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The Place of the People in Criminal Procedure

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ESSAY

THE PLACE OF “THE PEOPLE” IN CRIMINAL PROCEDURE

*Jocelyn Simonson**

The rules and practices of criminal procedure assume a clean separation between the interests of the public and the interests of the lone defendant who stands accused. Even the names given to criminal prosecutions often declare this dichotomy, as in jurisdictions such as California, Illinois, Michigan, and New York that caption criminal cases “The People of the State of X v. John Doe.” This Essay argues that this traditional people/defendant dichotomy is critically flawed and then builds on that critique to point the way toward a more realistic, inclusive, and just vision of the role of the public in the criminal process.

The people/defendant dichotomy in the ideology of contemporary criminal procedure rests on two mistaken premises: first, that prosecutors are and should be the primary representatives of the public in the courtroom; and second, that the rules of criminal procedure must limit direct public participation to an illusory, limited subset of the public that is deemed “neutral” and “unbiased.” These conceptions of representation and neutrality distort the criminal legal system’s understanding of who “the People” are, marginalizing and excluding the voices of those members of the community who stand to be harmed by the defendant’s prosecution or incarceration. As a result, the ideology of the people/defendant dichotomy promotes practices that are more punitive than the multifaceted interests of the public dictate.

This Essay puts forth a new, alternative approach to thinking about popular participation in criminal procedure, an approach that recognizes that “the People” can and do appear on both sides of the scale of justice. This recognition casts new light on the role of bottom-up resistance to local police actions and prosecutions—such as through courtwatching, participatory defense, and community bail funds—by

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those who otherwise do not have a voice in the process. And it directs us toward procedural rules and constitutional jurisprudence that both acknowledge communal interests beyond merely protecting “public safety” and promote an inclusive system of criminal adjudication responsive to the multidimensional demands of the popular will.

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INTRODUCTION

The customary case caption in criminal court, “The People v. Defendant,” pits the local community against one lone person in an act of collective condemnation.¹ Or, as the opening credits of *Law and Order* tell us, “The people are represented by two separate yet equally important groups: the police, who investigate crime, and the district attorneys, who prosecute the offenders.”² Procedures for policing, adjudication, and punishment often flow from this understanding of prosecutors and

1. See, e.g., Law Reporting Bureau of the State of NY, New York Law Reports Style Manual § 8.1(a) (2012), http://www.courts.state.ny.us/reporter/new_styman.htm [<https://perma.cc/F93H-53DD>] (“In criminal actions, the prosecuting authority is usually described as ‘The People of the State of New York.’”). In some jurisdictions, the prosecution is termed “the State,” “the Commonwealth,” or “the United States,” rather than “the People.” See, e.g., Orin S. Kerr, How to Read a Legal Opinion, 11 Green Bag 2d 51, 52 (2007) (describing different types of case captions).

2. Title Sequence, *Law & Order* (NBC television broadcast 1990–2010).

police officers as representatives of the public at large.³ We construct the rules of interaction between accused individuals and the state based on a balance between, on the one hand, giving individual defendants adequate protections against state power and, on the other hand, smoothing the wheels of justice so that state actors can do their work of promoting safety and punishing transgressions on behalf of us all. The public is brought into conversation with "the People" by voting for prosecutors and serving on the occasional jury,⁴ but rarely are members of the public at large—the people—envisioned as being on the side of defendants themselves.⁵

And yet acts of popular intervention on the side of defendants happen every day: A community bail fund posts bail for a stranger;⁶ activists surround a police car in which officers have detained a fourteen-year-old black boy whom the activists have never met;⁷ a participatory defense team creates a biographical video about a defendant;⁸ a group of court-watchers sits in the audience section of a courtroom to demonstrate support for the accused.⁹ These acts are sometimes isolated or spontaneous. But often, they are part of long-term efforts by marginalized groups, especially poor people of color, to participate in a criminal legal system

3. As discussed in Part II, prosecutors and the police are also bound by obligations beyond representing public sentiment, including constitutional limits on their conduct and ethical obligations to serve as "ministers of justice" in a neutral manner.

4. Cf. Stephanos Bibas, *The Machinery of Criminal Justice* 1–40, 176 n.48, 177 n.56 (2012) [hereinafter Bibas, *Machinery of Criminal Justice*] (contrasting colonial American criminal justice, in which the public participated in individual cases, with the modern system of criminal procedure, in which the limited public input comes through elections, community policing or prosecution, and the rare jury trial).

5. See *infra* Part II.

6. See, e.g., People Freed, Chi. Cmty. Bond Fund, https://www.chicagobond.org/#people_freed [<https://perma.cc/J5GC-DUAS>] (last visited Sept. 12, 2018) (describing stories of people in Chicago for whom the Chicago Community Bond Fund has posted bond).

7. See *Activists Helping Teen Detained by Police Pepper Sprayed in Cleveland*, Al Jazeera Am. (July 27, 2015), <http://america.aljazeera.com/articles/2015/7/27/black-lives-matter-activists-pepper-sprayed-in-cleveland.html> [<https://perma.cc/C6NQ-MGC2>] (describing a crowd of Black Lives Matter activists in Cleveland gathering around a police van in which a fourteen-year-old had been detained, resulting in the release of the child to his mother without being arrested).

8. See ACJPDEBUG, *Photo Recap: National Social Biography Media Boot Camp!*, Albert Cobarrubias Justice Project (June 6, 2017), <https://acjusticeproject.org/2017/06/06/photo-recap-national-social-biography-media-boot-camp/> [<https://perma.cc/SR92-9QZH>] (describing a meeting of participatory defense hubs from around the country to share strategies for creating social biography videos for use in court).

9. See, e.g., *Black Lives Matter Supporters Gather 57,000 Signatures, Vow to Pack Pasadena Court During Jasmine Richards' Sentencing Tuesday*, Pasadena Now (June 6, 2016), <http://www.pasadenanow.com/main/black-lives-matter-supporters-gather-57000-signatures-vow-to-pack-pasadena-court-during-jasmine-richards-sentencing-tuesday> [<https://perma.cc/W6U2-XW2M>] (describing the plans of supporters of an activist convicted of the felony charge of attempting to unlawfully remove a suspect from police officers to "pack" the court at her sentencing hearing).

that they feel does not represent them. Organizer and writer Mariame Kaba explains this choice starkly: “Petitioning the state which is set up to kill us for help and protection can be untenable and therefore forces us to consider new ways of seeking some justice.”¹⁰ For Kaba and many other activists, the futility of trying to have their voices heard by those in charge of policing and prosecution has led them to turn toward interventions on behalf of defendants as a means of collective action.

In the context of the criminal courthouse, in particular, marginalized groups have pursued methods of popular participation outside of the formal mechanisms of voting and jury service, through tactics such as community bail funds, participatory defense, and courtwatching. Mainstream reactions to these forms of participation range from outrage and disgust to more subtle requests for dialogue and decorum.¹¹ But rarely are these bottom-up acts of participation recognized as a legitimate part of our work of seeing justice done; rarely do we acknowledge in any formal manner that the arrest and prosecution of an individual can run against the interests of local community members.¹² By relegating communal interventions on behalf of defendants to the status of problematic interference, rather than productive public participation, the ideology of criminal procedure facilitates the exclusion of marginalized communities from everyday criminal adjudication.

This Essay explores the disconnect between the leading conceptions of the proper place of public interventions in criminal procedure and the on-the-ground reality of groups who participate in everyday adjudication on behalf of defendants. The idea that “the Prosecution” is synonymous with “the People,” implicit in the case captions of California, Illinois, Michigan, and New York, serves as a jumping-off point for a larger examination of how we think about public participation in the criminal process. Despite this focus on the term “the People,” this Essay is not centrally concerned with the meaning of “the People” in the text of the Constitution—whether it is “the People” of the Second or Fourth Amendments¹³ or the “We, the People” of the Preamble.¹⁴ Instead, I

10. Mariame Kaba, *Free Us All: Participatory Defense Campaigns as Abolitionist Organizing*, *New Inquiry* (May 8, 2017), <https://thenewinquiry.com/free-us-all/> [<https://perma.cc/QF98-2NQV>] [hereinafter Kaba, *Free Us All*] (explaining why Kaba and other activists engage in participatory defense campaigns).

11. See *infra* section I.C.

12. See *infra* sections I.B–C.

13. Compare *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (limiting the operative meaning of “the people” in the Second Amendment to “law-abiding citizens”), with *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (defining “the people” in the Fourth Amendment as “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country”).

14. Cf. Michael Perry, *We the People: The Fourteenth Amendment and the Supreme Court 15–32* (1999) (describing how the definition of “we” in “We, the People” changes based on which part of the Constitution is being analyzed); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *Const. Comment.* 47, 58–59 (2006) (providing an

examine the dominant ways in which we think about the uses and limits of public participation in criminal procedure, more broadly conceived: not only constitutional doctrine, but also statutory, administrative, and customary rules and practices that structure everyday criminal adjudication. When a judge orders a spectator to leave the courtroom or a clerk tells a community group that they cannot post bail, those official acts are as much a part of procedure as any formal rule.¹⁵ What emerges from examining both constitutional doctrine and these on-the-ground realities of everyday procedure is a striking dichotomy between the idea of a collective "people," and the lone defendant on the other side of the "v."

This people/defendant dichotomy is problematic for a number of reasons. First, it assumes that the prosecution and the police adequately represent, or at least are capable of adequately representing, the interests of a local "community." In reality, however, the unequal distribution of political power means that the decisions of "the People" are often not responsive to the interests of the poor populations of color most likely to come into contact with the criminal process as arrestees, defendants, or victims.¹⁶ Moreover, seeking public input only on behalf of policing and

originalist interpretation of the term "We, the People"); Sanford Levinson, *Who, if Anyone, Really Trusts "We the People"?*, 37 *Ohio N.U. L. Rev.* 311, 317 (2011) (arguing that it is a mistake to infer from the "We, the People" of the Preamble that "the People" should actually rule in any fundamental sense); David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 *Tex. L. Rev.* 1969, 1973–77 (2013) (distinguishing between "We, the People" at the time of the drafting of the Constitution and the meaning of "the People" in constitutional interpretation today). For an argument that the constitutional ideal of "We, the People" should be a central animating goal of criminal procedure, see Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 *Nw. U. L. Rev.* 1455, 1483–86 (2017) [hereinafter Kleinfeld, *Three Principles*].

15. Cf. Herbert Packer, *The Limits of the Criminal Sanction* 149 (1968) [hereinafter Packer, *Limits*] (describing "the criminal process" as "a compendious term that stands for all the complexes of activity that operate to bring the substantive law of crime to bear (or to keep it from coming to bear) on persons who are suspected of having committed crimes"); Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking* [hereinafter Dolovich & Natapoff, *Introduction*], in *The New Criminal Justice Thinking* 1, 5 (Sharon Dolovich & Alexandra Natapoff eds., 2017) [hereinafter Dolovich & Natapoff, *The New Criminal Justice*] ("[I]t is not enough to look to formal rules and processes. We must also attend to the reality on the ground . . ."). For an argument advocating for a grounded understanding of criminal procedure, see *infra* section I.A.

16. See Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?*, 126 *Harv. L. Rev.* 1299, 1321 (2013) (book review) ("[T]he 'truly disadvantaged' groups—who are mainly located in inner-city areas and whose victimization at the hands of both crime and criminal justice underpins their more complex view of crime and punishment—are rarely the median or decisive voters in the electoral contests that shape policy."); see also Traci Burch, *Trading Democracy for Justice: Criminal Convictions and the Decline of Neighborhood Political Participation* 75–104 (2013) (documenting the decline of political participation in neighborhoods with higher concentrations of people with criminal records); Amy E. Lerman & Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* 202–18 (2014) (describing how contact with the criminal justice system dilutes political engagement);

prosecution ignores the multifaceted nature of any “community,”¹⁷ excluding strong critiques of reigning practices and resulting in an echo chamber that reinforces existing notions of justice. I call this set of issues with the people/defendant dichotomy the *representation problem*.

The second problem with the people/defendant dichotomy is that it is imbued with a false sense that our procedures promote “neutrality” from the public during adjudication and other criminal procedures. To be “neutral” is to side with the prosecution, not the defendant. The ideal public (whether voters, juries, courtroom audiences, or the community at large) becomes a disinterested and decorous public, calm and orderly, without “bias” against the police or the prosecution. This false ideal of neutrality allows for the exclusion of members of the public attempting to participate in ways that align with defendants’ interests. For example, police officers arrest individuals filming officers in public for “interference” with police work;¹⁸ judges forbid courtroom audience members from wearing shirts demonstrating support for defendants;¹⁹ court clerks refuse to let community bail funds post bail for strangers;²⁰ and jury

William J. Stuntz, *The Collapse of American Criminal Justice* 255 (2011) [hereinafter Stuntz, *Collapse of American Criminal Justice*] (noting that “voters with the largest stake [in the process of building and filling prisons]—chiefly African American residents of high-crime city neighborhoods—had the smallest voice in the relevant decisions”); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *Stan. L. Rev.* 1271, 1291–98 (2004) [hereinafter Roberts, *Social and Moral Cost*] (detailing the “role [of mass incarceration] in controlling the social, economic, and political engagement of African American communities in the national polity”).

17. See Laura I. Appleman, *Defending the Jury: Crime, Community, and the Constitution* 70–87 (2015) (discussing the difficulties with defining community in relation to criminal justice); Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 *U. Chi. Legal F.* 215, 216–17 (critiquing the amorphous concept of community in the context of policing); Regina Austin, “The Black Community,” *Its Lawbreakers, and a Politics of Identification*, 65 *S. Cal. L. Rev.* 1769, 1770–74 (1992) (describing different conceptions of “community” among African Americans with respect to criminal justice); Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 *Stan. L. Rev.* 751, 769 (2000) (“In a diverse, multicultural society, many collectivities may vie for th[e] status [of community].”); Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 *Utah L. Rev.* 343, 343 (critiquing the idea of community in the context of the restorative justice and “community justice” movements).

18. See Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 *Geo. L.J.* 1559, 1560–63 (2016) [hereinafter Simonson, *Beyond Body Cameras*] (describing resistance against organized copwatchers and individuals who record the police).

19. See, e.g., Lindsay Corcoran, *Judge Says Worcester Protestor Can’t Wear Black Lives Matter Shirt During Trial*, *Mass Live* (Nov. 9, 2015), https://www.masslive.com/news/worcester/index.ssf/2015/11/judge_says_worcester_protestor.html [<https://perma.cc/S276-5457>]; Ruthann Robson, *Judge Bans Spectator Symbols in Cecily McMillan’s Trial, Dressing Constitutionally* (Apr. 7, 2014), <http://www.dressingconstitutionally.com/2014/04/07/judge-bans-spectator-symbols-in-cecily-mcmillans-trial/> [<https://perma.cc/XWJ8-35XS>].

20. See, e.g., Toby Sells, *Just City’s Bail Program Worked in Nashville, Can’t Get Consensus in Memphis*, *Memphis Flyer* (July 14, 2016), <https://www.memphisflyer.com/>

selection excludes individuals with criminal records or negative views of the police.²¹ Under the guise of neutrality, popular efforts to intervene on behalf of defendants become interference with the rule of law rather than welcome participation. In the process, our estimations of public sentiment become distorted toward the prosecution. This focus on the creation of a neutral public that is not biased toward the defense also cements the status of arrestees and defendants as the “other,” as a group of outsiders different from the average member of the public, rather than *of* the public.²² This, in turn, colors the interpretation and implementation of procedural rules. I think of this as the *neutrality problem*.

My argument is that under the umbrella of the people/defendant dichotomy, the representation problem and the neutrality problem together contribute to a concept of criminal procedure that moves us away from truly responsive local justice²³ and toward practices that are more punitive than the multifaceted interests of the public dictate. The people/defendant dichotomy constructs a limited and exclusionary view of which “public” matters in criminal adjudication. If we think of all members of the public as represented by “the People” and all those who might side with a defendant as “biased,” then we exclude from criminal adjudication those who would disagree with a prosecution or support a defendant, shutting out an entire subset of the public who might bring more contestatory views to the table. In doing so, procedural rules and practices do not simply mirror existing political inequalities—they create them.²⁴ This Essay is thus about ideology, about how the reigning

NewsBlog/archives/2016/07/14/just-citys-bail-program-worked-in-nashville-cant-get-consensus-in-memphis [https://perma.cc/CV4H-VBSR] (describing procedural hoops set up by clerks and judges in Memphis that prevented activists from operating a community bail fund).

