

DEMOCRATIZING CRIMINAL JUSTICE THROUGH CONTESTATION AND RESISTANCE

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ABSTRACT—Collective forms of participation in criminal justice from members of marginalized groups—for example, when people gather together to engage in participatory defense, organized copwatching, community bail funds, or prison labor strikes—have a profound effect on everyday criminal justice. In this Essay I argue that these bottom-up forms of participation are not only powerful and important, but also crucial for democratic criminal justice. Collective mechanisms of resistance and contestation build agency, remedy power imbalances, bring aggregate structural harms into view, and shift deeply entrenched legal and constitutional meanings. Many of these forms of contestation display a faith in local democracy as a tool of responsive criminal justice, while simultaneously maintaining a healthy skepticism of the law and existing legal institutions that maintain the status quo. These forms of resistance and contestation are not antagonistic, but agonistic; not revolutionary, but devolutionary. Without facilitating critical resistance from below, well-meaning criminal justice reforms are in danger of reproducing the anti-democratic pathologies that plague our existing system. Indeed, it is from the voices of those who have been most harmed by the punitive nature of our criminal justice system that we can hear the most profound reimaginings of how the system might be truly responsive to local demands for justice and equality. This Essay concludes by sketching out the dual roles of the state in a criminal justice system that values contestation: to facilitate methods of participation that originate with and are led by non-elite actors from marginalized populations; and to create criminal justice institutions that transfer agency and control to people ordinarily left out of criminal justice decisionmaking.

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INTRODUCTION

America’s criminal justice system is anti-democratic in at least three distinct senses. First, the system is run and maintained by privileged insiders. There is little transparency, participation, or day-to-day accountability in today’s police precincts and criminal courthouses, and the result is that communal input into everyday justice has all but disappeared.¹ Second, even for the very few ways in which ordinary citizens do participate in criminal justice, for example through voting or juries, the unequal distribution of political power means that the resulting criminal laws and enforcement are rarely responsive to the interests of the poor populations of color most likely to come into contact with the system as arrestees, defendants, or victims. The mass incarceration and supervision of poor communities of color only exacerbate these political inequalities.² And third, when marginalized populations *do* participate in democratic processes meant to facilitate their input, their participation is often muted by those very processes, reinscribing rather than dismantling existing power imbalances.³ These multiple layers of democratic exclusion reinforce each other, reproducing and legitimizing an unequal, racialized system of justice.

Although the notion of democratic criminal justice is deeply contested,⁴ it has tended in recent decades to center around ideas that

¹ See generally LAURA I APPLEMAN, DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION (2015); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 29–60 (2012).

² See generally TRACI BURCH, TRADING DEMOCRACY FOR JUSTICE: CRIMINAL CONVICTIONS AND THE DECLINE OF NEIGHBORHOOD POLITICAL PARTICIPATION 75–104 (2013); AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 199–231 (2014); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 244–81 (2011); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1291–98 (2004).

³ See, e.g., DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 66–105 (2008) (describing these dangers in the context of participation and policing).

⁴ Cf. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367 (2017) (synthesizing conflicting notions of democratic criminal justice).

emphasize and idealize participation through deliberation.⁵ When it comes to remedying the distrust, disengagement, and disenfranchisement of marginalized groups, the instinct of elites is often to include these marginalized groups in democratic fora in which their voices can be heard. From stakeholder meetings,⁶ to listening sessions,⁷ to online notice-and-comment procedures,⁸ these state-driven processes seek the input of individuals who have historically been shut out of the creation and execution of criminal justice policies. These well-meaning mechanisms of participation tackle the first two layers of democratic exclusion: they increase public input into criminal justice overall and they deliberately seek out the voices of the marginalized in doing so. However, they are not always sufficiently attentive to the third layer of democratic exclusion—internal exclusion—and to the mechanisms through which marginalized populations often remain politically powerless despite the creation of democratic institutions meant to facilitate their participation.⁹

If we truly want to eliminate the racial domination and systemic oppression of vulnerable populations endemic to our contemporary criminal justice system, we must expand our go-to conceptions of what we mean when we call for the participation of the marginalized and oppressed in our precincts, courthouses, and statehouses. Relying on deliberation and consensus ignores the ways in which our current criminal justice system relegates African-Americans and other marginalized populations to non-democratic subjects—not just through literal disenfranchisement of individuals with criminal records, but also through doctrine, policy, and rhetoric.¹⁰ Moreover, a focus on seeking consensus may lead us to privilege

⁵ See SKLANSKY, *supra* note 3, at 59–105 (describing this trend in the context of policing).

