end the time of prisons. See ANGELA DAVIS, *ARE PRISONS OBSOLETE?* (2003). More recently, scholars like Paul Butler and Allegra McCleod have carried the prison abolition mantle, arguing that locking human beings in cages is a morally abhorrent practice that should be phased out of our society. See, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 31 (2018) (“We face a crucial choice. Do we allow the Chokehold to continue to strangle our democracy and risk the rebellion that always comes to police states? Or do we transform the United States of American into the true multiracial democracy that, at our best, we aspire to be?”); Allegra McCleod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1161 (2015) (“[A]bolition may be understood instead as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.”).

13. See, e.g., BUTLER, *CHOKEHOLD*, *supra* note 12, at 13 (“American cops are the enforcers of a criminal justice regime that targets black men and sets them up to fail.”).

14. Yoana Tchoukleva, Amalee Beattie, & Josh Cottle, *Defunding the Police: Brief Overview of History, Models and the Demands of the Movement*, EQUAL JUSTICE SOCIETY (June 18, 2020), <https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Aascds%3AUS%3A4bb4fb99-c2e8-46e4-8ebc-6789a9c6b88c#pageNum=1>.

15. See, e.g., Phillip V. McHarris & Thenjiwe McHarris, *No More Money for the Police*, *N.Y. TIMES* (May 30, 2020), <https://www.nytimes.com/2020/05/30/opinion/george-floyd-police-funding.html?searchResultPosition=1>; Alex S. Vitale, *The Answer to Police Violence is not ‘Reform.’ It’s Defunding. Here’s Why*, *THE GUARDIAN* (May 31, 2020), <https://www.theguardian.com/commentisfree/2020/may/31/the-answer-to-police-violence-is-not-reform-its-defunding-heres-why>; Farah Stockman & John Eligon, *Cities Ask if It’s Time to Defund*

police budgets significantly, “defunding” includes calls to invest in alternative means of preserving public safety and ensuring the well-being of all citizens.¹⁶ The new models of public safety provision could include anti-homelessness policies, healthcare legislation, educational reform, expanded drug rehabilitation programming, affordable housing, mental health programming and training, and many other elements.¹⁷ Importantly, activists emphasize that new models of public safety provision are primary goals of the defunding process. “The dual focus of the demand is crucial: this is not solely about slashing police budgets, but also about investing in resources and creating separate, new models of safety responsive to specific communities’ needs.”¹⁸

III. MISUNDERSTANDING AND MYOPIA

The energy behind today’s criminal justice reform movement is incredibly valuable. It has brought the plight of those abused by police

Police and ‘Reimagine’ Public Safety, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/us/defund-police-floyd-protests.html>.

16. “[G]enerally speaking, the call to defund the police is a call to decrease police budgets, size, scope, and power while investing into alternative community safety models and wellbeing services (anti-homelessness, healthcare, education, drug rehabilitation, affordable housing, etc.), with the ultimate goal of divesting entirely from our modern policing system.” Tchoukleva, et al., *supra* note 14; see also *Defund the Police: Linda Sarsour & Mychal Denzel Smith on What Meaningful Change Would Look Like*, DEMOCRACY NOW! (June 8, 2020), https://www.democracynow.org/2020/6/8/bill_de_blasio_nypd_police_funding#transcript (“All we’re saying is, decrease their budget, take that money and reappropriate it into youth, seniors, community development, and with a focus on those who have been the most directly impacted, focused on communities of color, poor working-class people.”); Vitale, *supra* note 15 (“The alternative is not more money for police training programs, hardware or oversight. It is to dramatically shrink their function. We must demand that local politicians develop non-police solutions to the problems poor people face. We must invest in housing, employment and healthcare in ways that directly target the problems of public safety.”); Sean Illing, *The “Abolish the Police” Movement, Explained by 7 Scholars and Activists*, VOX (June 12, 2020), <https://www.vox.com/policy-and-politics/2020/6/12/21283813/george-floyd-blm-abolish-the-police-8cantwait-minneapolis> (“Yes, the thinkers and activists involved with the movement all see the phrase as a serious call to completely rethink the very concept of law enforcement in this country. But they don’t all agree on the meaning of ‘abolish the police’—they see it as the distillation of a whole host of changes that go well beyond what is typically considered ‘realistic.’”).