21. See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 *Am. U. L. Rev.* 65, 70–71 (2003) (describing exclusion of individuals with criminal records from juries); Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 *U.C. Davis L. Rev.* 1359, 1403–04 (2012) [hereinafter Roberts, *Disparately Seeking*] (describing doctrine that comfortably allows prosecutors to strike from juries individuals with negative views of, or interactions with, the police and the criminal justice system).

22. See Erin R. Collins, *Status Courts*, 105 *Geo. L.J.* 1481, 1522–23 (2017) (describing the “othering” effect” of reigning retributivist models of American criminal courts); Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1608 (1986) [hereinafter Cover, *Violence*] (explaining that when interpretive communities focus on a judge’s neutral interpretation, they distance themselves from the pain of the defendant); cf. Sune Qvotrup Jensen, *Othering, Identity Formation and Agency*, 2 *Qualitative Stud.* 63, 66–67 (2011) (describing the process of “othering” of minority groups so that they are imbued in the dominant culture with undesirable characteristics).

23. See Philippe Nonet & Philip Selznick, *Law and Society in Transition* 77 (1978) (defining responsive legal institutions as those which open themselves up to adaptation by “perceiv[ing] social pressures as sources of knowledge and opportunities for self-correction”).

24. See Janet Moore, *The Antidemocratic Sixth Amendment*, 91 *Wash. L. Rev.* 1705, 1718–20 (2016) (noting how the inability of indigent defendants to choose counsel exacerbates the already existing inequalities in the justice system); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 *N.Y.U. L. Rev.* 1449, 1452 (2005) [hereinafter Natapoff, *Speechless*] (describing how procedure leads to the “expressive

assumptions structuring how we think about the criminal adjudicatory process legitimize inequitable practices and limit how we design procedures and approach reform.

I explore an alternative approach to thinking about popular participation in criminal procedure, and especially in the adjudication of criminal cases. With this approach, “the People” appear on both sides of the scale of justice in individual cases; no longer can the prosecution call itself “the People.” I look to the bottom-up practices of marginalized groups intervening on behalf of defendants to show the possibility of a different way of thinking about the place of the people in the criminal process, one in which members of the public are allowed to voice their support or opposition through procedural channels other than elections, juries, or community justice fora. If a central purpose of criminal procedure becomes to channel the will of the people into both sides of each individual criminal case—the prosecution *and* the defense—then popular efforts to intervene on behalf of criminal defendants take on legitimacy and importance. They become part of our system, worthy of examination in any comprehensive debate over how we design our procedures.

This Essay is part of a larger vision of the importance of leaving the sphere of criminal law open to communal resistance and to agonistic participation—forms of direct participation that engage with powerful state institutions in a respectful but adversarial manner.²⁵ Crucial to this vision is a view that local criminal adjudication *is* and *should be* a site of communal contestation and resistance.²⁶ This does not mean that all

disempowerment of those disadvantaged groups who tend to become defendants”); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 Colum. Hum. Rts. L. Rev. 261, 279–86 (2007) [hereinafter Roberts, *Constructing a Criminal Justice System*] (describing the criminal justice system’s “anti-democratic function”).

25. See Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 Nw. U. L. Rev. 1609, 1611–13 (2017) [hereinafter Simonson, *Democratizing Criminal Justice*] (describing this larger vision); see also Jocelyn Simonson, *Copwatching*, 104 Calif. L. Rev. 391, 413–27 (2016) [hereinafter Simonson, *Copwatching*] (using the lens of agonism to argue for the importance of respecting the practice of organized copwatching by marginalized populations). On agonism, see generally Chantal Mouffe, *Agonistics: Thinking the World Politically* 1–19 (2013) [hereinafter Mouffe, *Agonistics*] (summarizing a theoretical framework of agonistic politics); I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 Colum. L. Rev. 653, 700–01 (2018) [hereinafter Capers, *Good Citizen*] (describing the benefits of agonistic confrontations between civilians and the police); Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOJ Consent Decrees*, 51 Wake Forest L. Rev. 793, 804–07 (2016) (using the theory of agonism to argue that we should respect and uplift the participation of grassroots groups in police consent decrees).

26. On the importance of resistance to everyday criminal justice, see Jenny E. Carroll, *The Resistance Defense*, 64 Ala. L. Rev. 589, 641–42 (2013); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. Chi. Legal F. 295, 343 [hereinafter Miller, *Encountering Resistance*]; Alice Ristroph, *Regulation or Resistance? A*

contestation is healthy or desirable. In the end, some popular interventions on behalf of defendants may skew the results of adjudication in ways that subvert our notions of fairness or the rule of law. But our starting point should be a presumption that popular interventions on behalf of defendants are legitimate, followed by an examination of whether they excessively undermine other competing values.

Part I begins by situating my argument within current debates over both the ideology of criminal procedure and the politics of criminal law. It then describes how bottom-up forms of communal contestation in everyday justice, including community bail funds, participatory defense, and courtwatching, present a vision of public intervention that does not fit neatly into existing narratives of popular participation. Part II lays out the contours of the dichotomy between "the People" and the defendant in our reigning ideology of criminal procedure. I argue that the people/defendant dichotomy carries with it two particular ideological problems: first, a limited focus on public participation through representatives, and second, an illusory conception of a public that is "neutral" and unbiased. Part III conceptualizes how the public might instead participate on both sides of individual conflicts in the criminal courtroom. Under this approach, a state might facilitate, rather than silence, direct, contestatory forms of participation in criminal adjudication most often found on the defendant side of the "v." Finally, Part IV defends the conception of placing "the People" on both sides in individual criminal cases against the charge that it would unduly undermine the rule of law by connecting everyday contestation in criminal adjudication to the possibility of large-scale decarceration more broadly.

I. IDEOLOGY, CRIMINAL PROCEDURE, AND DEMOCRACY

This Essay identifies, and then sets out an alternative to, a central ideological idea in criminal procedure: that the public's input should fall only on the side of "the People," or the prosecution. In this Part, I situate this argument within current debates over, on the one hand, the study of ideology in criminal procedure and, on the other, the place of popular participation in criminal adjudication. My goal is to bridge these two conversations, revealing the connection between how we think about criminal procedure and the inclusion of generally disempowered populations in our reigning conceptions of justice and fairness. A criminal legal system responsive to all facets of a local "community" should be one that facilitates collective forms of participation that challenge powerful institutional actors and dominant ideas of justice. Current forms of bottom-up communal contestation led by members of historically disempowered populations demonstrate how this might be possible and should inform our understandings of the interaction between the design of

Counter-Narrative of Constitutional Criminal Procedure, 95 B.U. L. Rev. 1555, 1558-60 (2015).

criminal procedures and the possibilities of public participation in everyday justice.

A. *The Ideology of Criminal Procedure*

In legal scholarship, there is a rich history of thinking broadly about the structure of rules, doctrines, and cultures that produce everyday criminal law and its processes—and often reproduce existing hierarchies and pathologies.²⁷ In the context of criminal procedure, Herbert Packer famously posed two competing “models” of criminal procedure in the 1960s: the “Due Process model” and the “Crime Control model.”²⁸ Packer argues that how we think of the purpose of criminal procedure—as a vehicle for due process or as a means of facilitating speedy prosecutions—in turn mediates the interpretation of constitutional and procedural rules. Packer’s models have spawned a wide range of critiques and adjustments, which further both positive and normative models of how we structure our criminal procedures.²⁹ A central insight of the literature on ideology and criminal procedure is that the principles we use to frame our procedures in turn shape the cultures of our precincts, courthouses,

27. For examples in criminal justice scholarship, see, e.g., David Sklansky, *Democracy and the Police* 1–13 (2008) [hereinafter Sklansky, *Democracy*] (describing the links between conceptions of democracy and policing models); Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 *Berkeley J. Crim. L.* 259, 265 (2011) (describing “the ‘cognitive conventions’ by which current penal practices are rendered at once logical and legitimate,” including the focus on defendant autonomy and responsibility); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *Criminology* 449, 452–55 (1992) (describing a shift in penological discourse marked by “the replacement of a moral or clinical description of the individual with an actuarial language of probabilistic calculations and statistical distributions applied to populations”); Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 *S. Cal. L. Rev.* 733, 783 (2014) (arguing for the importance of paying attention to the “public framing, discourse, and rhetoric” in constitutional regulation of the death penalty); Michael Tonry, *Evidence, Ideology, and Politics in the Making of American Criminal Justice Policy*, 42 *Crime & Just.* 1, 8 (2013) (arguing that criminal justice policy is influenced by “the filter of prevailing paradigms and ways of thinking”).

28. Packer, *Limits*, supra note 15, at 153; Herbert L. Packer, *Two Models of the Criminal Process*, 113 *U. Pa. L. Rev.* 1, 6 (1964).

29. See, e.g., Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 *Law & Soc. Inquiry* 237, 237–38, 240 (2011) (discussing John Griffiths’s critique that Packer’s models “in fact presented two sides of the same model: the ‘battle’ between the ‘police perspective’ and the ‘ACLU perspective’”); John Griffiths, *Ideology in Criminal Procedure or a Third “Model” of the Criminal Process*, 79 *Yale L.J.* 359, 367–75 (1970) (critiquing both of Packer’s models and proposing a new “Family Model” of criminal procedure); Alexandra Natapoff, *The Penal Pyramid*, in Dolovich & Natapoff, *The New Criminal Justice*, supra note 15, at 72–73, 92 [hereinafter Natapoff, *The Penal Pyramid*] (proposing a new model of analyzing criminal procedure focusing on the differences in the criminal process along lines of race, class, gender, and other factors); Kent Roach, *Four Models of the Criminal Process*, 89 *J. Crim. L. & Criminology* 671, 672 (1999) (acknowledging the significance of Packer’s Due Process and Crime Control models but suggesting an alternative approach).

prisons, and other sites of interaction between criminal justice actors and the public. Although these principles are not always explicit, nor are they uniform, they constitute a set of ideas and assumptions that run beneath the operation of the criminal process and legitimize the status quo.³⁰

A full study of the ideology of criminal procedure requires moving beyond analyses of constitutional doctrine. As Packer puts it, studying criminal procedure demands attending to all of "the complexes of activity that operate to bring the substantive law of crime to bear (or to keep it from coming to bear) on persons who are suspected of having committed crimes."³¹ Indeed, although the term "criminal procedure" can at times be shorthand for "constitutional criminal procedure," scholars and teachers are increasingly recognizing that we must study and teach well beyond the doctrine to capture the reality of criminal adjudication on the ground.³² "Criminal procedure" is thus a combination of

30. See Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 *Yale L.J.* 480, 530 (1975) ("In discovering affinities between ideology and criminal procedure we are actually canvassing ideological arguments advanced in support of existing procedural arrangements and in opposition to their change."). To use the term ideology to describe a conception of procedure underscores the potential of ingrained ideas about the legal and political world to legitimate and normalize systemic injustices. In Gramscian terms, legal ideology plays a role in perpetuating hegemonic relationships. See *Selections from the Prison Notebooks of Antonio Gramsci* 180–81 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971). See generally Tommie Shelby, *Dark Ghettos* (2017) (defining ideology as "a widely held set of associated beliefs and implicit judgments that misrepresent significant social realities and that function, through this distortion, to bring about or perpetuate unjust social relations"). The legitimating function of legal ideology is a core insight of both critical legal studies and critical race theory. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049, 1051–52 (1978) (arguing that legal doctrine can legitimate the existing social structure—but only if "it holds out a promise of liberation"); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 *Minn. L. Rev.* 265, 268 (1978) (noting that the Court began to elaborate the boundaries of "legitimate" labor activity through development of Wagner Act doctrine).

31. Packer, *Limits*, *supra* note 15, at 149. Packer further argues that criminal procedure is both the rules of law and "patterns of official activity that correspond only in the roughest kind of way to the prescriptions of procedural rules." *Id.* In other words, if under our expansive criminal codes we are all technically criminals, procedure is the complex of activities and rules that allow us to differentiate between those whom the state controls and supervises in the name of public safety, and those whom it does not. Cf. Damaška, *supra* note 30, at 481 (arguing that scholars of ideology and criminal procedure should "discard[] a preoccupation with legal mythology to consider law as it is actually applied"); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale L.J.* 1, 53 (1997) [hereinafter Stuntz, *Uneasy Relationship*] ("The problem with the criminal process may not be particular rules or practices, but rather the system that defines what that process should look like.").

32. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 *Colum. L. Rev.* 1303, 1305–06 (2018) (describing the importance of subconstitutional court rules and state laws governing procedures of plea bargaining); Dolovich & Natapoff, *Introduction*, *supra* note 15, at 5 ("[I]t is not enough to look to formal rules and processes. We must also attend to the reality on the ground . . ."); Rachel A. Harmon, *The Problem of Policing*,

the rules and practices—constitutional, statutory, administrative, and customary—that structure contact with the criminal legal system for those suspected and accused of crimes. Widely held conceptions of these interactions in turn structure scholarship, doctrine, and the day-to-day practices of our courthouses and precincts.

The ideology of criminal procedure is especially important in the post-trial world of mass prosecutions and plea bargaining, in which “processes”—a stop-and-frisk, the provision of counsel, the decision to set bail—often determine as much as anything else the “substantive” outcome of a case or interaction.³³ Alexandra Natapoff recently theorized a model of criminal procedure that accounts for the differences between the substance-driven prosecutions of well-resourced defendants charged with serious crimes, often in federal court, and the experiences of less privileged defendants who are rushed through the criminal justice system without a thorough airing of the charges against them. Natapoff locates the experiences of poor people of color charged with low-level offenses as the bottom of a “penal pyramid”: a place where under-resourced defendants charged with low-level cases face “outcomes . . . driven by institutional practices and inegalitarian social relations.”³⁴ At the bottom of the penal pyramid, where the vast majority of criminal cases take place, formal rules and methods of public intervention escape from view in favor of top-down institutional practices that facilitate control and surveillance along lines of class, race, and gender.³⁵ In these situations, procedure *is* the control and the surveillance—the system doles out what Issa Kohler-Hausmann has termed “procedural hassle,” rather than conviction

110 Mich. L. Rev. 761, 768–81 (2012) (arguing that scholars must look beyond constitutional doctrine in thinking about the regulation of the police); Adriaan Lanni & Carol Steiker, *A Thematic Approach to Teaching Criminal Adjudication*, 60 St. Louis U. L.J. 463, 464–66 (2016) (urging a move beyond constitutional rules in teaching about the rules of criminal adjudication); Kate Levine, *Police Suspects*, 116 Colum. L. Rev. 1197, 1199–223 (2016) (describing the importance of looking at procedural protections beyond constitutional rights in the context of interrogations).

33. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 Colum. L. Rev. 1655, 1692–703 (2010) (describing how discretionary decisions by police officers and prosecutors lead to the processing of misdemeanor arrests in a way that diverges from determinations of guilt and innocence); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 722–23, 747 (2017) (describing how the setting of bail in low-level cases leads to a greater likelihood of guilty pleas and longer jail sentences); Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1346–47 (2012) (describing how procedural pressures lead to “the perfect storm of wrongful pleas”). Indeed, the procedures themselves are often the heart of the experience of being prosecuted. See Malcolm M. Feeley, *The Process Is the Punishment* 222–43 (1979) (describing how the pretrial process amounts to its own form of punishment); Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 Am. J. Soc. 351, 355–57 (2013) (describing how the charging and processing of misdemeanor cases serves as a form of control even in the absence of convictions).

34. Natapoff, *The Penal Pyramid*, *supra* note 29, at 92.

35. *Id.* at 75–90.

or formal punishment.³⁶ A full account of the ideology of criminal procedure in the post-trial world must therefore explore the relationship between the beliefs and judgments underlying procedural practices and the perpetuation of on-the-ground conditions of inequality.