⁶ See, e.g., CITY OF GRAND RAPIDS, GRAND RAPIDS POLICE DEPARTMENT SEEKS PUBLIC INPUT ON ITS MISSION (2016), <http://grcity.us/Pages/Police-Department-seeks-public-input-on-its-mission.aspx> [<https://perma.cc/ZQ46-SNNB>] (describing a series of stakeholder meetings).

⁷ See, e.g., CMTY. ORIENTED POLICING SERVS., LISTENING SESSION (2016), [http://sanfranciscopolice.org/sites/default/files/USJusticeInitiative/SanFrancisco_Community%20Listening%20Session%20Flyer_%20Mission\(1\).pdf](http://sanfranciscopolice.org/sites/default/files/USJusticeInitiative/SanFrancisco_Community%20Listening%20Session%20Flyer_%20Mission(1).pdf) [<https://perma.cc/BN7N-SXW9>] (advertising an open forum intended to improve the San Francisco Police Department).

⁸ See, e.g., NYPD Body-Worn Camera Questionnaire, POLICING PROJECT, <https://policingproject.org/nypd-body-worn-camera-feedback/> [<https://perma.cc/T4E2-ZREQ>] (describing an online survey designed to solicit comments from New York City residents on the NYPD's body camera program).

⁹ See generally IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 52–57 (2000) (describing the process of “internal exclusion”).

¹⁰ See, e.g., BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 160–80 (2001) (arguing that broken windows policing objectifies poor people and people of color); LERMAN & WEAVER, *supra* note 2 (describing the myriad ways in which crime control policies disempower marginalized populations and undermine democracy); JONATHAN SIMON, GOVERNING THROUGH CRIME (2007) (arguing that an overemphasis on crime and fear of crime has

discourse that repeats rather than re-envisioning our reigning ideas of what criminal justice should look like. A complete blueprint for democratic criminal justice requires embracing adversarial, contestatory forms of participation and resistance that go beyond the decorum of calm deliberation to build power and push for transformation.

In past work I have emphasized the importance of studying and respecting grassroots forms of participation in and disruption of everyday criminal justice—for example, when organized groups participate in copwatching, courtwatching, or community bail funds.¹¹ In this Essay I argue that bottom-up forms of participation are not only powerful and important, but also crucial for *democratic* criminal justice.¹² Collective mechanisms of resistance and contestation build agency, remedy power imbalances, bring aggregate structural harms into view, and shift deeply entrenched legal and constitutional meanings. Many of these forms of contestation display a faith in local democracy as a tool of responsive criminal justice, while simultaneously maintaining a healthy skepticism of the law and existing legal institutions that maintain the status quo. These forms of resistance and contestation are not antagonistic, but agonistic;¹³ not revolutionary, but devolutionary.¹⁴ Without facilitating critical resistance from below, well-meaning reforms are in danger of reproducing the anti-democratic pathologies that plague our existing criminal justice system. In the words of one of the founders of the participatory defense movement, this requires envisioning a world in which “the millions who face prison or jail and their communities, those waiting in line at court everyday . . . shift from being fodder of the criminal justice system, to

distorted American democracy); Monica C. Bell, *Police Reform & the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067 (2017) (demonstrating that “current [criminal justice] regimes can operate to effectively banish whole communities from the body politic”); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 966 (2002) (describing how Fourth Amendment doctrine reproduces racial inequalities).

¹¹ See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017) [hereinafter Simonson, *Bail Nullification*]; Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016) [hereinafter Simonson, *Copwatching*]; Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014) [hereinafter Simonson, *Audience*].

¹² In making this argument, I am particularly indebted to David Sklansky’s work mapping the intersections of democratic theory and American criminal justice, and to Janet Moore’s work connecting grassroots mobilization to democracy in criminal justice. See SKLANSKY, *supra* note 3; Janet Moore, *Decarceral Constitutionalism* (Dec. 2016) (unpublished draft) (on file with author).

¹³ See generally CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* 5–9 (2013) (describing agonistic politics as involving confrontation, debate, and dissent, but not antagonism or withdrawal from politics).

¹⁴ Cf. Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1452 (2017) (“Pushing more criminal justice power . . . down to directly affected communities and neighborhoods could enhance representativeness and sharpen lines of authority.”).

those fated to bring the era of mass incarceration to its rightful end.”¹⁵ Indeed, it is from the voices of those who have been most harmed by the punitive nature of our criminal justice system that we can hear the most profound reimaginings of how the system might be truly responsive to local demands for justice and equality.¹⁶

If I can insert one idea into this Symposium issue on democratizing criminal justice, it is that we should not be content with inviting the voices and viewpoints of the marginalized into our existing institutions; we also need to support outside mechanisms of agonistic participation and create new spaces of contestation. I begin this Essay in Part I by drawing on democratic theory, constitutional values, and visions of contemporary social movements to present a preliminary case for why we should study and promote contestation, agonism, and oppositional politics in criminal justice. In Part II, I recount examples of powerful bottom-up tactics of resistance and participation, including the tactics of organized copwatching, participatory defense, community bail funds, and prison strikes. Then, in Part III, I sketch out the dual roles of the state in a criminal justice system that values contestation: to facilitate methods of participation that originate with and are led by non-elite actors from marginalized populations; and to create criminal justice institutions that transfer agency and control to people ordinarily left out of criminal justice decisionmaking.