17. Tchoukleva, et al., *supra* note 14; Vitale, *supra* note 15 (“We must invest in housing, employment and healthcare in ways that directly target the problems of public safety. Instead of criminalizing homelessness, we need publicly financed supportive housing; instead of gang units, we need community-based anti-violence programs, trauma services and jobs for young people; instead of school police we need more counselors, after-school programs, and restorative justice programs.”).

18. “While views differ on whether defunding means disbanding police entirely or merely diverting a portion of their budgets into community solutions, the prevailing stance originating from activists on the ground is that defunding ‘is an abolitionist demand,’ situated in a long-term goal of abolishing the police as agents of the prison industrial complex.” Tchoukleva, et al., *supra* note 14.

and trapped in cycles of violence and imprisonment by a systemically biased criminal justice complex to the forefront of our political conversation. But unfortunately, the important ideas that the defunding movement has for reimagining public safety services are often overlooked by the reform movement's opponents. Because the slogan is easily seen as a direct attack on well-meaning officers, opponents can twist it into a caricature hardly anyone supports.

For many citizens, defunding the police suggests a desire to abolish government provision of public safety altogether.¹⁹ When defunding is misrepresented, “‘anybody who would render anything short of unwavering support to law enforcement’ is cast as ‘someone who hates the police.’”²⁰ Unsurprisingly, police unions have launched counter-campaigns to the defunding movement, aligning themselves with political campaigns that tout their support for law and order in America.²¹ Despite the horrors of overpolicing brought to light in recent years, many Americans continue to favor more, not fewer, police officers.²²

There may be good reason for caution when reducing or eliminating the police force. Crime control has significant benefits for the same people of color often victimized by overpolicing. As James Forman has noted, “Black Americans benefit the most when violent crime drops.”²³ In many cities where the majority of homicide victims are citizens of color,

19. “Some versions of ‘defunding the police,’ however, are little different from abolition. Advocates of abolition want to get rid of the police entirely. Their alternative is to have no clear dedicated forces to providing law and order.” Akiva Malamet, *Don’t Abolish the Police—End Their Monopoly*, CATALYST (Nov. 12, 2020), <https://catalyst.independent.org/2020/11/12/abolish-police-monopoly>. To varying degrees, some activists do promote the total abolition of police departments, though, as noted above, not without some replacement by a reimagined public safety force, as discussed above. See Tchoukleva, et al., *supra* note 14; Illing, *supra* note 16 (quoting Professor Christian Davenport, University of Michigan: “I feel that it is worthwhile to have some advocate for completely eliminating the institution and then re-creating something that is deemed to be more just and humane.”)

20. Deena Zaru & Tonya Simpson, ‘Defund the Police’ Movement 6 Months After Killing of George Floyd, ABC NEWS (Nov. 25, 2020), <https://abcnews.go.com/US/defund-police-movement-months-killing-george-floyd/story?id=74296015> (quoting Professor Tom Nolan, a former Boston police officer and current sociology professor at Emmanuel College).

21. *Id.*

22. “Over the decades, Americans have consistently said they want more police officers. A 2019 Civis Analytics poll for *Vox* found that 60 percent of African Americans, 65 percent of Latinos, and 74 percent of whites would like to see an increased number of police officers in high-crime areas. In 2015, just after the protests in response to Michael Brown’s death in Ferguson, Missouri, Gallup asked Americans whether they would prefer to see a larger police presence in their neighborhood or a smaller one. Thirty-eight percent of African Americans said they would like to see a larger police presence, 51 percent said they wanted no change, and only 10 percent said they wanted a smaller police presence.” David Brooks, *The Culture of Policing Is Broken*, THE ATLANTIC (June 16, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/how-police-brutality-gets-made/613030>.