B. *The Public Participation Dilemma*

How we think about criminal procedure is intimately connected to how we think about popular participation in criminal adjudication. Should members of the public be active participants in everyday criminal justice, or should the world of plea bargaining foreclose public intervention in favor of neutral processing by public representatives? Haunting this question is the widespread (though not universal) view that the current phenomena of "mass incarceration"³⁷ and "overcriminalization"³⁸ have been caused by a public bent toward "penal populism," a hunger for criminalization and punishment beyond what is fair or rational.³⁹ This public, lacking a nuanced understanding of the causes of crime or the consequences of punishment, should perhaps not be trusted with control over efforts at decarceration or criminal-law reform at the individual level. At the same time, however, there is growing concern from scholars of criminal law and procedure that our post-trial world, in which juries are largely absent, too comfortably excludes the public from everyday adjudication, resulting in a system divorced from popular ideals of justice and fairness.⁴⁰ Under this view, we might do well to include the public more often in our adjudication of cases, whether by expanding the use of

36. Kohler-Hausmann, *supra* note 33, at 353.

37. See, e.g., Devon W. Carbado, *Predatory Policing*, 85 UMKC L. Rev. 545, 549 (2017) ("Today, mass incarceration rolls comfortably off the tongues of people of all ideological stripes."); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 Mich. L. Rev. 259, 276–84 (2018) (describing the scholarly conception of mass incarceration).

38. See generally Douglas N. Husak, *Overcriminalization: The Limits of the Criminal Law* (2008) (examining the relationship between "too much" criminal law and "too much punishment"); Andrew Ashworth, *Conceptions of Overcriminalization*, 5 Ohio St. J. Crim. L. 407 (2008) (discussing the need for a "consequentialist audit of criminal laws"); Levin, *supra* note 37, at 292–302 (describing the scholarly conception of overcriminalization); Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703 (2005) (defining overcriminalization as a phenomenon to be evaluated in the aggregate for "causes, consequences, and correctives").

39. See generally Julian V. Roberts et al., *Penal Populism and Popular Opinion: Lessons from Five Countries* 310 (2002) ("Most populist penal policies create disproportionate punishment and are profligate with respect to the use of incarceration.").

40. See Laura I. Appleman, *Defending the Jury: Crime, Community, and the Constitution* 91–219 (2015); Bibas, *Machinery of Criminal Justice*, *supra* note 4, at 29–60; Albert Dzur, *Punishment, Participatory Democracy, and the Jury* 21–41 (2012); Kleinfeld, *Three Principles*, *supra* note 14, at 1483–88; see also *infra* note 53.

juries or creating new institutions of “community justice.” This public participation dilemma pervades contemporary scholarship.⁴¹

The dominant contemporary conception of how to mediate public participation in contemporary criminal adjudication is to give the public input into *systemic* laws, policies, and priorities but keep *individual* cases against defendants free of public interference, except in the rare case of a jury trial. This is the backbone of a particular conception of the rule of law, in which procedural rules and criminal laws are defined by democratically elected legislatures, and judges and other courtroom actors then enforce those rules in a neutral and uniform way.⁴² Even if legislation is influenced by penal populism, everyday criminal adjudication can at least abide by neutral, orderly processing, treating all defendants equally. In the world of plea bargaining, this means that the representation of the public by prosecutors becomes especially important—though jurors may sometimes serve as public representatives in individual cases,⁴³ juries are rare indeed.⁴⁴ Prosecutorial offices can improve their representation by setting up systems that combine democratic inputs and internal checks and balances.⁴⁵ However, once the

41. See Samuel Walker, *Popular Justice: A History of American Criminal Justice* 5–7 (2d ed. 1998) (describing the “paradox of popular justice,” which “represents the best and worst of American criminal justice history”); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 *Nw. U. L. Rev.* 1367, 1371, 1375–77 (2017) [hereinafter Kleinfeld, *Manifesto*] (describing a conflict among legal scholars between those who focus on improving criminal justice through bureaucratic professionalization and those who favor democratization); David Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States*, in *Prosecutors and Democracy: A Cross-National Study* 276, 276–86 (Maximo Langer & David Alan Sklansky eds., 2017) [hereinafter Sklansky, *Unpacking the Relationship*] (describing the prevalence of this dilemma in the context of conceptions of the role of prosecutors).

42. See Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 *Colum. L. Rev.* 1, 31–33 (1997) (describing the “Legal Process” conception of the rule of law); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 *B.U. L. Rev.* 781, 809 (1989) (“The point of ‘the Rule of Law, not of individuals’ is that the rules are supposed to *rule*. . . . [J]udges [are] . . . merely instrumental functionaries.”).

43. See Jeffrey Abramson, *Four Models of Jury Democracy*, 90 *Chi.-Kent L. Rev.* 861, 861–73 (2015) (describing different conceptions of how jurors can serve as public representatives in criminal court).

44. Cf. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

45. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117, 2123–24 (1998) (describing and defending a vision of the American criminal justice system in which “the brief formal procedure in court obscures what can be an invisible, but elaborate and lengthy process of adjudication of the defendant’s guilt” within the prosecutor’s office). For scholarly discussions of ways to improve the administrative ideal, see, e.g., Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. Rev.* 715, 798–812 (2005) (emphasizing the importance of institutional design in sentencing commissions, and suggesting that commissions be placed “in the middle of the political thicket” to expose influential actors to the voices of reformers and give the commission notice of the political viability of its proposals); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 *Va. L. Rev.* 271, 331–41 (2013)

prosecutor enters the courtroom, a neutral, untainted procedure determines a defendant's fate. Under this view of procedure, criminal procedure becomes a way to ensure neutral and equal processing of a case *after* partisan inputs into systemic priorities. Conversely, any unpredictable or extrajudicial discretionary moves become interference with the orderly processing of cases.⁴⁶

Although this administrative ideal continues to hold sway, a growing number of scholars and policymakers recognize the decline in public input into everyday criminal adjudication as a problem, and even a democratic crisis, and look to democratic processes as a potential answer to the system's ills.⁴⁷ Whether seen as a problem of legitimacy or representation, responses from scholars and state actors alike have featured calls to include the "community" in the bureaucracy of criminal justice in new and novel ways, including through community policing and community prosecution. These methods of seeking input range from stakeholder meetings,⁴⁸ to listening sessions,⁴⁹ to online notice-and-

(recommending structural changes within the Department of Justice to eliminate prosecutorial bias); Shima Baradaran Baughman, *Subconstitutional Checks*, 92 *Notre Dame L. Rev.* 1071, 1121–38 (2017) (providing a "blueprint" for ways in which prosecutorial power can be checked by each of the three branches of government, including within the Executive Branch).

46. Rachel Barkow connects the focus on neutral processing and reviewable decision-making with the rise of the administrative state, which lead scholars and jurists alike to look down on jury nullification, clemency, and other exercises of mercy other than the prosecutorial decision not to prosecute. See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 *Harv. L. Rev.* 1332, 1336–55 (2008).

47. See, e.g., Bibas, *Machinery of Criminal Justice*, *supra* note 4, at 29–58 (describing contemporary criminal adjudication as "the machinery of criminal justice," a lawyer-driven system of pleas without public participation); Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 *Nw. U. L. Rev.* 1437, 1452 (2017) (arguing that "[p]ushing more criminal justice power . . . down to directly affected communities and neighborhoods could enhance representativeness and sharpen lines of authority"); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 *N.Y.U. L. Rev.* 1827, 1832–35, 1848 (2015) (advocating for increased democratic inputs into policing priorities); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 *Ohio St. J. Crim. L.* 133, 164–73 (2011) (advocating for improving democratic criminal justice more broadly through participatory procedures). But see Dorothy Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 *Nw. U. L. Rev.* 1597, 1600 (2017) [hereinafter Roberts, *Democratizing Criminal Law*] (arguing that American systems of law enforcement are by their nature antidemocratic, so that democratizing criminal law requires looking beyond increasing public participation in criminal justice to considering abolition more broadly). For recent collections of essays on the themes of democracy and criminal justice, see *Democratic Theory and Mass Incarceration* (Albert W. Dzur et al. eds., 2016); *Prosecutors and Democracy: A Cross-National Study*, *supra* note 41; Kleinfeld, *Manifesto*, *supra* note 41, at 1370–72 (summarizing symposium essays on "Democratizing Criminal Justice").

48. See, e.g., *Community Court Stakeholders Meeting Tonight*, City of Madison Police Dep't (Nov. 5, 2014), <http://www.cityofmadison.com/police/south/blotter.cfm?Id=6178> [<https://perma.cc/79N5-BG7W>] (inviting the community to a stakeholder input meeting).

49. See, e.g., *Cmty. Oriented Policing Servs.*, U.S. Dep't of Justice, *Listening Session*, http://sanfranciscopolice.org/sites/default/files/USJusticeInitiative/SanFrancisco_

comment procedures.⁵⁰ The goal of much “community justice” becomes to make the representation *better*: to fix the politics of electing prosecutors or the internal checks and balances within the executive branch.⁵¹ These “community justice” approaches prioritize consensus, with the goal of getting the entire “community” in agreement about prosecutorial or policing priorities at the systemic level.⁵² Newer approaches to improving public participation also tend to focus on systemic inputs—on facilitating ongoing communication between institutional players and the local public. The notable exception is scholars who call for the creation of juries in which citizens make decisions at moments other than a verdict, including at a suppression hearing, bail hearing, plea, or sentencing.⁵³

Community%20Listening%20Session%20Flyer_%20Mission(1).pdf [https://perma.cc/BN7N-SXW9] (last visited Mar. 28, 2017) (advertising an open forum intended to improve the San Francisco Police Department).

50. See, e.g., N.Y. Police Dep’t, NYPD Body-Worn Camera Community Survey, <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59fb52eb6c31948dfdecbe88/1509642990544/NYPD-BWC+Paper+Questionnaire.pdf> [https://perma.cc/65LE-VEPN] (last visited Oct. 9, 2018) (describing an online survey designed to solicit comments from New York City residents on the NYPD’s body camera program).

51. See Todd R. Clear & David R. Karp, *The Community Justice Ideal* 25 (1999) (“[The] central focus [of community justice] is community-level outcomes, shifting the emphasis from individual incidents to systemic patterns . . .”).

52. See Sklansky, *Democracy*, *supra* note 27, at 66–105 (2008) (describing the primacy of seeking consensus in the context of participation and policing); Sklansky, *Unpacking the Relationship*, *supra* note 41, at 282–83, 288–89 (describing the connection between conceptions of participatory democracy that seek consensus and efforts to promote community prosecution).

53. See, e.g., Appleman, *supra* note 40, at 91 (calling for lay juries throughout the adjudication process); Josh Bowers, *Upside-Down Juries*, 111 *Nw. U. L. Rev.* 1655, 1671–74 (2017) (calling for “normative” juries at multiple stages of adjudication); Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 *Nw. U. L. Rev.* 1693, 1697 (2017) (“Juries should be included in the criminal justice process whenever reasonably possible, including at the investigative, charging, trial, and sentencing phases of criminal procedure.”). For specific proposals, see Bibas, *Machinery of Criminal Justice*, *supra* note 4, at 69–70 (plea juries); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 *Wash. & Lee L. Rev.* 1297, 1363–66 (2012) (bail juries); Laura I. Appleman, *The Plea Jury*, 85 *Ind. L.J.* 731, 750–59 (2010) (plea juries); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 *U. Pa. L. Rev.* 33, 102–16 (2003) (calling for juries to make some sentencing determinations); Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 *Wake Forest L. Rev.* 319, 343–49 (2012) (grand juries); Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 *Wm. & Mary Bill Rts. J.* 339, 354–58 (2010) (grand juries that review pleas and sentencing); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 *Va. L. Rev.* 311, 312–16 (2003) (sentencing juries); Adriaan Lanni, *The Future of Community Justice*, 40 *Harv. C.R.-C.L. L. Rev.* 359, 394–99 (2005) (grand and petit juries that review charging, sentencing, and policymaking decisions); Jason Mazzone, *The Waiver Paradox*, 97 *Nw. U. L. Rev.* 801, 872–78 (2003) (“plea panels”); Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 *Ala. L. Rev.* 849, 851–56 (2014) (proposing that juries make findings regarding constitutional questions in criminal cases). And, in a different vein, R.A. Duff

But there is another way to approach public participation in the criminal system. In contrast to the community-justice focus on building consensus stands a different ideal of public participation: one that promotes *agonism* rather than consensus as the ideal mode of engagement by members of the public.⁵⁴ An agonistic stance toward public participation in criminal legal institutions would allow groups to participate in the processes of those institutions while still remaining opposed to the dominant priorities of the state actors in charge of them.⁵⁵ If we can open up our institutions to the flow of agonistic contestation, we might arrive at a more nuanced account of what is in the best interests of "the People."⁵⁶ In order to do so productively, such paths of critique must include and even prioritize the voices of those marginalized populations who are most directly impacted by criminal procedural practices. For it is the people at the bottom of the "penal pyramid"—defendants, victims, and their families, friends, and neighbors who come from under-resourced neighborhoods⁵⁷—who are least likely to have the political

and Russell Gold have each proposed on-the-record procedures that would require prosecutors to account for the impact of their choices on the public. See Antony Duff, *Discretion and Accountability in a Democratic Criminal Law*, in *Prosecutors and Democracy: A Cross-National Study*, supra note 41, at 9, 9–40 (proposing a new procedure in which prosecutors are called to account for the effects of their actions on the public); Russell M. Gold, "Clientless" Prosecutors, 51 Ga. L. Rev. 693, 733–35 (2017) [hereinafter Gold, *Clientless Prosecutors*] (proposing that courts appoint amici in individual criminal cases to represent the public).

54. See Simonson, *Copwatching*, supra note 25, at 435–37 (arguing for agonism as a mode of change through contestation that engages with formal democratic processes); Simonson, *Democratizing Criminal Justice*, supra note 25, at 1612–13 (arguing that bottom-up forms of participation in criminal justice are "crucial for democratic criminal justice" and that such forms of "contestation are not antagonistic, but agonistic").

55. See Mouffe, *Agonistics*, supra note 25, at 8–9 (describing agonism as a "real confrontation [among groups with ideas in opposition to each other], but one that is played out under conditions regulated by a set of democratic procedures accepted by adversaries").

56. Cf. Philip Goodman et al., *Breaking the Pendulum: The Long Struggle over Criminal Justice* 3, 123–40 (2017) (arguing that the fight over criminal justice in the United States has long been an agonistic one, in which "actors . . . with varying resources and differing visions of how to prevent and sanction crime continually contest punishment"); 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"); Lerman & Weaver, supra note 16, at 236, 236–60 (recommending policy changes to better include those who have contact with the criminal justice system in democratic processes so as to "walk back the substantial damage that the [criminal justice] system has done to democracy over the past fifty years"); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 408–10 (2018) [hereinafter Akbar, *Radical Imagination*] (describing the importance of the critiques created by marginalized groups and emergent social movements); Allegra M. McLeod, *Beyond the Carceral State*, 95 Tex. L. Rev. 651, 657 (2017) (book review) [hereinafter McLeod, *Carceral State*] (calling for a "broader public reckoning with our carceral state—informed by the critical insights of impacted communities and experts").

57. See Natapoff, *The Penal Pyramid*, supra note 29, at 75–90.

power necessary to voice critiques of the system.⁵⁸ It is therefore especially important to pay attention to existing agonistic forms of public participation in the very place where people excluded from the political process interact with institutional players every day: the criminal courthouse. As the next section demonstrates, while debates over the ideology of criminal procedure and the ideal nature of public participation in criminal adjudication take place, individuals at the bottom of the “penal pyramid” are taking public participation into their own hands by intervening collectively in individual criminal cases. In doing so, they demonstrate how agonistic contestation can play out in everyday justice.