I. COLLECTIVE RESISTANCE AS DEMOCRATIC CRIMINAL JUSTICE

The importance of collective resistance is central to many prominent conceptions of democracy. To begin with, our Constitution enshrines the value of protecting and even promoting resistance to state power. The First Amendment’s protections for dissent, assembly, and publicity all underscore the idea that “elections, political parties, and voting, while critical to democracy, are not the whole deal.”¹⁷ The Sixth Amendment’s guarantee of public input into everyday adjudication, through both juries

¹⁵ Raj Jayadev, “Participatory Defense” – *Transforming the Courts Through Family and Community Organizing*, ALBERT COBARRUBIAS JUSTICE PROJECT (Oct. 17, 2014), <https://acjusticeproject.org/2014/10/17/participatory-defense-transforming-the-courts-through-family-and-community-organizing-by-raj-jayadev/> [https://perma.cc/WEE2-BNLD].

¹⁶ See Amna A. Akbar, *Borderlands: Policing Reimagined* 33–47 (Feb. 20, 2017) (unpublished draft) (on file with author) (describing the ways in which the Movement for Black Lives profoundly recasts the terms of the debate around American policing); cf. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing that legal scholarship can benefit from listening to marginalized voices).

¹⁷ Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 1 (2011); see also Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097 (2016) (arguing that the First Amendment endorses an active form of citizenship involving open communication and dissent).

and the courtroom audience, passes on to the public the ability not only to deliberate about state power, but also to challenge it.¹⁸ And individual criminal procedure rights can be understood as a means of protecting the ability of citizens to resist the power of state violence.¹⁹ The formal structure of American democracy thus leaves ample room to think about public participation in criminal justice governance as including grassroots efforts to contest state actions outside of formal state-driven channels.

The importance of collective resistance also echoes throughout a number of areas of democratic theory, including theories of neorepublicanism, radical democracy, critical theory, and theories of law and social movements. The neorepublicanism of Philip Pettit, for example, places an emphasis on the importance of contestatory publics that serve as a counter to domination.²⁰ Scholars such as Sabeel Rahman have expanded this idea, insisting that we think about contestation beyond individual moments of disagreement to include larger methods of collective political action that resist structural domination and inequality.²¹ The importance of collective contestation is also embedded in the concept of agonism—a politics that respects conflict and adversarialism, but seeks to channel it through democratic channels—found within the radical democratic theory of Chantal Mouffe and Ernesto Laclau.²² Although not theories of democracy per se, a number of strands of critical theory have also developed useful accounts of the emancipatory potential of collective acts of resistance when those acts create agency through bottom-up critique of the status quo.²³ And theories of law and social movements, as well as

¹⁸ See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (describing the ability of the jury to challenge state power through nullification); Simonson, *Audience*, *supra* note 11, at 2195–220 (describing the power of the audience through courtwatching).

¹⁹ See generally Jenny E. Carroll, *The Resistance Defense*, 64 ALA. L. REV. 589 (2013); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295; Alice Ristorph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555 (2015).

²⁰ See PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 5–25 (2012); see also YOUNG, *supra* note 9, at 258–59 (combining Pettit's neorepublicanism with feminist ideas of relational autonomy to put forth a vision of inclusive democratic institutions).

²¹ K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 CONTEMP. POL. THEORY 41 (2016); see also PIERRE ROSANVALLON, COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST (Arthur Goldhammer trans., 2008).

²² See MOUFFE, *supra* note 13, at 1–19; see also Simonson, *Copwatching*, *supra* note 11, at 435–38 (arguing that organized copwatching is a form of agonistic political engagement).

²³ See, e.g., DAVID COUZENS HOY, CRITICAL RESISTANCE: FROM POSTSTRUCTURALISM TO POST-CRITIQUE (2004) (locating concepts of critical resistance across different strands of critical theory); Bernard E. Harcourt, *A Dialectic of Theory and Practice*, 12 CARCERAL NOTEBOOKS 19 (2016),

social movement theory, often center collective resistance in analyses of the ways in which courts and other state institutions can serve as sites of contestation, framing, and, ultimately, change.²⁴