23. FORMAN, *supra* note 10, at 218.

reductions in crime saves those lives the most.²⁴ In other words, continuing to maintain low levels of violent crime is especially helpful to those most vulnerable to such crime—including the very populations disproportionately affected by overcriminalization and violent policing tactics. Keeping crime rates low should remain a top priority even in a reformed criminal justice system, and even if that reduction comes from a reimagined public safety force that is not focused on incarceration as its primary goal.

In part, that means rebuilding trust between those who investigate crime and the people of color that are frequently the victims. Alice Goffman's sociological study of an African American community in Philadelphia illustrates the trust gap in many overpoliced neighborhoods. Because many residents have criminal records themselves, they are unlikely to turn to the police when they are victims of, or witnesses to, a crime; they fear that a prior act of misconduct or an outstanding warrant may come to the fore in the reporting process.²⁵ This in turn makes those residents the target of more crime because of their inability to rely on the police to protect them, perpetuating the deterioration of their neighborhoods.²⁶ Reformers must focus on building a community-based police force that aims to keep residents, including themselves, safe, rather than to incarcerate as many "criminals" as possible.²⁷ Doing so might change the culture of police departments in vital ways, reducing the violence too many people of color experience at the hands of police.

24. *Id.*

25. "A man intent on staying out of jail cannot call the police when harmed, or make use of the courts to settle disputes. . . . they cannot turn to the police because their legal entanglements prevent them from doing so. The police are everywhere, but as guarantors of public safety, they are still out of reach." ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* 29, 31 (2014).

26. "If young men known to have a warrant become the target of those looking for someone to exploit or even to rob, they may resort to violence themselves, for protection or for revenge." *Id.* at 32.

27. "The police forces that have done well in reducing crime do not train their officers to see themselves as superheroes attacking bad guys. They have a stronger community-service ethos. Camden, New Jersey, became something of a model for reformers a few years ago when the entire police department was disbanded. It was replaced with a county-level agency less encumbered by union rules, which then hired more cops—411 officers, up from 250—and moved them out of their cars and back to walking the beats. Newark has handled the past few weeks reasonably well in part because it has not militarized its force, but also because in 2014, the city created the Newark Community Street Team, consisting of community leaders who take a public-health approach to violence and, in moments of tension, work to prevent looting and violence." Brooks, *supra* note 22.

IV. NOSTALGIC RHETORIC

Beyond the potential for misrepresentation or misunderstanding, there are nostalgic elements to the defunding campaign.²⁸ Though well-intentioned, calls to defund the police in part suggest that a return to underpolicing, before departments became highly-militarized and systemically biased against young men of color, will allow many neighborhoods to thrive and flourish once again.

The term “nostalgia” is derived from the Greek work “nostos,” or homecoming, and “algos,” or ache.²⁹ The concept appears across cultures under various guises, but with the common feature that one can long so deeply for a past moment in time as to experience pain at the mere thought of that period.³⁰ Psychologists have suggested that nostalgic yearning is often related to “an unresolved parental tie,” where subjects experiencing nostalgia subconsciously long for a wholesome maternal experience dating back to their infancy—whether or not such an experience ever occurred.³¹ Nostalgia thus involves a longing for a more perfect place than our present reality.³² Perhaps unsurprisingly, we experience nostalgic longing more frequently in times of greater uncertainty, transition, or change.³³

Nostalgia can be classified as personal—where the subject pines for their own past experiences—or historical, where the subject pines for a distant, bygone era that they did not personally experience.³⁴ In either form, though, nostalgia involves a degree of self-deception. When a

28. “[C]ommunity groups in the 1960s also demanded civilian review boards, better training, and community policing initiatives. Some of these demands were even met. But universally, they were either ineffective, or dismantled by the police department over time.” MPD 150, <https://www.mpd150.com/faq/> (last visited Mar. 4, 2021).

29. Neel Burton, *The Meaning of Nostalgia*, PSYCHOLOGY TODAY (Nov. 27, 2014), <https://www.psychologytoday.com/us/blog/hidden-and-see/201411/the-meaning-nostalgia>; MARIO JACOBY, *THE LONGING FOR PARADISE: PSYCHOLOGICAL PERSPECTIVES ON ARCHETYPE 5* (1985).