C. *Communal Participation from Below*

Bottom-up agonistic participation in individual criminal cases plays out in criminal courthouses every day, in phenomena as varied as community bail funds, courtwatching, and participatory defense. The tactic of community bail funds exemplifies this dynamic. With a community bail fund, groups come together to post bail for strangers and assert a communal interest in a defendant’s freedom, in contrast to the assumed communal interest in pretrial detention.⁵⁹ Bail funds deliberately connect the fate of individual defendants with the fate of neighborhoods and communities, linking these relationships to larger visions of the (in)justice caused by seemingly neutral procedures. Bail funds express love and support for strangers—they are not on the side of defendants as friends or even acquaintances, but rather as members of a larger social movement in support of decarceration and reinvestment in

58. See Lerman & Weaver, *supra* note 16, at 139–56 (describing how interacting with the criminal process affects political engagement); Stuntz, *Collapse of American Criminal Justice*, *supra* note 16, at 255 (noting that “voters with the largest stake [in the process of building and filling prisons]—chiefly African American residents of high-crime city neighborhoods—had the smallest voice in the relevant decisions”); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *Yale L.J.* 2054, 2067 (2017) (“[A]t both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic.”); Capers, *Good Citizen*, *supra* note 25, at 654–57 (describing how constitutional criminal procedure doctrine constitutes exclusionary meanings of who is a “good citizen”); Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 *Annals Am. Acad. Pol. & Soc. Sci.* 159, 161–73 (2014) (describing how the criminal justice system educates individuals in “anticitizenship”); Natapoff, *Speechless*, *supra* note 24, at 1452 (arguing that the silencing of defendants inside the courtroom is part of the “expressive disempowerment of those disadvantaged groups who tend to become defendants”); Roberts, *Constructing a Criminal Justice System*, *supra* note 24, at 279–85 (describing the criminal justice system’s “anti-democratic function”).

59. See Jocelyn Simonson, *Bail Nullification*, 115 *Mich. L. Rev.* 585, 599–611 (2017) [hereinafter Simonson, *Bail Nullification*] (discussing the rise of community bail funds); Pilar Weiss, *Reflections on Year One of the National Bail Fund Network* (2017) (on file with the *Columbia Law Review*) (reviewing the history of community bail funds as well as lessons gleaned from the National Bail Fund Network’s coordination of new bail funds).

poor communities of color.⁶⁰ Community bail funds now exist in at least twenty-one states throughout the United States.⁶¹ Through the recurring, performative act of posting bail, these movement actors build power and shift dominant ideas about the legal meaning of "community" in everyday pretrial procedures, resulting in tangible political and legal change.⁶²

Community bail funds, however, are often met with resistance from court clerks and other courthouse and jailhouse actors⁶³—especially when they bail out large numbers of people in a short period of time. In May 2017, for example, nearly two dozen local organizations coordinated together to bail out more than 100 women and caregivers for Mother's Day.⁶⁴ In the words of Mary Hooks, codirector of Southerners on New Ground (SONG), who helped conceive, coordinate, and implement this mass action, this "Mama's Bail Out Day" was a form of "abolition in the now" that brings both freedom to individuals and attention to "the slow deaths of our families and communities."⁶⁵ Some local organizations involved in the effort, however, encountered resistance when they attempted to bail out more than one person for Mama's Bail Out Day, finding that clerks, lawyers, wardens, and other corrections officials were "obstructionist to the farthest extent possible."⁶⁶ This on-the-ground

60. Simonson, *Bail Nullification*, supra note 59, at 612–21.

61. See National Bail Fund Network: Directory of Community Bail Funds, Brooklyn Cmty. Bail Fund, <https://brooklynbailfund.org/nbfndirectory> [<https://perma.cc/R3AU-T5XY>] (last visited Sept. 12, 2018) (listing thirty-two active local community bail funds across twenty-one states, as well as one national fund and a number of immigration bail or bond funds).

62. See Simonson, *Bail Nullification*, supra note 59, at 621–31 (describing how community bail funds have led to the reform of bail laws in New York state and have challenged the assumptions underlying constitutional jurisprudence on bail).

63. See *id.* at 608–10 (describing judicial resistance to bail funds in New York City); Sells, supra note 20 (describing an advocacy group's abandonment of efforts to set up a bail fund program after unnecessary delays by the county court clerk); Demond Fernandez, *Group Working to Post Bail for Inmates Runs into Problems at Dallas Co. Jail*, WFAA (Aug. 24, 2018), <https://www.wfaa.com/article/news/group-working-to-post-bail-for-inmates-runs-into-problems-at-dallas-co-jail/287-587438482> [<https://perma.cc/24FB-Y3T9>] (recounting Community Bail Fund of North Texas's complaints that court clerks gave the group the "run-around" when they attempted to post bail).

64. Jasmine Sanders, 'If We Let Everybody Go, There'd Be Nobody in Prison', *N.Y. Times* (May 13, 2018), <https://www.nytimes.com/2018/05/13/style/mothers-day-bail-out.html> (on file with the *Columbia Law Review*); Jocelyn Simonson, *Opinion, Bail Keeps These Moms in Jail on Mother's Day. So Strangers Are Posting It for Them.*, Wash. Post (May 12, 2017), https://www.washingtonpost.com/opinions/bail-keeps-these-moms-in-jail-on-mothers-day-so-strangers-are-posting-it-for-them/2017/05/12/04524d7e-3678-11e7-b373-418f6849a004_story.html (on file with the *Columbia Law Review*).

65. Melissa Gira Grant, *Abolition in the Now*, *Pac. Standard* (May 10, 2017), <https://psmag.com/social-justice/home-for-mothers-day> [<https://perma.cc/BS2F-9PCX>].

66. See, e.g., *A Labor of Love: Black Mama's Bail Out Action + Reflection*, Southerners on New Ground (May 16, 2017), <http://southernersonnewground.org/2017/05/a-labor-of-love/> [<https://perma.cc/W7MY-CHMU>] ("Wardens, jailers, public defenders, and solicitors were in SOME sites . . . helpful, supportive and even bent and changed rules

resistance from state actors demonstrates the ways in which the system bristles when social-movement interventions disrupt the status quo, even when they do so via formally established procedures such as the posting of bail.⁶⁷ Although state actors are accustomed to family members of defendants expressing support by posting bail, they resist the idea that a community group might support a defendant even though members of the group do not know him or her personally.

Community groups also use the procedural interventions known as “participatory defense” to intercede directly on behalf of defendants. With participatory defense, community groups join together with families, friends, neighbors, and allies of defendants to learn about the facts and procedures of individual cases, perform investigations, present biographical videos to prosecutors and judges, and pack courtrooms in support of defendants.⁶⁸ Participatory defense hubs operate in at least eighteen jurisdictions throughout the United States.⁶⁹ At every step, they aim to connect the stories of individual defendants to larger systemic injustices, exposing the everyday violence of policing, prosecution, and incarceration.⁷⁰ Although the goal of participatory defense at any one moment might be to help free an individual defendant, ultimately the aim of the practice is nothing less than an end to mass incarceration through “chang[ing] the landscape of power . . . in the criminal justice system.”⁷¹ This means that a participatory defense group attending a “justice hub meeting” will applaud and congratulate a teenager recently released from custody, even though they have never met him before;⁷²

to help us. But in other places, they were completely obstructionist to the farthest extent possible.”).

67. Local governments have sometimes embraced bail funds, for example in New York City, St. Louis, and Connecticut, all of which have proposed or implemented state- or city-funded bail funds. But these efforts, in shifting to a model of representation, have watered down both the participatory potential and the impact of the bail fund model. See Jocelyn Simonson, *When the City Posts Bail* 13–16 (July 2016) (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Simonson, *When the City Posts Bail*].

68. See Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 *Alb. L. Rev.* 1281, 1285–86 (2015) (describing the participatory defense movement and its power); Liana Pennington, *An Empirical Study of One Participatory Defense Program Facilitated by a Public Defender Office*, 14 *Ohio St. J. Crim. L.* 603, 606–10 (2017) (documenting the recent growth of the participatory defense movement).

69. ACJPDEBUG, *Participatory Defense Launches in Philadelphia*, Albert Cobarrubias Just. Project (Dec. 12, 2017), <https://acjusticeproject.org/2017/12/12/participatory-defense-launches-in-philadelphia/> [<https://perma.cc/GM2Q-ACQ5>] (stating that, with the launch of the Philadelphia participatory defense project in 2017, there are now eighteen participatory defense sites in the National Network for Participatory Defense).

70. Cf. Cover, *Violence*, supra note 22, at 1608 (connecting a recognition of the violence of the law with a respect for the experience of defendants and prisoners).

71. See Robin Yeamans, *Fighting for Justice by Court Watching*, *People’s Trib.*, <http://www.peopletribune.org/PT.2012.05/PT.2012.05.11.shtml> [<https://perma.cc/52N3-NZ5D>] (last visited Oct. 5, 2018).

72. Moore et al., supra note 68, at 1283–84.

and a campaign to free an incarcerated black woman will work not only to humanize that particular woman but also "to challenge false and damaging binaries that we use to describe incarcerated people, like violent/non-violent and innocent/guilty."⁷³ Although participatory defense campaigns may cooperate with public defenders or defense attorneys, lawyers are never the center of any one effort.⁷⁴ Instead, the wisdom and energy of marginalized groups who do not ordinarily have a say in the justice process are centered in collective efforts to support defendants, shift power, and create new visions of community.⁷⁵ But, like community bail funds, the tactics that make up participatory defense have met obstacles, both formal and cultural, at every step.⁷⁶

Collective forms of intervention in everyday adjudication also happen through observation inside the courtroom. Some community groups participate in efforts at courtwatching, not to support an individual defendant but rather to voice opposition to larger prosecutorial policies and practices, or to collect information so as to hold prosecutors accountable.⁷⁷ Courtwatching groups affiliated with larger social movements, for example, gather volunteers to document everyday proceedings in local courts—bond hearings, arraignments, pleas—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.⁷⁸ Courtwatchers not only hold courtroom actors accountable, they also shift the power dynamics within the courtroom, reminding institutional players of the larger public dimensions of individual cases.⁷⁹

73. Kaba, *Free Us All*, *supra* note 10.

74. Moore et al., *supra* note 68, at 1283.

75. *Id.*

76. See Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 *Mercer L. Rev.* 715, 716–18 (2018) (describing the history of public defender resistance to participatory defense but noting that this is changing as the practice becomes more established).

77. See generally Bryce Covert, *The Court Watch Movement Wants to Expose the "House of Cards," Appeal* (July 16, 2018), <https://theappeal.org/court-watch-accountability-movement/> [<https://perma.cc/RJ9E-Z5VJ>] (describing the recent rise of "mission-driven court watch").

78. For examples of this at work, see, e.g., *id.*; 8 Week Court Watching Project!!, *Cmty. Renewal Soc'y*, <http://www.communityrenewalsociety.org/calendar/8-week-court-watching-project> [<https://perma.cc/9MEF-LKMQ>] (last visited Feb. 15, 2017).

79. See Judith Resnik & Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* 300–02 (2011) (describing how audience members in courtrooms help define the meaning of proceedings); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 *Harv. L. Rev.* 2173, 2184–90 (2014) [hereinafter Simonson, *Audience*] (describing the power shifts that occur through the act of observation inside a courtroom); Covert, *supra* note 77 (quoting a Court Watch NYC activist and describing the purpose of courtwatching as, in part, "shifting power").

Activists engaging with criminal adjudication through participatory defense, community bail funds, courtwatching, or any number of other collective interventions into everyday justice see themselves as trying to move the criminal legal system toward something that is more responsive to the local communities it claims to serve. The exploration of the ideology of criminal procedure in this Essay is indebted to the work of these contemporary movement activists to shift the discourse surrounding the interactions of power, structure, and community in criminal law and policy reform.⁸⁰ In the remainder of this Essay, I examine the facets of our ideology of criminal procedure that cause the system to resist these bottom-up interventions into everyday criminal adjudication. In the next Part, I attempt to set out what I see as the reigning ideology of procedure with respect to popular participation: that the general public belongs on the side of the police and the prosecution, and not on the side of defendants. This ideology facilitates the resistance of state actors to forms of agonistic participation with the greatest potential to shift the status quo in criminal adjudication.

II. THE PEOPLE/DEFENDANT DICHOTOMY IN CRIMINAL PROCEDURE

In our dominant contemporary conception of criminal procedure, the place of the public—“the People”—is on the side of the police and the prosecution, in an act of communal condemnation. From there, the familiar approach to crafting criminal procedure depends on the idea that police officers and prosecutors, or “the People,” should act and speak as representatives of the local community. This ideal of communal representation, in turn, dictates how we approach procedural innovations. If the ideal of representation is undermined—if the state is not adequately channeling popular will—then procedures can shift to seek out ways of gathering input to make police and prosecutors more responsive to the community. This is the heart of many contemporary criminal adjudication reforms that seek to craft new procedures in the name of “community justice.” At the same time, each defendant is in need of protection in the face of the communal suspicion that state actors personify. If the defendant does not have adequate protections against state power, the answer is to strengthen individual procedural protections through individual rights and resources. On each side, our channels of remedying injustices in the system strengthen the dichotomy between “the People” and the person whom the people suspect of wrongdoing. In this Part, I lay out the basic contours of this ideology and argue that it

80. Cf. Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 *J. Legal Educ.* 352, 355–56 (2015) (describing the importance of studying the visions and critiques created by marginalized groups and emergent social movements); Janet Moore, *Decarceral Constitutionalism* 39–43 (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Moore, *Decarceral Constitutionalism*] (arguing that we should bring grassroots interventions in criminal justice into our analyses of popular constitutionalism).

carries with it a distinct set of problems: one, an undue focus on prosecutors as representatives of the public will; and two, an illusory conception of a "neutral" public that is both disinterested and decorous. Taken together, the ideology of the people/defendant dichotomy serves to exclude marginalized populations from paths of participation in criminal procedure and legitimize overly punitive outcomes in individual cases.

A. *The People v. the Defendant: Mapping the Dichotomy*

Dominant conceptions of the criminal process largely presuppose a clean separation between the interests of the public and the interests of the defendant, which are assumed to be in direct opposition to each other. The people/defendant dichotomy is especially pronounced in the realm of adjudication, after a prosecutor decides to file charges, thereby designating a member of the public a "defendant." This dichotomy plays out at multiple levels: in prosecutorial identity as representing "the People," in the constitutional jurisprudence of individual procedural rights, and in the policies and cultures of local courthouses. And the dichotomy is echoed in much of the scholarship that examines ideology and criminal procedure: Herbert Packer, for example, assumed an adversarial system in which the defendant stands alone, with only defense counsel and formal rules and requirements to help her along the way.⁸¹ As John Griffiths explained in his critique of Packer nearly fifty years ago, this assumption continually sets things up as a battle, a "stylized war" between "the Individual (particularly the *accused* individual) and the State."⁸² On one side of the battle is a lone defendant, and on the other are "the People."⁸³ This theme recurs throughout the practices, rules, and jurisprudence structuring criminal procedure: The debate is over how to structure this battle between "the People," represented by a

81. See *supra* notes 27–31 and accompanying text (describing this aspect of Packer's ideas); see also Stuart A. Scheingold, *The Politics of Street Crime* 26–27 (1991) (arguing that both of Packer's models center on the treatment of an individual and therefore direct attention "toward the fate of formally anonymous defendants and away from their broader social identities and circumstances"); Roach, *supra* note 29, at 672 (arguing that Packer's models do not account for the different ways in which victims can intervene in the process).

82. Griffiths, *supra* note 29, at 367.

83. This idealized battle certainly predated Herbert Packer, emerging as early as the nineteenth century. See Herman W. Chaplin, *Reform in Criminal Procedure*, 7 *Harv. L. Rev.* 189, 199–200 (1893) (describing a shift in the late nineteenth century toward an idea of a prosecution as "the contest . . . between the public and the accused"). Notably, Chaplin identified this as a problem: "We ought now to be ready for the theory that a criminal prosecution is not a contest at all, but an investigation, conducted by the State, before a tribunal of its own appointment . . ." *Id.* at 199. Thanks to Alice Ristroph for pointing me to Chaplin's work.

prosecutor, and the defendant, rather than about whether the battle lines should be drawn in those ways at all.⁸⁴

When the public is situated as a force opposed to the defendant, prosecutors become the central representatives of the public in the courthouse. Prosecutors are “ministers of justice,”⁸⁵ representing the sovereign and its citizens, and must act in the interests of their client, the state.⁸⁶ This aspect of the prosecutorial identity—as a servant of the public—is but one of the multifaceted identities that prosecutors possess;⁸⁷ and the prosecutor’s duty to the public does not supplant her duty to the rule of law or even to an independent sense of justice.⁸⁸ But implicit in the prosecutorial identity as a public servant is the idea that

84. One important exception to this trend is the theory and practices of restorative justice, which often try to bridge the gap between the defendant and the community by bringing the two into conversation. Even there, however, the defendant is assumed to have done wrong and prosecution is assumed to be the right approach. See generally John Braithwaite, *Crime, Shame and Reintegration* (1989) (laying out a comprehensive theory of restorative justice).

85. Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 *Geo. J. Legal Ethics* 301, 304 (2017) (“[I]t is well accepted that the prosecutor is a fiduciary who represents the sovereign and must make decisions for society at large”); see also Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 *Iowa L. Rev.* 1447, 1451–53 (2016) [hereinafter Levine, *Prosecuting Police*] (“[P]rosecutors have the well-known duty to ‘seek justice’” (quoting Standards for Criminal Justice § 3-1.1(c) (Am. Bar Ass’n 1986))).

86. Griffin & Yaroshefsky, *supra* note 85, at 311–15; see also Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *Fordham Urb. L.J.* 607, 634–37 (1999) (arguing that the best justification for the prosecutorial duty to seek justice is representing the sovereign’s interest in “ensuring fairness of the process”).

87. One recent study of state prosecutors from nine different offices identified four principal career motivations for working state prosecutors: “reinforcing one’s core absolutist identity, gaining trial skills, performing a valuable public service, and sustaining a work-life balance.” See Ronald F. Wright & Kay L. Levine, *Getting Beyond Superheroes Versus Trojan Horses: Career Motivations of State Court Prosecutors 4–5* (Aug. 17, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3021429> (on file with the *Columbia Law Review*); see also Maximo Langer & David Alan Sklansky, *Epilogue: Prosecutors and Democracy—Themes and Counterthemes*, in *Prosecutors and Democracy: A Cross-National Study*, *supra* note 41, at 300, 302–08 (describing “prosecutors as agents of the popular will” as one of four main conceptions of the relationship between prosecutors and democracy). But even the demand of “neutrality” and obedience to the rule of law is guided by the wishes of the public. For instance, Bruce Green & Fred Zacharias have argued that the concept of prosecutorial neutrality is best described by the idea that “prosecutors should make decisions based on articulable principles or subprinciples that command broad societal acceptance.” Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 *Wis. L. Rev.* 837, 840.

88. See David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 *J. Crim. L. & Criminology* 473, 519 (2016) (describing how prosecutors must mediate between “democratic responsiveness” on the one hand and “detached objectivity” on the other). And, moreover, once the decision to prosecute has been made, the goal is to win the case via a plea or a guilty verdict at trial. See John Langbein, *The Origins of Adversary Criminal Trial* 332–34 (2003) (describing how during the ascendance of the adversary criminal trial, prosecutors became “partisans whose interest is in winning, not in truth”).

they are the institutional actors who channel the will of the people into adjudication. This is how prosecutors are able to call themselves "the People" in many states. Although judges and even public defenders are sometimes elected,⁸⁹ it is the prosecutors who *represent* the people. Not only that, they represent the community, in the sense of a local public with common concerns; they speak for us all.⁹⁰ This leaves the other side—the defendant—as a solitary individual in need of the support of counsel and the protection of the Constitution.⁹¹

I do not mean to minimize the importance of the criminal jury as an institution of public participation and representation. In the tiny subset of cases in which juries adjudicate guilt and innocence after a full-blown trial,⁹² members of the public do indeed have important roles as citizens and judges.⁹³ This is the top of the "penal pyramid," where cases are either adjudicated before juries or plea bargains genuinely happen in the shadow of potential jury decisions.⁹⁴ But this is not the reality for the vast majority of cases in criminal court, for which "[t]rials are nearly extinct and their shadows weak."⁹⁵ Given this post-trial landscape, our contemporary ideology of criminal adjudication has internalized the reality that we have a "system of pleas, not a system of trials,"⁹⁶ such that prosecutors are

89. See generally David E. Pozen, *The Irony of Judicial Elections*, 108 *Colum. L. Rev.* 265 (2008) (arguing that a rise in the legitimacy of judicial elections undermines the distinctive role of the judiciary); Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 *Mo. L. Rev.* 803 (2010) (describing the three states that hold elections for public defenders).

90. See Michelle Madden Dempsey, *Prosecuting Domestic Violence* 48–52 (2009) (describing the difference between the prosecutorial claim to act on behalf of the state and the prosecutorial claim to act on behalf of the community). I return to this distinction in Part III.

91. See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *Yale L.J.* 2176, 2195–96 (2013) [hereinafter Butler, *Poor People Lose*] (critiquing the "isolated individualism" of *Gideon* and the right to counsel); David Alan Sklansky, *Autonomy and Agency in American Criminal Process 1* (Stanford Pub. Law Working Paper No. 2849226, 2016) [hereinafter Sklansky, *Autonomy*], <https://ssrn.com/abstract=2849226> (on file with the *Columbia Law Review*) (describing the assumption underlying American criminal procedure that "fairness is best advanced through a series of procedural rights that defendants can invoke or waive at their discretion").

92. See Suja A. Thomas, *What Happened to the American Jury? Proposals for Revamping Plea Bargaining and Summary Judgment, Litig.*, Spring 2017, at 25, 25 ("[J]uries today decide only 1–4 percent of criminal cases filed in federal and state court.").

93. See generally Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 1–13 (1994) ("No other institution of government rivals the jury in placing power so directly in the hands of citizens."); Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 3–11 (Univ. of Chi. Press 1971) (1966) ("The jury . . . represents a deep commitment to the use of laymen in the administration of justice . . .").

94. See Natapoff, *The Penal Pyramid*, *supra* note 29, at 71–82.

95. *Id.* at 78; see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2464, 2466–68 (2004) (questioning the impact of the "shadows of trial" on plea bargaining outcomes).

96. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

able to assume their place as public representatives seeking justice on behalf of “the People.” Moreover, even when juries do deliberate and decide the fate of individual defendants, we select individual jurors amid an illusory ideal of neutrality that leans toward the exclusion of members of the public who might side with the interests of the defendant.⁹⁷

The dichotomy between “the People” and the defendant is echoed in constitutional jurisprudence as well. The emphasis on individual rights of defendants inside the courtroom is based, at its heart, on the classification of a lone defendant faced with communal suspicion. The reigning assumption is that protecting individual autonomy through constitutional rights and procedures can in turn protect fairness.⁹⁸ On the one hand, protection of an autonomous defendant is said to reinforce fairness and due process, and on the other hand, the public is assumed to be a force of condemnation pushing against this autonomous defendant. This leads to a constitutional jurisprudence that assumes that the weight of the public interest is on the side of the prosecution. For example, in the leading Supreme Court case on pretrial detention, *United States v. Salerno*, the Court explicitly describes a defendant’s interest in liberty and the community’s interest in safety as two sides of a scale of justice that a judge must weigh against each other.⁹⁹ This theme recurs throughout constitutional criminal procedure, from the Sixth Amendment right to counsel,¹⁰⁰ to the Fifth Amendment right to not be subject to double jeopardy,¹⁰¹ to the Fourth Amendment protection against unreasonable seizure.¹⁰²

The assumption that the public’s interest and the defendant’s interest are in direct opposition to each other in turn affects a central calculus that courts must often make in constitutional criminal procedure: a balancing test between the prosecution’s interest in community safety (representing the interest of the public) and the defendant’s individual

97. See *infra* notes 145–151 and accompanying text.

98. See Sklansky, *Autonomy*, *supra* note 91, at 1 (showing how these ideas are reflected in rules of waiver and effective assistance of counsel); Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. Rev. 621, 623–40 (2005) (arguing that the reliance on defendant autonomy in constitutional criminal procedure is incoherent and harmful); cf. Dolovich, *supra* note 27, at 264–65 (“The sustaining discourse of this penal system is a radically individualist one that locates the causes of crime exclusively in the free and conscious choice of the offenders themselves.”).

99. 481 U.S. 739, 750 (1987) (“On the other side of the scale, of course, is the individual’s strong interest in liberty.”).

100. *Morris v. Slappy*, 461 U.S. 1, 25 (1983) (Brennan, J., concurring) (“[T]he trial judge has an obligation to . . . balance the defendant’s interest against the public’s interest in the efficient and expeditious administration of criminal justice.”).

101. *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (contrasting the “defendant’s interests” with “the public’s interest in fair trials” (internal quotation marks omitted) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949))).

102. *Tennessee v. Garner*, 471 U.S. 1, 23 (1985) (O’Connor, J., dissenting) (describing the Court’s “balancing of the interests of the suspect and the public interest in effective law enforcement”).

liberty interest (representing one lone defendant).¹⁰³ When the interests of the community are assumed to be on the side of the prosecution, the court's calculation of costs and benefits fails to include the interests of the community that align with defendants. There is no recognition, for example, that members of a community might have an interest in the defendant's liberty or share the defendant's understanding of what a fair trial entails;¹⁰⁴ instead, the weight of the entire community is against the interests of the defendant. This skews the results of constitutional balancing tests in favor of the prosecution.¹⁰⁵

To be sure, constitutional jurisprudence recognizes that enforcing some rights can benefit both a defendant and other members of the public. For example, enforcing the exclusionary rule for violations of the Fourth or Fifth Amendments in individual cases can deter police misconduct in other instances,¹⁰⁶ and prohibiting the exclusion of jurors because of race or gender benefits potential jurors in addition to defendants.¹⁰⁷ The idea that one defendant may act as a kind of "private attorney general" in a suppression hearing squarely recognizes that the public and the defendant have shared interests in constitutional police conduct.¹⁰⁸ The Fourth Amendment, in particular, explicitly protects "the people" rather than a single "person" or "accused" as in the Fifth and

103. See *Salerno*, 481 U.S. at 750; see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943, 981 (1987) (describing how "[b]alancing opinions typically pit individual against governmental interests"); Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 *Geo. L.J.* 1, 15–17 (2013) (describing a range of constitutional criminal doctrines in which courts balance the interests of the government in public safety against the interests of the defendant).

104. For accounts of the harms to the public of pretrial detention, see Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 *B.U. L. Rev.* 1, 5–7 (2017) [hereinafter Baughman, *Pretrial Detention*] (describing the social and communal harms of pretrial detention); Simonson, *Bail Nullification*, *supra* note 59, at 599–612 (describing how community bail funds demonstrate that incarcerating defendants before trial harms their families, neighborhoods, and communities); Crystal S. Yang, *Toward an Optimal Bail System*, 92 *N.Y.U. L. Rev.* 1399, 1423–29 (2017) (describing harms to the public of pretrial detention).

105. See, e.g., Baradaran, *supra* note 103, at 14–19 (discussing these skewed results in the context of the Fourth Amendment balancing test).

106. See *id.* at 15–17; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 *Colum. L. Rev.* 247, 267–74 (1988) ("The fourth amendment's exclusionary rule . . . serves only to deter the police from engaging in illegal searches in the future and thereby from violating the rights of others . . ."); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 *Va. L. Rev.* 761, 779–83 (1989) [hereinafter Stuntz, *Waiving Rights*] (describing when individual rights in criminal procedure serve larger interests).

107. See *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

108. See Meltzer, *supra* note 106, at 249 (describing how a defendant can function as a "private attorney general" when seeking suppression of evidence because she deters government misconduct on behalf of the public).

Sixth Amendments.¹⁰⁹ The Supreme Court has stressed the significance of this distinction, which implies a common interest between all “the people,” including defendants, in protection from unnecessary state interference.¹¹⁰

But while this strand of Fourth Amendment jurisprudence does indeed imply that defendants are part of a broader “people,” a “national community,”¹¹¹ the context of adjudicatory procedure does not support the inverse idea, that the “people” support the defendant. In the courtroom context—a suppression hearing for a Fourth or Fifth Amendment violation—the idea is that a defendant may help the larger public of people similarly situated, not that the national community stands on the side of the defendant.¹¹² Or, as Bill Stuntz describes it, the exclusionary remedy exists as “protection extended to the guilty primarily as a means of protecting the innocent.”¹¹³ The public’s interest is not in the freedom of the defendant but in the constitutional treatment of other “law-abiding” members of the public.¹¹⁴ Indeed, the doctrines structuring interactions between the police and the public themselves construct a separation between “good” and “bad” members of the public.¹¹⁵ The people/defendant dichotomy remains.

Even the constitutional doctrines that would seem to provide a place for public input beyond the prosecution—the jury-trial right and the right to a public trial—tend to reinforce the sense that the appropriate community input in adjudication is that which stands with the prosecution, or at least is not “biased” against the prosecution. Although the Sixth Amendment guarantees that a jury be drawn from a fair cross-section of the local community, in practice the demand for neutral and

109. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264–66 (1990) (declaring the significance of this distinction).

110. See *id.* But see *District of Columbia v. Heller*, 554 U.S. 570, 625–26 (2008) (limiting the operative meaning of “the People” to “law-abiding citizens”); see also Pratheepan Gulasekaram, “The People” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. Rev. 1521, 1530–31 (2010) (discussing the implications of *Heller*’s definition of “the People”); Note, The Meaning(s) of “the People” in the Constitution, 126 Harv. L. Rev. 1078, 1078–86 (2013) (describing the conflict between inclusive and exclusive notions of “the People” in *Verdugo-Urquidez* and *Heller*).

111. *Verdugo-Urquidez*, 494 U.S. at 265.

112. Cf. Meltzer, *supra* note 106, at 280–81 (describing a suppression hearing as an “assertion of the rights of others”).

113. Stuntz, *Waiving Rights*, *supra* note 106, at 766.

114. Cf. *Heller*, 554 U.S. at 625.

115. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 Geo. L.J. 1419, 1447 (2016) (“[T]he Supreme Court ha[s] established a set of police practices that, in theory, apply to everyone, but are principally directed against black men.”); Capers, *Good Citizen*, *supra* note 25, at 654–57 (detailing how the “good citizen” is one who is willing to cooperate with the police, at times willingly waiving his rights); Devon W. Carbado, (E)racing the Fourth Amendment, 100 Mich. L. Rev. 946, 1006–11 (2002) [hereinafter Carbado, *Fourth Amendment*] (critiquing a racialized concept of innocence in Fourth Amendment doctrine).

disinterested jurors weeds out many jurors who might tend to side with defendants. For example, we comfortably exclude from juries not only potential jurors with criminal convictions¹¹⁶ but also those who have a history of being arrested or charged with crimes,¹¹⁷ or whose family members have experience with the criminal legal system.¹¹⁸ And although jury nullification is a powerful tool that juries can use to check prosecutorial power, it is a hidden power, and jurors who admit they might nullify are excluded from serving.¹¹⁹ Jury nullification, of course, may directly controvert some conceptions of the rule of law.¹²⁰ So, too, might the elimination of another doctrine that epitomizes the idea of a jury primed to side with the prosecution: the requirement that jurors in death penalty cases be "death-qualified."¹²¹ But these doctrines defining the composition

116. See Kalt, *supra* note 21, at 67 (describing how the majority of states and the federal government exclude individuals with felony records from jury service); see also Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 *Minn. L. Rev.* 592, 605 (2013) ("To exclude from jury service those with criminal convictions is to remove a certain type of experience from the jury . . .").

117. See Roberts, *Disparately Seeking*, *supra* note 21, at 1403–07 (describing how peremptory strikes of potential jurors of color because of their experience with policing is generally a "safe haven" under *Batson*).

118. *Id.* at 1403–04.

119. See *United States v. Dougherty*, 473 F.2d 1113, 1137 (D.C. Cir. 1972) ("[W]hat is tolerable or even desirable as an informal, self-initiated exception [of nullification], harbors grave dangers to the system if it is . . . incorporat[ed] in the judge's instruction."); Paul Butler, *Let's Get Free: A Hip-Hop Theory of Justice* 67–68 (2009) [hereinafter Butler, *Hip-Hop Theory of Justice*] (describing nullification as a "secret power of jurors").