These constitutional and democratic values coalesce around a general idea that it is possible to embrace grassroots politics without a singular focus on deliberation and consensus as touchstones of inclusive democracy. Instead, we must sometimes yield to unruly, outside decisionmaking in order to temper injustice and ground responsive politics. In the context of criminal justice, this would mean opening up new channels of contestation accessible to the groups and communities that are most affected by the state's domination but have the least input into the state's policies and practices.²⁵ And yet, among those scholars and state actors most focused on increasing public participation in criminal justice today, there is a striking emphasis on inclusion, participation, and consensus. Moreover, recent examples of powerful contestatory practices by marginalized groups—for example, organized copwatching and prison labor strikes—have been met with either resistance or silence from state actors, including state actors in local administrations seeking to push through liberal reforms and reduce the imprint of mass incarceration.²⁶

Promoting collective contestation in criminal justice therefore involves critiquing, albeit sometimes implicitly, the deliberative forms of democracy that dominate progressive efforts to remedy inequality in the criminal justice system.²⁷ Indeed, in practice there is a dialogical relationship between the promotion of contestatory forms of participation and critiques of consensus-seeking forms of participation. To help illustrate this phenomenon, consider the conflicting narratives surrounding the

http://www.thecarceral.org/cn12/3__Dialectic_of_Theory.pdf [<https://perma.cc/454P-VDVF>] (describing the relationship between Foucault's theories and practices of resistance).

²⁴ See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946–48 (2006); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2757–68 (2014); Michael W. McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* 76, 90–100 (Bryant G. Garth & Austin Sarat eds., 1998).

²⁵ See Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 566 (“A democracy-enhancing theory of criminal law . . . prioritiz[es] the empowerment of low-income and minority individuals and communities to participate more fully in the formation and implementation of criminal justice policies.”).

²⁶ See, e.g., Simonson, *Copwatching*, *supra* note 11, at 427–29 (describing resistance of police departments to filming the police); Memorandum from Hunger Strike Representatives to Scott Kernan, CDCR Undersecretary (Oct. 12, 2011), <https://prisonerhungerstrikesolidarity.wordpress.com/education/pelican-bay-prisoners-go-on-hunger-strike-to-protest-grave-conditions/2nd-round/memo-from-hunger-strike-representatives-to-cdcr-undersecretary-scott-kernan/> [<https://perma.cc/8ABZ-RY7W>] (describing retaliation against prisoners engaged in hunger strikes at Pelican Bay prison).

²⁷ See SKLANSKY, *supra* note 3, at 52–105.

implementation of a community policing program, the Chicago Alternative Policing Strategy (“CAPS”). Community policing is an idealized form of participatory, consensus-based democracy in action.²⁸ In October 2015, President Obama praised Mayor Rahm Emmanuel’s community policing strategy for “forming new partnerships with ministers, putting more officers on bikes and on foot so they can talk with residents.”²⁹ That very same month, local activists issued their own “Counter-CAPS Report.” The report’s authors collected their own data surrounding the operations of CAPS and concluded that Emmanuel’s “‘community policing’ is the superficial involvement of select community members in providing police with legitimacy.”³⁰ This local organization’s work—gathering their own data about the effects of Chicago’s community policing program and publicizing their findings—is itself an example of a contestatory form of participation outside of formal state-driven mechanisms. And the report itself articulates two central critiques of the push for consensus through “community justice”: that community justice excludes, both internally and externally, the most marginalized from its participatory mechanisms; and that, in doing so, it fails to appreciate more transformative remedies to our criminal justice ills.³¹ To promote contestation is to facilitate productive critiques of our go-to democratizing strategies, and vice versa.

Focusing on the decorum of deliberation can lead us to discount messier, oppositional forms of contestation, equating disruption with criminality and reinforcing the very inequalities that reforms aim to dismantle. Frances Fox Piven and Richard A. Cloward identified this phenomenon in their classic study of the relationship between social movements and elites, arguing that demands by poor people for political recognition and power are often undermined when elites focus on methods of participation that mute any oppositional politics. This turn to conflict-free institutions serves “to divert attention from many forms of political unrest and to consign them by definition to the more shadowy realms of social problems and deviant behavior.”³² It is in those shadowy realms,

²⁸ See *id.* at 82–105.

²⁹ President Barack Obama, Remarks by the President at the 122nd Annual IACP Conference (Oct. 27, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/10/27/remarks-president-122nd-annual-iacp-conference> [<https://perma.cc/YJ8R-LSB5>].

³⁰ WE CHARGE GENOCIDE, COUNTER-CAPS REPORT: THE COMMUNITY ENGAGEMENT ARM OF THE POLICE STATE 3 (2015), <http://wechargegenocide.org/wp-content/uploads/2015/10/CAPSreport-final.pdf> [<https://perma.cc/H5A3-8QTF>]. Elaborating on the “superficial” nature of CAPS, the report states that “[a] self-selecting group of empowered community members, who are frequently gentrifiers, work with police to deflect criticism and build local support for policing.” *Id.*

³¹ *Id.* at 3–15.

³² FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 5 (1977).

though, that we find some of the most innovative forms of collective resistance to the status quo of criminal justice in America.

II. COLLECTIVE RESISTANCE FROM BELOW

To observe agonistic contestation in action, one need only walk the streets of neighborhoods with a large police presence or enter a crowded local criminal courtroom. Every day, marginalized groups living in the shadow of the carceral state engage in acts of resistance, large and small, that go beyond mass protest or social media campaigns. The value of these moments of communal intervention is not participation for its own sake, but rather the potential to build power and shift legal meanings. This Part briefly describes the power of some tactics of resistance that marginalized groups are using to destabilize the everyday workings of the criminal justice system.³³ These tactics illustrate the ways in which contestation outside of formal state-driven mechanisms can play a part in shifting power and agency to marginalized groups, destabilizing entrenched legal and constitutional meanings, and demonstrating to the larger public the communal and structural harms that the criminal justice system creates and perpetuates.³⁴

One example is collective resistance within the courtroom. State criminal courtrooms and courthouse hallways are often crowded with defendants, victims, and their families—the people most affected by local criminal justice. However, despite the presence of marginalized populations in the courthouse, these courthouse visitors are denied the ability to participate meaningfully in everyday justice. Judges conduct short, routine court appearances at inaudible volumes and in inscrutable language, masking the important decisions and policies that have led to a particular prosecution, plea, or sentence.³⁵ The exclusionary dynamics of criminal courtrooms, however, shift and bend when organized groups come together to observe and intervene in courtroom proceedings. Courtwatching groups affiliated with larger social movements, for example, gather volunteers to document everyday proceedings in local courts—bond

³³ Although I describe practices taking place today, collective resistance in American criminal justice is of course not just a contemporary phenomenon.

³⁴ For accounts of ways in which aggregate or communal harms can be minimized in the process of criminal justice policy-making, see, for example, Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924584 [<https://perma.cc/5WHB-GQ4N>]; Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 912–28, 936 (2015).

³⁵ See BIBAS, *supra* note 1 (describing the mechanical nature of state courtroom proceedings, in contrast to the “morality plays” of colonial times); Simonson, *Audience*, *supra* note 11, at 2190–95 (describing the exclusion of the audience in criminal courtrooms).

hearings, arraignments, plea bargains—and report to the public the results of their observations. These community groups become self-appointed watchdogs who can present the results of their observations in their own words, on their own terms, and independent of official accounts of policies and trends.³⁶ Similarly, community groups involved in “participatory defense” join with families, friends, neighbors, and allies of defendants to learn about the facts and procedures of individual cases, perform investigations, and ultimately aim to “change the landscape of power . . . in the criminal justice system.”³⁷

The tactics of courtwatching and participatory defense can have an effect on the adjudication of everyday, low-level cases.³⁸ Courtwatching groups help define the proceedings through their presence, reminding courtroom players that each individual case is connected to larger aggregate harms to families and neighborhoods.³⁹ And, by doing so, these tactics shift power and build agency among individuals previously delegated to subjects, not objects, of the state. This agency, in turn, can lead to robust engagement with legal and constitutional meanings—for example, when courtwatching organizations uncover the relationship between policing policies and misdemeanor adjudications⁴⁰ or participatory defense groups push the boundaries of the right to counsel.⁴¹

A similar power shift occurs when poor people and people of color engage in organized copwatching of police officers on the streets of their neighborhoods.⁴² Like other methods of documenting police conduct—for example, police-worn body cameras—copwatching deters police misconduct in the moment and promotes police accountability after the fact. But the tactic of organized copwatching does more than deter and

³⁶ For examples of this at work, see *8 Week Court Watching Project!!*, COMMUNITY RENEWAL SOC’Y, <http://www.communityrenewalsociety.org/calendar/8-week-court-watching-project> [https://perma.cc/9MEF-LKMQ]; *Municipal Court Watching*, DECARCERATE ST. LOUIS, http://www.decarceratestl.com/municipal_court_watching [https://perma.cc/V5X5-SHQ5].

³⁷ See Robin Yeaman, *Fighting for Justice by Court Watching*, PEOPLE’S TRIB., May 29, 2012, at 11; see also Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281 (2015).

³⁸ I describe the criminal court audience as a site of power shifts in more detail in prior work. See Simonson, *Audience*, *supra* note 11.

³⁹ Cf. JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE 300–02 (2011) (describing how audience members “deny[] the government and disputants unchecked authority to determine the social meanings of conflicts and their resolutions”).

⁴⁰ See, e.g., *The Court Monitoring Project*, POLICE REFORM ORGANIZING PROJECT, <http://www.policereformorganizingproject.org/court-monitoring-project/> [https://perma.cc/6ED2-KLDQ]; see also Simonson, *Audience*, *supra* note 11, at 2183–84 (documenting the impact an audience can have on court proceedings).