30. JACOBY, *supra* note 29, at 5.

31. *Id.* at 6.

32. “The ultimate goal of nostalgic longing is a *condition*, then, a state of being which finds symbolic expression in the image of Paradise.” *Id.* at 4 (emphasis in original). “For many people, paradise is not so much a place to go to as the place (they think) they came from.” Burton, *supra* note 29.

33. Burton, *supra* note 29; *see also* Krystine Batcho, *Nostalgia Can Be a Useful Psychological Tool—or a Destructive One*, INVERSE (June 6, 2017), <https://www.inverse.com/article/32591-nostalgia-psychological-tool-helpful-harmful> (“[N]ostalgic yearning for the past is especially likely to occur during periods of transition, like maturing into adulthood or aging into retirement. Dislocation or alienation resulting from military conflict, moving to a new country or technological progress can also elicit nostalgia.”).

34. “Longing for our own past is referred to as personal nostalgia, and preferring a distant era is termed historical nostalgia.” Batcho, *supra* note 33.

subject feels nostalgic, they idealize the time or place they imagine, focusing on the peaks of that personal or historical period while ignoring the valleys.³⁵ Our perceptions of the quality of the past are deeply flawed, painting those periods with a rose-colored brush.³⁶

Nostalgia, though sometimes useful, thus has a dangerously deceptive component; “If overindulged, nostalgia can give rise to a utopia that never existed and never can exist, but that is pursued at all costs, sapping all life and joy and potential from the present.”³⁷ Troubling nostalgic thinking arises from feelings of separation from a more perfect world, and an intense desire to make one’s present reality more harmonious with that image of perfection.³⁸ Along with romanticizing the past, nostalgic thinking also fails to recognize the prosperity of the present; nostalgia ignores the many advances in both our personal lives and in broader society that abound in modern life.³⁹

Because Americans today are confronted by an interminable pandemic, apparently irreconcilable political polarization, and a daunting history of racial inequality, it is little surprise that many are tempted to turn away from the future and focus on a time in the past when life seemed better. Political campaigns that promise to return America to past greatness explicitly appeal to nostalgia for a prior period where crime was lower, employment steadier, and futures more secure. But such appeals gloss over the challenges of those bygone eras, inviting voters to reminisce about glory days that never existed. Those nostalgic appeals disregard the plight of populations of color systematically disadvantaged in decades past; downplay the dangers and challenges of employment in a less-regulated, manufacturing-based economy; and ignore the innumerable ways that technological advances have improved daily life and at least arguably been a boon to society, even as they have imposed painful employment losses and economic retrenchment. Nostalgia is also at the root of campaigns that seek a return to some form of political normalcy, where opposing parties and opposing ideals coexist peacefully

35. Burton, *supra* note 29.

36. “The fact is that we all tend to paint for ourselves a picture of the ‘good old days’ that does not accord with the facts. There never were any good old days, there never was an ‘intact world.’” JACOBY, *supra* note 29, at 4.

37. Burton, *supra* note 29.

38. JACOBY, *supra* note 29, at 9.

39. “It is noteworthy that, in this era of widespread prosperity, the predisposition to nostalgia always latent in the human psyche can take on the literal form of the wave of nostalgia referred to earlier. And since a society’s images of paradisaical bliss stand in a compensatory relationship to its actual living conditions, we are confronted with the fact that even our unprecedented levels of prosperity cannot provide true gratification or inner peace.” *Id.* at 12.

and compromise is plentiful. Such compromise was never truly at the root of our political discourse, even in the founding era. Though America's political parties were less diametrically opposed in previous years, the cold math of the electoral college or Senate majority always made politics a zero-sum game where victories for one party meant losses for others. Even if the political rhetoric can be less heated, there is no returning to a non-existent "normal" era where politics were not cutthroat and compromise was easy⁴⁰