120. See Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 *Minn. L. Rev.* 1149, 1150–52 (1997) (describing ways in which jury nullification may subvert the rule of law but is necessary to ensure justice); Jenny E. Carroll, *Nullification as Law*, 102 *Geo. L.J.* 579, 609–21 (2014) [hereinafter Carroll, *Nullification*] (discussing different conceptions of jury nullification in relation to the rule of law).

121. Jurors in death penalty cases must state that they would be willing to impose the death penalty, so as to weed out those who are "unable to decide a capital defendant's guilt or innocence fairly and impartially." See *Lockhart v. McCree*, 476 U.S. 162, 172 (1986); see also *id.* at 176 ("[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."); *Witherspoon v. Illinois*, 391 U.S. 510, 516–18 (1968) (refusing to declare the practice of death-qualifying juries unconstitutional, despite evidence that death-qualified juries will be predisposed to favor the prosecution). A number of scholars have documented how this requirement of death-qualified juries biases juries in favor of the prosecution. See, e.g., Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 *Law & Hum. Behav.* 53, 67–68 (1984); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 *Buff. L. Rev.* 469, 494–95 (1996); George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilty Determination Process*, 84 *Harv. L. Rev.* 567, 582–85 (1971). Moreover, death qualification skews the racial composition of juries. See Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 *Ind. L.J.* 113, 118 (2016) (presenting evidence that in seven trials in Louisiana, more than one-third of African Americans were struck from capital juries on the basis of their opposition to the death penalty); J. Thomas Sullivan, *The Demographic*

of “unbiased” juries exemplify a conception of criminal procedure that defines “bias” as the tendency to side with defendants.

The separation between the people and the defendant is also at work in efforts to seek popular input into the criminal process in new ways outside of the courthouse, especially through methods of “community justice.” Community prosecution and community policing may be promising ways to expand the number of voices who have input into policing and prosecution priorities.¹²² But even when these processes expand to better capture communal sentiment in local criminal law, they continue to do so by assuming that the community (including victims) is on the side of policing or prosecution. They rarely encourage or incorporate critique, and may instead have the tendency to mute any voices that seek to challenge the status quo.¹²³ They rarely ask how to facilitate communal support of those subject to surveillance, arrest, prosecution, and punishment.¹²⁴ And they rarely look to the ways in which marginalized

Dilemma in Death Qualification of Capital Jurors, 49 Wake Forest L. Rev. 1107, 1168–69 (2014) (“[T]he death-qualification process . . . serves to reduce the black presence in a symbolically important process in the criminal justice system.”).

122. For descriptions of how community prosecution works, see, e.g., Anthony V. Alfieri, Community Prosecutors, 90 Calif. L. Rev. 1465, 1466 (2002); Levine, Prosecuting Police, *supra* note 85, at 1492–93; Anthony Thompson, It Takes a Community to Prosecute, 77 Notre Dame L. Rev. 321, 360–71 (2002) [hereinafter Thompson, It Takes a Community]; Ronald F. Wright, Beyond Prosecutor Elections, 67 SMU L. Rev. 593, 609–10 (2014).

123. See Sklansky, Democracy, *supra* note 27, at 114–32 (critiquing the community policing paradigm, in part for its tendency to mute critical or oppositional voices); Alschuler & Schulhofer, *supra* note 17, at 217 (“Far from serving the needs of the disadvantaged, the concept of community can, in the wrong hands, become another weapon for perpetuating the disempowerment and discrimination that continue to haunt urban America.”); Stephen D. Mastrofski & Jack R. Greene, Community Policing and the Rule of Law, *in* Police Innovation and Control of the Police: Problems of Law, Order, and Community 80, 92–93 (David Weisburd & Craig Uchida eds., 1993) (discussing “the challenge of stimulating actual community voice rather than achieving cooptation” that arises from community policing); M. Alexander Pearl, Of “Texans” and “Custers”: Maximizing Welfare and Efficiency Through Informal Norms, 19 Roger Williams U. L. Rev. 32, 47–48 (2014) (arguing that community policing imposes norms on the community that are “fundamentally external and foreign to the community,” even if they are “executed by various members of the community”); Alice Ristroph, The Constitution of Police Violence, 64 UCLA L. Rev. 1182, 1223–25 (2017) [hereinafter Ristroph, Constitution of Police Violence] (describing the “scholarly veneration of compliance” in respect to community policing and procedural justice); Simonson, Copwatching, *supra* note 25, at 405 (describing how the consensus-based efforts at community justice reinscribe existing power imbalances).

124. See James Forman, Jr., Community Policing and Youth as Assets, 95 J. Crim. L. & Criminology 1, 14–16, 19–21 (2004) (describing studies of the uneven inclusion of populations with little political power in community policing, especially poor people of color and young people); Wesley G. Skogan, Representing the Community in Community Policing, *in* Community Policing: Can It Work? 57, 57 (Wesley G. Skogan ed., 2004) (describing how attendance at beat meetings in Chicago represents “a strong middle-class bias” and “do[es] a better job at representing already established stakeholders in the community than [it] do[es] at integrating marginalized groups with fewer mechanisms for voicing their concerns”). Even well-meaning prosecutors and police officers will tend to hear the

populations are already intervening at moments that are technically "procedural" but when added up constitute the heart of the criminal adjudication experience.

A conception of criminal procedure that places the public in direct opposition to defendants and arrestees is problematic for a number of reasons. To begin with, it is descriptively inaccurate. Pairing "the People" with the people discounts the array of ways in which marginalized groups living in the shadow of the carceral state intervene in the criminal process on behalf of defendants and those targeted by the police.¹²⁵ Police and courts often meet these bottom-up participatory tactics with resistance, arguing that they undermine the rule of law and disrupt the decorum of everyday justice. For example, police arrest organized copwatchers for filming, administrators close courtrooms to spectators, and judges order the closure of community bail funds.¹²⁶ This state resistance to participation on behalf of defendants is made possible by the people/defendant dichotomy, which limits the ways in which we balance and reform our current procedures. Below I flesh out two particular facets of the people/defendant dichotomy that serve to legitimize the exclusion of marginalized populations from everyday adjudication: the representation problem and the neutrality problem.

B. *The Representation Problem*

The idea that the public stands on the side of everyday prosecutions allows the criminal process to channel public participation in everyday adjudication through the public's representatives, most prominently line prosecutors. The problem with the ideology of representation is not the concept that prosecutors represent the interests of some public—surely they do. Rather, the problematic assumption underlying the representation ideal is that prosecutors represent the interests of the *entire* community. Describing prosecutors and police as representatives of "the People" as one entity assumes that our current methods of seeking public input into criminal justice are capable of accurately channeling public sentiment. This assumption is not only false, it is harmful; it allows the process to exclude those who would try to participate in other ways. The result of

opinions with which they agree, moving toward a "consensus" that reflects more their starting point than a compromise position. See Steve Herbert, *Citizens, Cops, and Power: Recognizing the Limits of Community* 72–73 (2006) (finding that police constitute their own view of community and "recognize some and not other forms of input as legitimate"); Sklansky, *Democracy*, *supra* note 27, at 114–20 (describing how some forms of community policing mute "dissident values" that diverge from the status quo); *id.* at 289 ("Community prosecution' and 'neighborhood prosecution' often wind up being . . . efforts to decentralize the *location* and *focus* of prosecutors, but not to decentralize political oversight.").

125. See *supra* section I.C.

126. Simonson, *Democratizing Criminal Justice*, *supra* note 25, at 1622. For a description of these forms of resistance by state actors, see *id.* at 1617–21.

the ideology of representation, then, is that marginalized groups are doubly excluded: They are excluded from the participation that does happen, and their own bottom-up participation is discounted as illegitimate.

Prosecutors have deeply entrenched identities as conduits for the public will for justice—as representatives of the public. This prosecutorial identity as a representative of the local public is exemplified by a prosecutor calling herself “the People” in court, but it is not dependent on this label. Nor is it solely about being elected by the populace. As Attorney General Jeff Sessions, himself an appointed rather than elected prosecutor, told a room of state and local prosecutors: “As a prosecutor, you have the honor of representing your community in court. I will never forget the feeling of going before a judge and saying, ‘the United States is ready.’ I will never get over that feeling . . . I’m sure you feel the same way.”¹²⁷ With respect to prosecutions, the idea of representation can mean either that prosecutors are making decisions that reflect the priorities of the public (they are “descriptive” representatives), or that prosecutors have been fairly selected and given authority to make the decisions that they feel are just (they are “acting for” the public based on their own ideas of justice).¹²⁸ Either way, the ideal of representation serves to cement the idea of the prosecutor as a conduit for the public interest. This concept of public prosecutors as representatives channeling public sentiment arose in the eighteenth and nineteenth centuries, as public prosecutors gradually supplanted private parties as initiators of criminal prosecutions in the United States,¹²⁹ with the role of defending the “peace and dignity of the state” by publicly prosecuting wrongdoers.¹³⁰ The resulting concept of public prosecution was that “society as a whole [is] the ultimate victim” of crime, and the role of prosecutors is to represent society in condemning that crime; in this sense, prosecutors *are* the people.¹³¹

127. Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice, Remarks to the National District Attorneys Association (July 17, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-national-district-attorneys-association> [<https://perma.cc/KAW4-3J5W>]. But see Laurie L. Levenson, Conflicts over Conflicts: Challenges in Redrafting the ABA Standards for Criminal Justice on Conflicts of Interest, 38 *Hastings Const. L.Q.* 879, 885 (2011) (“Although most prosecutors appreciate on some intellectual level that they represent the ‘People’ or ‘Government’ or the community-at-large, on a day-to-day basis, they answer only to themselves or to a supervisor.” (footnote omitted)).

128. See generally Hanna Fenichel Pitkin, *The Concept of Representation* 60–92, 112–42 (1967) (describing these different concepts of representation and functions of representatives).

129. For a summary of the history of public prosecution in the United States, see Joan E. Jacoby, *The American Prosecutor: A Search for Identity* 7–36 (1980); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 *Ark. L. Rev.* 511, 516–21 (1994); Eric S. Fish, *Against Adversary Prosecution*, 103 *Iowa L. Rev.* 1419, 1435–40 (2018).

130. Jacoby, *supra* note 129, at 10 (quoting the 1796 Vermont Constitution).

131. *Id.* at 10. Historians disagree as to whether this shift to prosecution by public representatives constituted an effort to democratize criminal justice by moving beyond

The ideal of prosecutorial representation has a baseline faulty assumption: that popular input happens, and happens well. The dichotomy between the people and the defendant assumes that because prosecutors and police chiefs are often elected, they are able to transform public sentiment into legal action. However, while prosecutorial and policing decisions surely reflect some popular sentiment, and possibly even the majority view of justice,¹³² studies have continually shown that they usually do not reflect the input of the most marginalized voices, who either are ineligible to vote or come from neighborhoods whose political power has been undermined by mass incarceration.¹³³ This is in large part a consequence of the broad reach of the criminal legal system itself, which not only disenfranchises large numbers of people with criminal records or in state custody but also drains political power from entire

private power, or an effort to expand the reach of the criminal law by allowing prosecution for victimless crimes. Compare, e.g., *id.* at 10–11 (describing the shift to public prosecution as a reaction to inequities), with Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800–1880*, at 119–49 (1989) (describing the rise of public prosecution in Philadelphia as a reaction to disorder and a desire to prosecute victimless crimes).

132. But see Jazmine Ulloa, *ACLU Campaign Highlights the Positions of California District Attorneys on Crime and Punishment Ballot Measures*, *L.A. Times* (Aug. 22, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-aclu-targets-california-district-1503370121-htmlstory.html> (on file with the *Columbia Law Review*) (describing the disconnect between public opinion polls and opinions of elected district attorneys in California).

133. See Vanessa Barker, *The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders* 12 (2009) (arguing that punitive policies coincide with electorates dominated by elite social groups); Traci Burch, *supra* note 16, at 75–77 (“People who live in high-imprisonment neighborhoods vote less than people who live in neighborhoods with fewer prisoners . . . [and] are less active in politics . . .”); Lerman & Weaver, *supra* note 16, at 199–202 (explaining the impact of the stigma of imprisonment on an individual’s likelihood to participate in political institutions); Lisa L. Miller, *The Myth of Mob Rule: Violent Crime and Democratic Politics* 9 (2016) [hereinafter Miller, *Mob Rule*] (arguing that high levels of imprisonment can be explained in part by a “*democratic deficit* that leaves lawmakers only marginally accountable for producing collective goods”); Stuntz, *Collapse of American Criminal Justice*, *supra* note 16, at 244–56 (tracing the decline of local democratic control over criminal justice, which has left those voters with the largest stake in the process with the smallest voice in relevant decisions); Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 *Mich. L. Rev.* 187, 239 (2017) (noting that it is the poor and disenfranchised “who overwhelmingly suffer the cost of criminal justice’s externalities and whose voices often go unheard”); Roberts, *Social and Moral Cost*, *supra* note 16, at 1291–98 (discussing the negative effects of mass imprisonment on the participation of black communities in elections and labor markets, and the resulting civic isolation in such communities).

neighborhoods¹³⁴ and teaches those who have contact with the criminal justice system that they are not deserving of full participation.¹³⁵

Even if it were possible to perfect representation, to assume that the people speak through “the People” (or through any representatives) discounts more adversarial forms of participation that would challenge everyday institutional practices. In other words, the focus on perfecting public input into prosecution priorities *ex ante* facilitates the suppression of input on behalf of defendants in individual cases. Because we assume that the public should participate in criminal procedure through their representatives, the system can feel free to treat interventions on the side of the defendant as interference rather than participation. When we interpret the will of the people, we do not take into account the input of those who intervene on behalf of defendants: They are simply members of the defendant’s support team, rather than members of the larger public whose views should dictate policing and prosecution priorities. As the next section describes, running alongside this ideal of representation is a second ideal, of a “neutral” public, which brings with it a related set of limitations with respect to public participation in criminal justice.

C. *The Neutrality Problem*

The second problem with the ideology of the people/defendant dichotomy is that it creates a misleading and exclusionary ideal of a “neutral” public that participates in the criminal justice process.¹³⁶ The ideal of a neutral public—a public that is both disinterested and decorous—is problematic because in practice it defines a neutral public as a subset of the public that buys into the legitimacy of the current system and the general priorities of current policing and prosecutorial practices.¹³⁷ Those assumed to be opposed to the dominant approach of the

134. See, e.g., Lerman & Weaver, *supra* note 16, at 140 (describing how interacting with the criminal process affects political engagement); Roberts, *Constructing a Criminal Justice System*, *supra* note 24, at 279–83 (describing the criminal justice system’s “anti-democratic function”).

135. In the context of everyday policing, for example, Monica Bell has diagnosed the ways in which “African Americans and residents of high-poverty neighborhoods . . . are . . . structurally ostracized through law’s ideals and priorities.” Bell, *supra* note 58, at 2085–86.

136. The problem of neutrality goes beyond the public—there is also an assumption of neutrality in the proceedings overall that Ion Meyn has argued distorts procedure in unfair ways. See Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 *Am. J. Crim. L.* 39, 56–60 (2014).

137. As a number of scholars have shown, this ideal of a subservient, obedient public is echoed in constitutional jurisprudence as well. See, e.g., Capers, *Good Citizen*, *supra* note 25, at 654–57 (describing how criminal procedure doctrine conceives of the “good citizen” as one willing to waive his rights); Miller, *Encountering Resistance*, *supra* note 26, at 300–10 (arguing that challenging the police is “*the way* in which we assert our legal rights against the government” while compliance vitiates protections provided by the Constitution); Ristroph, *Constitution of Police Violence*, *supra* note 123, at 1215–38 (describing how “constitutional doctrine expects and even demands suspects’ compliance across the board,” with a duty of compliance that is disparately aimed at black and brown suspects).

system are weeded out as biased, leaving us with a public predisposed to uphold the status quo. And those who take on more adversarial forms of participation are seen as disruptive, silencing counterviewpoints that might otherwise add balance to our conceptions of justice.