⁴¹ See Moore, *supra* note 12.

⁴² I describe this phenomenon in more detail in Simonson, *Copwatching*, *supra* note 11, at 408–27.

document; it also shifts power, creates agency, and sparks legal imaginations. Copwatchers engage with legal and constitutional principles at the same time that they enforce them, communicating to police officers in the moment that their conduct will influence future dialogue about the limits of police violence. In particular, copwatching challenges the traditional monopoly that courts and police officers have to determine what is “reasonable” or “suspicious” under the Fourth Amendment. And, as the results and ideas generated by organized copwatchers percolate into the public sphere and into the courtroom, they can in turn affect larger legal and constitutional understandings. As with courtwatching, copwatchers’ control over their own actions, data, and participation turns the tables on the traditional control that state officials possess to dictate the terms of public participation, and, by extension, to define the public to whom the system is accountable.⁴³

Another tactic of communal resistance, community bail funds, straddles the space between courtrooms and local jails. Community bail funds are grassroots collectives or nonprofits that post bail or bond for defendants who would otherwise be incarcerated pretrial awaiting the disposition of their cases. By posting bail for multiple defendants over a period of time, community bail funds engage in ongoing resistance to the status quo of money bail. The power of community bail funds is not just that they allow outsiders to intervene in individual criminal cases; if that were the only effect of bail funds, then they might actually legitimate an unjust system by greasing its wheels. Rather, community bail funds connect the literal act of posting bail to the greater communal harms of a criminal justice system that funnels members of particular neighborhoods in and out of jails because of their poverty. When a “community” group repeatedly posts bail for strangers, the group contests deeply entrenched understandings of the concepts of “community,” “risk,” and “criminality,” upon which the legitimacy of the practice of pretrial detention depends. Community bail funds demonstrate that the entire logic of bail and pretrial detention—that money bail is a necessary incentive for someone to come back to court; that the “community” is better off when someone is detained pretrial—rests on shaky ground. The result is profoundly destabilizing, not just for the institution of money bail, but also for the larger dynamics of power and control in the criminal courthouse.⁴⁴

Recent years have also seen potent forms of collective resistance from within prison walls, particularly through hunger strikes and labor strikes.

⁴³ *Id.*

⁴⁴ I describe the power of community bail funds as a form of collective resistance in more detail in Simonson, *Bail Nullification*, *supra* note 11.

Incarcerated individuals' ability to publicize their on-the-ground realities to the larger world is an especially powerful tactic of resistance, undermining the complete control that the institution of the prison has over the people trapped within it.⁴⁵ For example, in 2011 and 2013, incarcerated individuals in California engaged in a series of hunger strikes aimed at drawing attention to the degrading conditions in which they were held. Their suffering and demands—ranging from adequate food to an end to long-term solitary confinement—were brought to the attention of the public through on-the-ground organizing of the Prisoner Hunger Strike Solidarity network, both inside and outside of the Pelican Bay prison. Lisa Guenther describes this collective action as the “emergence of a community of resistance through the performative declaration and affirmation of rights that one does not (yet) have.”⁴⁶ The incarcerated collective used contestation to demand dignity, calling attention to the ways in which they are treated as less than human and in the process reclaiming their own agency.⁴⁷ These demands for dignity then influenced the prison's reform of its practices of solitary confinement⁴⁸ and interacted with the large-scale litigation over the Eighth Amendment implications of prison conditions and overcrowding in California.⁴⁹ This bottom-up contestation was echoed in 2016, when activists engaged in a national labor strike in prisons across the United States on the anniversary of the Attica uprising, drawing attention not just to the legalized slave labor, but also to larger dynamics of race, class, and mass incarceration.⁵⁰

Each of the collective practices that I have described above shifts power. Each of them destabilizes entrenched legal understandings upon

⁴⁵ See Perry Zurn & Andrew Dilts, *Active Intolerance: An Introduction*, in ACTIVE INTOLERANCE: MICHEL FOUCAULT, THE PRISONS INFORMATION GROUP, AND THE FUTURE OF ABOLITION 1, 8–9 (Perry Zurn & Andrew Dilts eds., 2016).

⁴⁶ See Lisa Guenther, *Beyond Guilt and Innocence: The Creaturely Politics of Prisoner Resistance Movements*, in ACTIVE INTOLERANCE, *supra* note 45, at 225, 227.