Flawed nostalgic thinking has filtered into today's criminal justice reform rhetoric. Defunding calls partly suggest a return to an era of underpolicing that would allow young men of color to escape the grip of police and return to prosperity. But this line of argument presents a simple solution that will surely fail to resolve incredibly complex problems.⁴¹ It also oversimplifies the messy truth of history, where many African American leaders called for some of the very tough-on-crime policies that have led to overpolicing and its many tragic consequences.⁴²

James Forman's powerful historical account of criminal justice reform movements in the Washington D.C. area over the past forty years illustrates the role that black activists played in shaping current criminal justice policy.⁴³ Forman highlights that in the 1960's, "black communities

40. Modern debates over constitutional interpretive philosophy similarly evoke flawed nostalgic thinking, with nostalgic flaws imbedded in many theories. Originalism is partially defined by what Professor Robert W. Gordon calls "nostalgic traditionalism," a sense that today's jurisprudence is out of control and a return to earlier times, with "sturdier and sweeter models of social life than the decadent ways into which we have fallen," is much needed. Robert W. Gordon, *Originalism and Nostalgic Traditionalism*, in ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 361, 365 (2017). Whether arguing for interpretations consistent with the original intent or original meaning of constitutional text, originalists place great stock in the wisdom of the text's authors, which was captured at moments in time characterized by widespread injustices and inequalities that significantly weaken the moral attractiveness of that interpretive method. *Id.* at 372 (arguing that when the Constitution was adopted, the government "supported command over slaves, wives, indentured servants, household servants, servants in husbandry, apprentices, paupers, and children," and claiming that "[o]riginalism as popular nostalgia necessarily hazes over such details.").

41. *Id.* at 379 ("[I]t's also a useful enterprise for judges—like historians and politicians and everybody else—to check their impulses to ancestor-worship by recalling what is most alien, repellent, and unusable about them.").

42. As gender and family historian Stephanie Coontz has illustrated, nostalgic thinking has been a similar trap in our national conception of the family and gender equality. Though many Americans share an idyllic conception of the "family" as it existed before the modern day, "[f]amilies have always been in flux and often in crisis; they have never lived up to nostalgic notions about 'the way things used to be.'" STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 2 (1992). Such nostalgic confusion has complicated the movement for gender equality, as society's misconception of the family life of the past builds a barrier to a reconceived family life of the future. *Id.* at 3-7.

43. FORMAN, *supra* note 10, at 9-10.

were devastated by historically unprecedented levels of crime and violence” that pushed community leaders to call for a broadly punitive approach.⁴⁴ Some activists at the time “argued that blacks were entitled to expanded police forces and courts—state resource they had historically been denied.”⁴⁵ Just as today’s defunding movement is deeply nuanced, so too were the calls for greater punitive responses in the 1960s. But as Forman highlights in a heartbreaking passage, the broader political response was blunt:

African Americans wanted more law enforcement, but they didn’t want *only* law enforcement. Many adopted what we might think of as an all-of-the-above strategy. On one hand, they supported fighting drugs and crime with every resource at the state’s disposal, including police, courts, and prisons. On the other hand, they called for jobs, schools, and housing—what many termed “a Marshall Plan for urban America.” But because African Americans are a minority nationally, they needed help to win national action against poverty, joblessness, segregation, and other root causes of crime. The help never arrived. The requests for assistance came at a time when Reaganism was ascendant, the Great Society was under assault, and there was little national appetite for social programs—especially those perceived as helping blacks. So African Americans never got the Marshall Plan—just the tough-on-crime laws.⁴⁶

As noted earlier, many who advocate for defunding are cognizant of these myriad injustices, and their platforms explicitly seek to reallocate funds away from police departments towards a basket of policy reforms that address more than just police violence and abuse.⁴⁷ But that nuance can be lost in the nostalgic rhetoric of the movement’s messaging. And if movement leaders hope to avoid repeating the history of the 1960s and 70s, where community leaders seeking a basket of reforms in addition to stronger policing obtained little more than more police,⁴⁸ they should carefully reconstruct their message and ensure that more Americans interested in the movement understand the wide scope of reforms needed today.