The concept of a "neutral" public in criminal procedure begins by excluding from its definition of the public those with criminal records or prior contact with the criminal justice system, labeling them inherently "biased." The formal exclusion of individuals with criminal records from participating in criminal justice as voters, jurors, and bail bond agents is based, in part, on a belief that people with criminal records are too biased to be neutral. One of the explicit justifications for disenfranchising individuals with felony criminal records, for example, is that people with criminal records will be biased against sensible crime policies.¹³⁸ Roger Clegg puts it this way: "If these laws did not exist there would be a real danger of creating an anti-law enforcement voting bloc in municipal elections, which is hardly in the interests of a neighborhood's law-abiding citizens."¹³⁹ In congressional testimony, Senator Mitch McConnell similarly worries that giving individuals with criminal records the ability to vote would create a "voting bloc" that would make it hard to be tough on crime.¹⁴⁰ The idea that individuals with criminal records might side with people accused of crimes, *and that this is a bad thing*, also pervades the practices of everyday adjudication such as jury selection,¹⁴¹ bail,¹⁴² and the regulation of the courtroom audience.¹⁴³ This idea, that people with criminal records or police contact are too biased to be included in public-facing procedures, furthers not only the isolation of

138. See Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 12–13 (2006) (describing the fear that people with criminal records could "corrupt the ballot box" by loosening criminal laws as one of three central arguments in favor of felon disenfranchisement); Alec C. Ewald, An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement, 36 *Colum. Hum. Rts. L. Rev.* 109, 111–22 (2004) (describing the fear expressed by judges, politicians, academics, and advocates that individuals with criminal records will sway elections to be "anti-law enforcement").

139. Roger Clegg, *Who Should Vote?*, 6 *Tex. Rev. L. & Pol.* 159, 177 (2001).

140. Manza & Uggen, *supra* note 138, at 12.

141. See Kalt, *supra* note 21, at 74–75 (noting that one "common basis offered for felon exclusion [from jury service] is that felons are inherently biased"); Roberts, *Disparately Seeking*, *supra* note 21, at 1403 ("The lack of inquiry into whether a connection with law enforcement or the criminal justice system automatically validates a strike, whatever its disparate impact, suggests an assumption that a potential juror with such a connection would have a negative view of the prosecution's case.").

142. See, e.g., Amber Widgery, *Bail Bond Agent Licensure*, Nat'l Conference of State Legislatures (Apr. 23, 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/bail-bond-agent-licensure.aspx> [<https://perma.cc/7H9D-T79A>] ("[M]ost states will not issue nor renew a license to those who commit a felony, a crime of moral turpitude or offenses involving misappropriation of money or property.").

143. See Simonson, *Audience*, *supra* note 79, at 2190–95 (describing the exclusion of audience members—defendants and their supporters—from criminal courtrooms).

individual defendants from public support but also the alienation of entire neighborhoods from the political processes that do happen.¹⁴⁴ The result is the legitimization of exclusionary rules and practices that maintain the antidemocratic nature of everyday criminal procedure.

The discourse surrounding the bias of individuals with criminal records is particularly strong in the realm of jury selection, where courts throughout the United States comfortably exclude individuals with criminal records from juries, either under blanket policies or via individual voir dire. When defendants have challenged the blanket exclusions of individuals with criminal records from jury service, courts justify the practice with the idea of neutrality, based on “promot[ing] the legitimate state goal of assuring impartiality of the verdict.”¹⁴⁵ Judicial decisions discuss the “presumptively ‘shared attitudes’” of people with felony convictions¹⁴⁶ and the “bias in favor of the defendant on trial, who is seen as a fellow underdog caught in [the system’s] toils.”¹⁴⁷ Whether or not it is correct to say that people with criminal records are more likely to acquit a defendant,¹⁴⁸ the underlying idea is clear: Empathy toward defendants as a general group of people accused by the state has no place in the courtroom. This state interest in “impartiality” has been enough to

144. Cf. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 *Stan. L. Rev.* 1147, 1161 (2004) (“Criminal disenfranchisement laws . . . operate as a kind of collective sanction: They penalize not only actual wrongdoers, but also the communities from which incarcerated prisoners come and the communities to which ex-offenders return by reducing their relative political clout.”).

145. *Rubio v. Superior Court*, 593 P.2d 595, 600 (Cal. 1979) (holding that a California statute excluding ex-felons from jury service did not violate the Equal Protection Clause); see also Kalt, *supra* note 21, at 73–75 (collecting cases justifying exclusion of people with felony records on the grounds of jury probity and inherent bias). Note though that there is another possible justification—that potential jurors with felony convictions have exhibited poor judgment or character through past acts and would not be upstanding jurors. Cf. *United States v. Barry*, 71 F.3d 1269, 1274 (7th Cir. 1995) (“[I]n most cases, by running afoul of the law, accused persons have shown poor judgment Theirs is hardly the common-sense judgment of the community.”).

146. *Carle v. United States*, 705 A.2d 682, 686 (D.C. 1998) (“The presumptively ‘shared attitudes’ of convicted felons as they relate to the goal of juror impartiality are a primary reason for the exclusion . . .”).

147. *Rubio*, 593 P.2d at 600 (“The Legislature could reasonably determine that a person who has suffered the most severe form of condemnation that can be inflicted by the state . . . might well harbor a continuing resentment [T]hese antisocial feelings would . . . risk . . . prejudice infecting the trial . . .”).

148. Recent research indicates that individuals with criminal records may actually not be predisposed to favor defendants. See James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 *Law & Pol’y* 1, 18 (2014) (conducting an empirical study that found “no significant difference between the group-level bias of convicted felons” and law students, suggesting that other groups without felony records “are likely to exhibit statistically similar levels of prodefense/antiprossecution bias”).

uphold constitutional challenges to the practice of excluding individuals with felony records from juries.¹⁴⁹

Similarly, courts have created a safe haven for prosecutors to strike from juries individuals who hold negative views of police officers, even if prospective jurors say that they could be impartial in assessing the evidence in the case.¹⁵⁰ Rarely, if ever, do courts engage in the reverse analysis, asking whether people *without* criminal records might have a different kind of bias, of not understanding what it is like to go through the process of arrest or accusation.¹⁵¹ Indeed, *Batson* jurisprudence is generally resistant to allowing defense attorneys to exclude white jurors because they may hold positive views of law enforcement.¹⁵² The assumption is that to be generally in favor of policing and prosecutorial policies is to be neutral.

The institutional practices of state courthouses also tend to push back against members of the general public who attempt to participate in everyday justice on the side of defendants, labelling them as biased meddlers rather than healthy participants in everyday justice. Although the First and Sixth Amendments together guarantee the right to a public criminal adjudication, in practice local audiences are often excluded from courtrooms, whether because courts create policies that explicitly forbid public attendance at nontrial proceedings, because courtrooms are too crowded, or because—in the case of courtwatching groups or other activists intervening on behalf of defendants—the presence of supporters of defendants undermines the “neutrality” of the proceedings.¹⁵³ Some court officers tell members of the public who are there to support a defendant but are not family members that they cannot enter courtrooms.¹⁵⁴ And it is not uncommon for courthouses to allow victims’

149. See Kalt, *supra* note 21, at 73–75 (collecting cases).

150. See Roberts, *Disparately Seeking*, *supra* note 21, at 1406–08 (describing *Batson* cases that hold it unacceptable to strike a white juror because they may have a positive view of law enforcement and contrasting those cases with those that allow prosecutors to strike jurors of color who have negative experiences with law enforcement).

151. Cf. Abramson, *supra* note 43, at 887–93 (describing how jury deliberation actually improves when the jury contains diverse points of view); Dov Fox, *Neuro-Voir Dire and the Architecture of Bias*, 65 *Hastings L.J.* 999, 1042 (2014) (“The conception of jury bias that much of impartiality doctrine takes for granted sweeps every source of outside influence under that vague concept. No such monolithic conception of bias can meaningfully distinguish those outside sources of juror influence that inform a fair trial from those that infect it.”); Martha Minow, *Stripped Down like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 *Wm. & Mary L. Rev.* 1201, 1208 (1992) (discussing “the danger of considering an initial appearance of bias without probing how others may be similarly but more subtly implicated in the issue of bias”).

152. Roberts, *Disparately Seeking*, *supra* note 21, at 1406–07.

153. See generally Simonson, *Audience*, *supra* note 79 (describing these trends).

154. See, e.g., Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 *Stan. L. & Pol’y Rev.* 455, 468–70 (2011) (describing the closing of courtrooms in Georgia as a means of blocking citizens from monitoring the criminal justice system).

rights advocates to sit together and wear visible T-shirts or other indications of prosecutorial support but to exclude groups who wish to sit in courtrooms visibly supporting defendants.¹⁵⁵ The net result of these doctrines and practices is a watered-down vision of lay participation in public adjudication in which to be “pro-defense,” “anti-police,” or “anti-prosecution” is a state of mind in conflict with the rule of law or the process of a democratic criminal justice system.

Overall, then, the pervading sense that audiences and juries must not be pro-defense or biased against the prosecution helps explain how state actors meet direct communal participation on behalf of defendants with either resistance or silence. When court clerks tell community groups that they cannot post bail for strangers, for example, those clerks simply cannot conceive of “neutral” reasons for a group to bail out a stranger. The bail fund becomes a force infusing bias into a neutral system, rather than a community group articulating a broader vision of justice that involves supporting defendants whom they do not know personally.¹⁵⁶ In this way, the concept of a “neutral” public of which defendants are not a part makes it that much easier to automatically cast those accused or investigated as “other.” When we cannot imagine ourselves on the side of the defendant, then we construct rules and analyze doctrine in distinctly different ways than we might otherwise.¹⁵⁷ The dominant ideology of criminal procedure simply cannot account for communal participation on behalf of defendants as anything other than “biased,” stifling the ability of these bottom-up visions to make their way into our everyday understandings of criminal procedure.

III. PUTTING THE PEOPLE ON BOTH SIDES: AN ALTERNATIVE VISION

In this Part, I put forth an alternative vision of criminal procedure that conceives of public participation as a valuable input on both sides of every criminal case. This vision centers on the notion that the public, or the “community,” does not always stand in opposition to a defendant who asserts an individual right or invokes a procedural rule. Instead, there is a facet of the local public that is on the side of many defendants—and potential defendants—as part of their own visions of justice and community.¹⁵⁸ The people are not just on the side of the prosecution, and so we

155. See *supra* note 19.

156. Simonson, *Bail Nullification*, *supra* note 59, at 599–612.

157. Cf. Cover, *Violence*, *supra* note 22, at 1608 (noting that the “violence of the act of sentencing is most obvious when observed from the defendant’s perspective” while the communal meaning of the event “will tend to ignore the prisoner or defendant and focus upon the judge and the judicial interpretive act”); Griffiths, *supra* note 29, at 385 (“[W]e . . . persist in thinking of a convicted person as a special sort of individual, one cut off in some mysterious way from the common bonds that unite the rest of us.”).

158. The idea that the public does not always stand against an individual defendant finds some resonance in scholarship that critiques individual constitutional rights as a legitimizing force in an unjust criminal justice system. See, e.g., Butler, *Poor People Lose*,

should recognize the benefit of facilitating resistance to individual prosecutions by encouraging participation at multiple moments in the criminal process. I begin with two theoretical ideas: first, that democratic criminal processes benefit from facilitating communal, agonistic contestation; and second, that such democratic contestation requires moving beyond the idea of prosecutors as representatives of the entire "People" in the courtroom. I then flesh out what putting "the People" on both sides of a criminal case can look like on the ground.

A. *Communal Contestation Through Criminal Procedure*

Criminal adjudication involves the prosecution of individual defendants for alleged law-breaking; but it need not follow that individual defendants stand alone in the courtroom. If criminal justice is a public enterprise, then we might open up both sides of a criminal case to public participation and to contestation over the meanings of justice and fairness. Collective interventions on behalf of individual defendants allow members of the public to connect the fates of those defendants to the well-being of entire neighborhoods and communities.¹⁵⁹ Groups of laypeople are able to demonstrate through action their disapproval of individual prosecutions while simultaneously contesting existing priorities in local criminal law more broadly. When laypeople join collectively to contest meanings of justice, they bring into the criminal courthouse what Lani Guinier and Gerald Torres call "demosprudence"—the engagement of social movements with legal meaning.¹⁶⁰ The criminal courthouse can become a site of democratic contestation in which ordinary people's

supra note 91, at 2178 ("*Gideon* . . . stands in the way of the political mobilization that will be required to transform criminal justice."); Louis Michael Seidman, *Brown and Miranda*, 80 Calif. L. Rev. 673, 680 (1992) (arguing that "the legislative character of *Brown* and *Miranda* actually allowed the Court to defuse the promise of radical transformation that was immanent in prior precedent"); Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 Const. Comment. 207, 207 (1995) ("[T]he Fourth, Fifth and Sixth Amendments function mostly to make us satisfied with a state of affairs that should trouble us deeply."); Stuntz, *Uneasy Relationship*, supra note 31, at 4 (describing the "perverse effects" of constitutional criminal procedure).

159. Cf. Bell, supra note 58, at 2083–89 (describing how people living in African American and high-poverty neighborhoods experience at a communal level exclusion from the polity as a result of criminal justice practices).

160. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L.J. 2740, 2743, 2749 (2014); see also Moore, *Decarceral Constitutionalism*, supra note 80, at 30–40 (describing how social movements shift constitutional meaning on the ground through efforts such as participatory defense). Demosprudence does not only happen outside of formal legal spaces, in community meetings or protests; it can also happen inside courtrooms, when members of the public engage in contestation alongside state actors, co-creating legal meaning. Cf. Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 Harv. L. Rev. 4, 13–20 (2008) (describing how demosprudence can operate inside the Supreme Court courtroom through oral dissents); Patel, supra note 25, at 867–77 (describing contestation within the courtroom in the context of police consent decrees).

visions of justice are placed on equal ground with those of elected prosecutors or judges. This communal resistance to prosecution can enrich the public arena of justice, expanding the possible legal meanings that we can attribute to any individual case or issue.

The conceptual shift I propose is intimately tied to the larger normative belief that direct forms of contestation are crucial for democratic justice. Although this Essay does not aim to present a complete theory of democracy by any means, there are at least four important aspects to how I conceptualize democracy and political change that bear on this Essay's vision of criminal procedure. First, I share with a republican criminal justice ideal the view that giving officials too much power is dangerous; in the context of criminal justice we should prioritize popular interventions, including from social movements, that counter dominion.¹⁶¹ Second, moving beyond a neorepublican ideal,¹⁶² my vision centers on the importance of agonistic interventions in which people who participate can remain opposed to the actors who ordinarily dominate the process. With agonism, lay participation in the criminal legal system can take an adversarial stance toward practices and ideologies of institutions in power through engagement with those institutions, by acknowledging intractable differences but respecting the adversary who disagrees.¹⁶³ Embedded in this second idea is a third: a pluralist conception of the demos in

161. See John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* 7–11 (1990) (arguing that criminal justice should favor republican ideals to maximize the “enjoyment of certain rights”); John Braithwaite, *Criminal Justice that Revives Republican Democracy*, 111 *Nw. U. L. Rev.* 1507, 1519–21 (2017) [hereinafter Braithwaite, *Criminal Justice*] (arguing that the criminal justice system can be used to counteract the antidemocratic forces of electoral populism and money in politics); cf. Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 *Crim. L. & Phil.* 457, 462–63 (2015) (contrasting the antidomination strand of republican criminal theory with Yankah's concept of an Aristotelian or Athenian republican theory of criminal law). For further development of these arguments, see *infra* notes 177–178 and accompanying text.

162. A neorepublican theory of criminal justice might prioritize restorative justice rather than agonistic confrontation. Philip Pettit, in his work with John Braithwaite, has connected his republican theory of democracy with a theory of criminal justice that centers in part on restorative justice. See Braithwaite & Pettit, *supra* note 161, at 120–24; Braithwaite, *Criminal Justice*, *supra* note 161, at 1509–10. Similarly, John Griffiths, in his takedown of Herbert Packer, would have had us move away from adversarialism toward a “Family Model” of criminal procedure, a model that became an inspiration for John Braithwaite in his pathbreaking vision of restorative justice. See Griffiths, *supra* note 29, at 372–73. But restorative justice, or a “Family Model,” assumes that a wrong has been committed against a community and works from there to seek common ground in fashioning a punishment. *Id.* It does not allow for adversarial or agonistic engagement with the criminal legal process.