⁴⁷ *Id.*

⁴⁸ See Sal Rodriguez, *California Prison Hunger Strikes Sparked Solitary Reforms, Internal Documents Show*, SOLITARY WATCH (Sept. 2, 2015), <http://solitarywatch.com/2015/09/02/california-prison-hunger-strikes-spurred-solitary-reforms-internal-documents-show/> [https://perma.cc/Q3ZP-5JTU] (describing evidence that solitary confinement reforms were initiated as a direct result of the 2011 and 2013 hunger strikes, despite prison officials' statements to the contrary).

⁴⁹ *Cf.* JONATHAN SIMON, MASS INCARCERATION ON TRIAL 135–37 (2014) (describing the move towards recognizing dignity in Eighth Amendment jurisprudence in the wake of the California prison litigation).

⁵⁰ See Dan Berger, *Rattling the Cages*, JACOBIN (Nov. 18, 2016), <https://www.jacobinmag.com/2016/11/prison-strike-slavery-attica-racism-incarceration/> [https://perma.cc/HRU3-VR9A]; E. Tammy Kim, *A National Strike Against “Prison Slavery,”* NEW YORKER (Oct. 3, 2016), <http://www.newyorker.com/news/news-desk/a-national-strike-against-prison-slavery> [https://perma.cc/2W5A-8CAV].

which the legitimacy of the criminal justice system relies. Each of them uses the voices of those affected by policies in the aggregate to demonstrate to the larger public the harms of those policies. And each of them puts forth new visions of what our criminal justice system can and should look like. In order to make room for the possibility of these new visions, we need to begin by supporting mechanisms of participation in which marginalized outsiders set the terms of engagement, displaying a healthy skepticism of the law and legal institutions that maintain the status quo.⁵¹

III. THE ROLE OF THE STATE IN DEMOCRATIC CRIMINAL JUSTICE

The methods of communal intervention I have been describing are born outside of the state and controlled by non-state actors. However, each branch and level of government has an important role to play in supporting and facilitating productive agonistic practices. As a preliminary matter, the state should eliminate formal barriers to democratic participation from marginalized populations. Any model of democratic criminal justice is incomplete without a push to restore voting rights to incarcerated individuals and those with criminal records.⁵² States interested in bolstering the political power of those most affected by local criminal justice policies can also allow non-citizens and youth to serve on juries and vote in local elections; eliminate death-qualifying juries;⁵³ reinvest in neighborhoods weakened by mass incarceration;⁵⁴ and push for inclusionary forms of citizenship for immigrants who are not United States citizens.⁵⁵ Although I have described these reforms as preliminary, the paradox is that without first possessing sufficient political power to call for reforms, disenfranchised populations struggle to attain formal political recognition. The change must therefore begin elsewhere, through processes that

⁵¹ Implicit in my argument is a belief that our current system is not a product of bad apples ignoring constitutional rules or disobeying laws, but of state institutions and constitutional doctrine legally facilitating oppression and exclusion. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016).

⁵² See generally NAACP LEGAL DEF. & EDUC. FUND, INC. & THE SENTENCING PROJECT, FREE THE VOTE: UNLOCKING DEMOCRACY IN THE CELLS AND ON THE STREETS (2016), http://www.naacpldf.org/files/about-us/Free%20the%20Vote%202016_0.pdf [https://perma.cc/92Y6-BLGL].

⁵³ See J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1169 (2014) (arguing it may be appropriate to abolish death-qualifying juries if minority groups are continually prevented from participating).

⁵⁴ See LERMAN & WEAVER, *supra* note 2, at 253–55.

⁵⁵ See Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869 (2015).

simultaneously build power and push against dominant conceptions of what it means to count as a citizen or democratic subject.⁵⁶

The state should facilitate—rather than silence—the efforts of disenfranchised groups to participate in criminal justice through contestatory modes of popular resistance. All too often, police and courts meet bottom-up participatory tactics with resistance, calling them disruptive and harmful to the decorum of everyday justice. Police arrest organized copwatchers for filming; administrators close courtrooms to the public; judges shut down community bail funds; prison officials retaliate against people striking in prison; and federal investigators increase surveillance of social movements that aim to transform the criminal justice system.⁵⁷ However, we can imagine how state actors might instead enact policies that allow for disruptive but nonviolent forms of protest and intervention. Localities can promote policing policies that respect the right of the people to assemble, protest and dissent; courts can enforce the First and Sixth Amendment rights of community members to dissent and intervene; court administrators can ensure open courtrooms and allow audience members to participate in proceedings upon request; and prison officials can permit prisoners to fast, strike, and publicize these mass actions beyond prison walls.

Finally, we can imagine state-driven processes that themselves allow for community control of local criminal justice policies and priorities. The key here is to design methods of governance that facilitate power shifts, not just deliberation.⁵⁸ Local juries that include individuals with criminal records might make decisions about individual cases and larger criminal justice policies alike.⁵⁹ A local police review board, drawn from residents

⁵⁶ See, e.g., Guinier & Torres, *supra* note 24, at 2761–72 (describing this process in the context of the work of Fannie Lou Hamer and the Mississippi Freedom Democratic Party).