44. *Id.* at 10-11. Forman notes that sky-high crime rates in the late 1960’s and early 1970’s had their roots in the heroin epidemic that tore through neighborhoods across the country. *Id.* at 217. In response, “black crime victims . . . often argued that a punitive approach was necessary to protect the African American community—including many of its most impoverished members—from the ravages of crime.” *Id.* at 11.

45. *Id.*

46. *Id.* at 12-13.

47. *See supra* Part III.

48. FORMAN, *supra* note 10, at 12-13.

V. A BROADER APPEAL

Discriminatory overpolicing has been a tragic cause of injustice, imprisonment, and death for far too long. But it is one of the many diverse elements that built our current criminal justice system, all of which must be reconceived.⁴⁹ As Paul Butler has argued, our criminal justice system involves “a constellation of tools that are used to keep [African American men] down—including a range of social practices, laws, punishments, and technologies that mark every black man as a thug or potential thug.”⁵⁰ And lawyers, judges, and politicians—much like police—have played a large role in constructing the system.⁵¹ It will take more than reducing the number of officers to reform that system.

Given the diverse causes of injustice in America’s criminal justice system, reform must have diverse focuses. One focus will certainly be policing practices and abuses. As the George Floyd killing and so many others well demonstrate, aggressive policing tactics, combined with implicit racial biases and systemic barriers to racial and economic diversity in many urban neighborhoods have led to tragic, needless deaths, over and over again. That pattern has led to predictable distrust of the police by law-abiding citizens in overpoliced neighborhoods, who often view authorities nominally designed to protect and serve as an invading paramilitary presence to be avoided at all costs, lest they be arrested and charged themselves.⁵²

But the reform movement must simultaneously broaden its attention beyond abusive police practices to include other areas vital to meaningful reform. For instance, consider the importance of prosecutorial discretion in the charging and plea bargaining process. Breonna Taylor’s killing, and the subsequent grand jury process that led to a dispiriting indictment charging only one of three officers involved in the shooting with a non-

49. “I have described mass incarceration as the result of a series of small decisions, made over time, by a disparate group of actors. If that is correct, mass incarceration will likely have to be undone in the same way. *Id.* at 229.

50. BUTLER, CHOKEHOLD, *supra* note 12, at 19-20.

51. *Id.* at 20.

52. Alice Goffman’s heart-wrenching sociological account of a group of young men in a high-crime neighborhood in Philadelphia brings this view into painfully clear focus. *See* GOFFMAN, *supra* note 25. Goffman recorded one of the young men in her study imparting the following lesson to his younger brother: “If you hear the law coming, you merk on [run away from] them niggas. You don’t be having time to think okay, what do I got on me, what they going to want from me. No, you hear them coming, that’s it, you gone. Period. ‘Cause whoever they looking for, even if it’s not you, nine times out of ten they’ll probably book you.” *Id.* at 23-24.

homicide offense,⁵³ is one flashbulb example of the incredible power prosecutors wield to determine how and when to charge criminal offenses. That power extends to the plea bargaining process, through which more than 90% of all criminal cases are resolved.⁵⁴ Charging decisions that overenforce the statutory criminal law against young men of color wreak havoc on families and communities across the country.⁵⁵ Or consider the need for meaningful bail reform that prioritizes equity across the socio-economic spectrum and assumes that pretrial release should be the norm for most offenders. There are much-needed changes to sentencing policy, such as an increased emphasis on meaningful rehabilitation and lowering American incarceration rates from their current, world-leading highs⁵⁶—especially regarding juvenile offenders that we now know continue their mental and social development well beyond their eighteenth birthday.⁵⁷

53. Rukmini Callimachi, Nicholas Bogel-Burroughs, John Eligon, & Will Wright, *Fired Officer Is Indicted in Breonna Taylor Case; Protesters Wanted Stronger Charges*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/breonna-taylor-officer-indicted.html>; Elizabeth Joseph, *Breonna Taylor Grand Jurors Say There was an ‘Uproar’ When They Realized Officers Wouldn’t be Charged with Her Death*, CNN (Oct. 30, 2020), <https://www.cnn.com/2020/10/29/us/breonna-taylor-grand-jurors/index.html>.

54. For plea bargaining statistics in America’s criminal courts, see, for example, John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do are Found Guilty*, PEW RESEARCH CENTER (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/#:~:text=Nearly%2080%20people%20were%20defendants,collected%20by%20the%20federal%20judiciary>; THE INNOCENCE PROJECT, REPORT: GUILTY PLEAS ON THE RISE, CRIMINAL TRIALS ON THE DECLINE (Aug. 7, 2018), <https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline>.

55. “Over the last 40 years we have seen a massive expansion of the scope and intensity of policing. Every social problem in poor and non-white communities has been turned over to the police to manage.” Vitale, *supra* note 15.

56. See, e.g., Sawyer & Wagner, *supra* note 10; *World Prison Populations*, *supra* note 10; Lee, *supra* note 10.

57. Eli Hager, *What’s the Meaning of ‘Life’ When Sentencing Kids?*, THE MARSHALL PROJECT (Jan. 30 2020), <https://www.themarshallproject.org/2020/01/30/what-s-the-meaning-of-life-when-sentencing-kids>.

The Supreme Court’s three landmark rulings were *Graham v. Florida* in 2010, *Miller v. Alabama* in 2012 and *Montgomery v. Louisiana* in 2016. They relied on modern neuroscience demonstrating that teens are impulsive, risk-seeking and easily influenced by peer pressure, all traits that can lead them to crime, and that because they are still maturing, they are less likely to commit another crime as they grow up. For these reasons, the justices found, they deserve an opportunity to reform themselves and then be released back into their communities for a meaningful period of time following their incarceration.

Id. (discussing *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)).

Or consider the need to reform felony disenfranchisement laws that leave an estimated six million citizens, most of them young men of color, unable to vote across the country.⁵⁸

These changes, and many others, are all necessary to solve the problems in our criminal justice system.⁵⁹ The problem is both enormous and enormously nuanced. It requires a response that is equally enormous, but also precisely tailored to addressing myriad unconscionable injustices repeated across the country every day.⁶⁰

VI. CONCLUSION

When people of color are dying at the hands of police while their neighborhoods deteriorate in cycles of crime and violence, it is easy to support wholesale change in the way police interact with citizens. It is tempting to pin the need for change on a single issue—overpolicing—that, once resolved, might allow young men of color to flourish once again. But that rhetoric, exemplified by the defund the police slogan, is too narrowly focused and too nostalgic for the supposed glory days of underpolicing. The criminal justice reform movement should not focus on such faulty images of the past. It must broaden the appeal for reform beyond merely reducing interactions between citizens and police, garnering support from a broad coalition of supporters for a broad array of desperately needed reforms.

[C]hildren are constitutionally different from adults for purposes of sentencing. These differences result from children's diminished culpability and greater prospects for reform . . . [Juveniles] have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity and heedless risk-taking. . . . [A] child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.

Montgomery, 136 S. Ct. at 733 (internal quotations and citations omitted).

58. See Michael Gentithes, *Felony Disenfranchisement & the Nineteenth Amendment*, 53 AKRON L. REV. 431, 432-33 (2019).

59. To my rough-and-ready list, Forman adds several others. His proposals include instituting pretrial diversion programs to funnel people into drug treatment instead of prison, funding public defenders adequately, giving discretion back to judges by eliminating mandatory minimums, building quality schools inside juvenile and adult prisons, restoring voting rights to people who have served their sentences (or, better yet, allowing people to vote while incarcerated), and welcoming—not shunning and shaming—those who are returning from prison. FORMAN, *supra* note 10, at 236.

60. “The whole world knows that the United States faces a crisis in racial justice, but the focus on police and mass incarceration is too narrow. We might be able to fix those problems the way that we ‘fixed’ slavery and segregation, but the Chokehold’s genius is its mutability. . . . In order to halt this wretched cycle we must not think of reform—we must think of transformation. The United States of America must be disrupted, and made anew.” BUTLER, CHOKEHOLD, *supra* note 12, at 13-14.