⁵⁷ See Amna A. Akbar, *Policing Black Radicalism*, JACOBIN (Aug. 17, 2016), <https://www.jacobinmag.com/2016/08/cointelpro-fbi-black-panther-party-young-lords-hoover/> [<https://perma.cc/98ZV-WFRW>] (describing increased surveillance on Black Lives Matter organizers); Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559 (2016) (describing resistance against copwatchers and individuals who record the police); Simonson, *Bail Nullification*, *supra* note 11, at 126 (describing retaliation against a community bail fund); Memorandum from Hunger Strike Representatives, *supra* note 26 (describing retaliation against incarcerated individuals conducting hunger strikes).

⁵⁸ A number of recent scholars have highlighted the importance of paying attention to the ways in which various forms of governance impede or facilitate power. See, e.g., Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1 (2016); Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016); Rahman, *supra* note 21.

⁵⁹ Cf. APPLEMAN, *supra* note 1 (examining ways to incorporate the community in the criminal justice system through the jury trial right); Josh Bowers, *The Normative Case for Normative Grand*

of a particular neighborhood, might be given the power to make both disciplinary and policy decisions.⁶⁰ And judges designing and enforcing consent decrees might give power to community groups and other marginalized stakeholders to design or veto portions of consent decrees that affect their neighborhoods.⁶¹ Any push to move decisionmaking and resource allocation in criminal justice down to the local level is a potentially useful one.⁶² But we should not rest at local, consensus-building strategies alone. Given the profound inequalities in political power that pervade our current system, we should also seek out methods of governance that hand over levers of power to the powerless.

To pursue any of these avenues, government actors must be open to the possibility of what Ruth Wilson Gilmore calls “nonreformist reform”—“changes that, at the end of the day, unravel rather than widen the net of social control through criminalization.”⁶³ There is reason to think that if those most likely to be arrested and incarcerated were given truly equal influence over policy, and if policymaking happened more locally, then the criminal justice system would be less rather than more punitive.⁶⁴ Not only that, law that is responsive to the demands of local democracy will end up depending less on a punitive criminal justice system, and more on other modes of state and community support.⁶⁵

CONCLUSION

Agonistic practices need not be foes of deliberation; but to promote agonism and contestation means recognizing that deliberation and consensus alone will not lead to transformative change. Dismantling the American carceral state will require not just top-down reform, but bottom-

Juries, 47 WAKE FOREST L. REV. 319 (2012) (arguing that a grand jury could make recommendations on the normative or extralegal aspects of low-level cases).

⁶⁰ See, e.g., M Adams & Max Rameau, *Black Community Control over Police*, 2016 WIS. L. REV. 515, 530–38; *Community Control*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/community-control/> [<https://perma.cc/5STY-8TUE>].

⁶¹ See Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793 (2016).

⁶² But see Stephen J. Schulhofer, Book Review, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1081–83 (2013) (arguing that increasing local power in criminal justice will aggravate existing problems because political power is not evenly distributed).

⁶³ RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 242 (2007).

⁶⁴ See generally Vanessa Barker, *Prison and the Public Sphere: Toward a Democratic Theory of Penal Order*, in *WHY PRISON?* 125 (David Scott ed., 2013) (arguing that states that have “engage[d] ordinary people in a more open and participatory democratic process” have in turn had lower incarceration rates).

⁶⁵ Cf. PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION* 89–92 (1978) (describing how responsive law involves a reduction in the use of criminal sanctions).

up efforts to build power and transform institutions. The exciting, but frightening, potential of “convulsive politics from below”⁶⁶—collective resistance and reimagining of our criminal justice system—is that if they are successful, they will undermine the legitimacy of the criminal justice system that we have. We will then need to support the wisdom of the demos as it creates new and better ways to support public safety. Following the recent work of Amna Akbar,⁶⁷ scholars of law, social change, and criminal justice have a responsibility to study and support marginalized and disenfranchised groups as they create, in the words of one activist–thinker, “a discourse that gives our communities clear alternatives and new visions, new imaginings of our public safety.”⁶⁸

⁶⁶ MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 282 (2015) (calling for “convulsive politics from below that we need to dismantle the carceral state and ameliorate other gaping inequalities”).

⁶⁷ See Akbar, *supra* note 16; Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 356–60 (2015).

⁶⁸ Christina Heatherton, #BlackLivesMatter and Global Visions of Abolition: An Interview with Patrisse Cullors, in *POLICING THE PLANET* 35 (Jordan T. Camp & Christina Heatherton eds., 2016); see also Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1238–39 (2015) (bringing the social movement concept of prison abolition into conversation with criminal justice theory).