163. See Mouffe, *Agonistics*, *supra* note 25, at 1–19 (arguing that democracy requires “confrontation of democratic political positions” but that adversaries in such confrontations should not “call into question the legitimacy of their opponent's right to fight for the victory of their position”); Chantal Mouffe, *The Democratic Paradox* 80–105 (2000) (advocating for an agonistic model of democracy in which people treat the opposition as “legitimate opponents”).

which there is no one "public," "people," or "community" to whom state actors are beholden, but rather multiple publics with contrasting ideas about justice that cannot be easily reconciled.¹⁶⁴ This is therefore not a populist vision of criminal adjudication, in the sense that I oppose the view that there is only one legitimate conception of who "the People" are.¹⁶⁵ The fourth important strand of this view of democratic criminal justice is that popular participation need not be mediated through representatives, but can and should also spring up through direct forms of participation and contestation.¹⁶⁶

Under these conceptions of democracy and political change, the answer to any disconnect between criminal processes and popular will is not to move away from or supplement the adversarial process but rather to bring into our debates over criminal procedure the merits of facilitating direct popular intervention on both sides of the "v." Indeed, this way of thinking about criminal procedure, in which the public has a part to play on both sides of any case, highlights a potential benefit of our adversarial system of criminal adjudication: that it can facilitate important forms of contestatory participation in everyday justice that would otherwise be muted in consensus-based methods of gathering popular input into criminal justice.¹⁶⁷ Moreover, these forms of contestatory participation are more likely to come from marginalized populations with the least amount of power in the current system—the poor people of color who are most likely to be arrested and prosecuted, as well as to be victims of crime. Power can move through procedure: When a group posts bail for a stranger, sits together in a courtroom to support a defendant, or makes a biographical video for a sentencing hearing, the members of that group shift power and agency dynamics inside the courthouse, destabilizing deeply entrenched legal and constitutional meanings. Dismantling the people/defendant dichotomy thus carries with it

164. See, e.g., Robert A. Dahl, A Preface to Democratic Theory 134–45 (1956) (describing American democracy as a political struggle among different groups); Sklansky, *Democracy*, supra note 27, at 23–28 (summarizing the ways in which the pluralists saw group conflict as the essence of politics).

165. See Jan-Werner Müller, *What Is Populism?* 3–4 (2016) (describing a core belief of populism that only some of the people are truly "the People").

166. This view contrasts directly with the value in democratic pluralist theory placed on the political elite as a sign of a healthy democracy. See generally Robert A. Dahl, *Who Governs?: Democracy and Power in an American City* (1961) (describing the importance of political elites, or "homo politicus").

167. See generally Sklansky, *Democracy*, supra note 27, at 86–97 (describing the dangers of the rising preoccupation with consensus-based forms of participation in policing). This is not to say that consensus-based forms of participation do not have their place. Agonistic engagement should complement, not replace, representation and deliberative participation. Cf. Íñigo Errejón & Chantal Mouffe, *Podemos: In the Name of the People* 125 (2016) (describing the "synergy between electoral competition and the wide range of struggles that take place in the social arena"); Miller, *Encountering Resistance*, supra note 26, at 296 ("Mature democracies are both participatory and contestatory . . .").

the potential to push back against the antidemocratic nature of current power relationships in criminal law and procedure.¹⁶⁸

B. *Moving Beyond Representation*

This vision of criminal procedure requires moving beyond representation, particularly inside the courthouse. This does not require that we abandon the use of prosecutors as representatives on the side of prosecution or of jurors as occasional representatives during deliberations after a trial. But to rely *only* on these representatives results in an illusory sense of representation of the polity as a whole: in the case of prosecutors, because they cannot fully represent any one public; and in the case of juries, because they are so rarely sworn in.

Our dependence on public representatives inside the courthouse is not inevitable—the Constitution does not require that we engage in criminal justice through representatives. Indeed, a structural reading of the Bill of Rights underscores the importance of the public as a constant presence, as jurors and as audiences, in the adjudication of criminal cases.¹⁶⁹ And, historically, the concept of the “jury of the whole” implicated the interest of the entire public in participating in individual cases on all sides.¹⁷⁰ As Judith Resnik and Dennis Curtis have identified, one of the central purposes of keeping courtrooms open to the public today is that audience members can “deny[] the government and disputants unchecked authority to determine the social meanings of conflicts and their resolutions.”¹⁷¹ When we shift our understanding of public participation so that it runs through representatives such as prosecutors, however, we mute other forms of direct engagement in everyday justice.

Moving beyond representation begins with a recognition that prosecutors do not fully represent “the People,” and therefore we should not label them that way. States such as California, Illinois, Michigan, and New

168. See *supra* notes 59–79 and accompanying text; cf. Roberts, *Constructing a Criminal Justice System*, *supra* note 24, at 279–85 (describing the criminal justice system’s “anti-democratic function”).

169. See Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 115–24 (1997) (describing the importance of public participation for constitutional criminal procedure); Simonson, *Audience*, *supra* note 79, at 2195–205 (“[T]he Sixth and First Amendment rights to a public trial apply with full force to the protection of the audience in the post-trial world.”).

170. See Susan N. Herman, *The Right to a Speedy and Public Trial* 25 (2006) (describing the concept of the “jury of the whole”).

171. Resnik & Curtis, *supra* note 79, at 302; see also Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 *Harv. L. Rev.* 78, 87 (2011) (“The presence of the public divests both the government and private litigants of control over the meanings of the claims made and the judgments rendered and enables popular debate about and means to seek revision of law’s content and application.”); cf. Kleinfeld, *Three Principles*, *supra* note 14, at 1483–88 (arguing that at the time of the Founding, there was an understanding of criminal justice as belonging to “We the People” and requiring the participation of the people).

York should abandon that label on case captions and when referring to individual prosecutors. Instead, it is more honest to designate prosecutors as "the State," "the Commonwealth," or "the Government": They are state actors, wielding their state power to prosecute individual defendants. This distinction matters. The words that we use to describe prosecutors make their way from courtroom dockets and Westlaw into courtroom conversations and popular culture. When I was a public defender in New York City, it was common for judges, clerks, and other courtroom players to refer to individual Assistant District Attorneys as "the People," as in, "Do the People have an offer?"; "Would the People like to request a lunch break?"; or, if an ADA was not visible in the courtroom, "Are the People in the bathroom?" Calling an individual prosecutor "the People" sends a powerful message to courtrooms full of defendants waiting for their cases to be called: a message that those defendants are not part of "the People," are not part of the public that matters. And to the public at large, it sends the message that the good public, the "neutral" public, cannot be on the side of the defendant.

This is not mere rhetoric; there is an important conceptual distinction between claiming that a prosecutor acts on behalf of the state and claiming that a prosecutor acts on behalf of her community and is of the community. As Michelle Madden Dempsey has argued, "[W]hilst prosecutors necessarily represent their state, they may very well fail to represent their community."¹⁷² Dempsey follows R.A. Duff in arguing that for the prosecution to represent the community, the prosecution must meet conditions of political legitimacy by treating alleged wrongdoers with respect, as members of that very community.¹⁷³ Dempsey concludes that this ideal, of an inclusive community of which defendants are a part, is rarely if ever achieved in the United States.¹⁷⁴ As a result, "[g]iven the radical disparity between the actual and the ideal in prosecutorial practices and criminal justice systems more generally . . . it is unlikely that any prosecutor acts on behalf of (represents) every member of her political community."¹⁷⁵

Prosecutors may therefore be legitimate agents of the state—they may be elected, a majority of the local citizenry may even have chosen them—but it does not follow that they have permission to speak as an agent of the community. Indeed, to speak of prosecutors as constitutive of communal sentiment runs counter to the very concept of adversarial prosecution by a public prosecutor. Paul Butler puts it this way: "In an adversarial system, the prosecutor who is too sympathetic toward the

172. Dempsey, *supra* note 90, at 50.

173. *Id.* at 49–50 (citing R.A. Duff, *Trials and Punishment* 11 (1986)).

174. *Id.* at 49 ("Typically, of course, these conditions are not met . . .").

175. *Id.* at 52 n.24.

defendant's plight or too suspicious of the police is not doing her job."¹⁷⁶ An honest accounting of how our criminal justice system operates must acknowledge that prosecutors engage not just in imperfect public representation but also in troublesome forms of power-wielding against relatively powerless people. In republican terms, prosecutors are sources of state domination as much as of popular representation.¹⁷⁷ To keep this domination in check, we must first acknowledge it. From there, we can then facilitate and even encourage forms of communal contestation that counter it.¹⁷⁸

This contestation should not be mediated through representatives, either public defenders or a new form of communal representative in the courtroom. Public defenders are not in a position to provide an adequate counterweight to prosecutors as community representatives. Public defender offices are sometimes seen as representing communal interests, either because they check the power of the prosecutors on behalf of defendants in the aggregate,¹⁷⁹ or because they adopt institutional postures of being "community-based" or of advocating for larger political change that benefits their clients.¹⁸⁰ However, the beneficial roles of institutional

176. Butler, *Hip-Hop Theory of Justice*, *supra* note 119, at 115; see also Fish, *supra* note 129, at 1420 n.4 (collecting similar sentiments from other sources).

177. See Braithwaite & Pettit, *supra* note 161, at 113–17 (arguing that, in light of the power wielded by prosecutors, community policing and accountability systems are necessary to maintain communities' sense of security and peace of mind); Kleinfeld, *Manifesto*, *supra* note 41, at 1396 ("From Pettit, we can add to our mix of ideas the notion . . . that police and prosecutors in the contemporary operation of American criminal justice may enjoy a form of domination inconsistent with democratic freedom . . ."); cf. John F. Pfaff, *Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform* 127 (2017) (describing the outsized power of prosecutors in criminal justice and arguing that "[f]ew people in the criminal justice system are as powerful, or as central to prison growth, as the prosecutor"); Angela J. Davis, *Prosecutors, Democracy, and Race*, *in* *Prosecutors and Democracy: A Cross-National Study*, *supra* note 41, at 195, 195 ("Prosecutors are the most powerful officials in the American criminal justice system.").

178. See Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* 187–293 (2012) (describing the need for popular contestation to counter domination by public officials); K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 *Contemp. Pol. Theory* 41, 46–56 (2017) (expanding the republican idea of popular contestation to larger contestation against structural inequality); cf. Braithwaite & Pettit, *supra* note 161, at 114 (arguing that the overall security and well-being of the community "is frequently best served by not prosecuting").

179. See Laura I. Appleman, *The Community Right to Counsel*, 17 *Berkeley J. Crim. L.* 1, 60 (2012) [hereinafter Appleman, *Community Right*] (characterizing the defense counsel as offsetting the state's power to initiate a process with potential "collateral consequences that result in death, life imprisonment, or deportation"); Nirej Sekhon, *Mass Suppression: Aggregation and the Fourth Amendment*, 51 *Ga. L. Rev.* 429, 474–77 (2017) ("Embracing a community-oriented ethos requires that defenders imagine their advocacy obligations beyond just obtaining favorable results in individual cases.").

180. See Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 *Geo. L.J.* 2419, 2457–62 (1996) (describing a then-growing trend of public defender offices becoming community-based institutional players).

public defenders are different from, and can even conflict with, the power of communal intervention on behalf of individual defendants.¹⁸¹ Although we might imagine a new kind of community representative who could represent public interests in the courtroom,¹⁸² this second problem would still remain: Such ombudsmen or public advocates would not facilitate the shifts in power that characterize direct forms of communal participation.

Instead of searching for perfect representatives of public will, then, our system of criminal procedure must also facilitate direct, contestatory forms of participation in criminal justice most often (but not exclusively) found on the defendant side of the "v." To be sure, precinct and courtroom actors should be democratically accountable.¹⁸³ In recent years, some local prosecutorial elections have been genuinely contested, and a number of "progressive" prosecutors have won elections with promises of reform, racial justice, and decarceration.¹⁸⁴ These are promising developments for anyone interested in decarceration. And yet, we should be careful not to let the high-profile wins of progressive prosecutors further re-entrench the notion that the public belongs only on the prosecution side of the "v."; even when a progressive prosecutor wins, she does not represent the full community. As long as there are prosecutions against

181. This conflict manifests itself in two distinct ways. First, real conflicts of interest can emerge between a public defender's duty to her client and the stated or perceived interests of local community groups; the interests may often be aligned, but sometimes they may not be. It would strain the ability of an attorney to fully represent her client if she also had to consider the interests of the neighborhood. And second, the acts of public defenders working on behalf of supporters of a defendant cannot shift power relationships in the way that bottom-up direct participation by marginalized populations can. See Criminal Justice Standards for the Def. Function Standard 4-1.7 (Am. Bar Ass'n 2018), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html [<https://perma.cc/BMA6-X6BX>] (describing how a defense attorney's zealous advocacy of her client must come before other loyalties, opinions, or obligations); see also Godsoe, *supra* note 76, at 724 (describing this potential conflict in the context of participatory defense); cf. Moore et al., *supra* note 68, at 1284–85 (describing the power differentials between public defenders and marginalized populations who engage in participatory defense).

182. See, e.g., Gold, *Clientless Prosecutors*, *supra* note 53, at 733–35 (proposing the appointment of amici on behalf of the public).

183. For suggestions on how we might better do this, see generally, e.g., Appleman, *Community Right*, *supra* note 179 (public defenders); Friedman & Ponomarenko, *supra* note 47 (policing); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 *Wash. L. Rev.* 69 (2011) (prosecutors); Sekhon, *supra* note 179 (public defenders); Thompson, *It Takes a Community*, *supra* note 122 (prosecutors).

184. See David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 *U.C. Davis L. Rev. Online* 25, 26 (2017) [hereinafter Sklansky, *Progressive Prosecutor*], <https://lawreview.law.ucdavis.edu/online/vol50/Sklansky.pdf> [<https://perma.cc/4CM5-SPEM>] (describing the growing number of prosecutors who have won local elections based on a "more balanced approach to criminal justice"); Paige St. John & Abbie VanSickle, *Prosecutor Elections Now a Front Line in the Justice Wars*, Marshall Project (May 23, 2018), <https://www.themarshallproject.org/2018/05/23/prosecutor-elections-now-a-front-line-in-the-justice-wars> [<https://perma.cc/VZV7-ZGW2>].

individual defendants, there will be members of the public who support defendants, and there will be interests of the public that coincide with the interests of defendants. The people will be on both sides.

C. *When the People Are on Both Sides*

What does this new vision of criminal procedure look like on the ground? There are examples all around us. Many existing forms of communal contestation demonstrate how agonistic participation can be a powerful and productive force in local criminal justice, underscoring the place of “the People” on the side of the defendant. The tactics that make up participatory defense, for example, are powerful because they not only help mitigate an individual defendant’s sentence, they also connect the fate of that person to the public at large. A participatory defense team might produce a biographical video to be shown in court that tells an individual defendant’s personal story within the context of his neighborhood and local community.¹⁸⁵ Doing so demonstrates to the court that, in the words of one participant, “there never is a sentence just for the ‘defendant’, but rather . . . all the time of incarceration is shared time.”¹⁸⁶ Similarly, when a community bail fund posts bail for a stranger, or for multiple strangers in a mass bailout, they declare through their actions that they have a “shared destiny” with the people for whom they post bail.¹⁸⁷ And these actions, in the aggregate, build power within marginalized communities and push against established ideas of risk, public safety, and justice.

We can imagine an approach to criminal procedure that treats tactics of communal contestation, such as participatory defense or mass bailouts, as procedures worthy of consideration on an equal playing field with other mechanisms of generating public input. My argument is not that any of these interventions are always normatively good or procedurally just. Indeed, as I discuss below, there may be aspects of participatory defense or other movement tactics that make one pause to the extent that they bump up against an ideal of the rule of law. But to think about the popular thrust behind these interventions as being about communal or democratic input, rather than simply the enforcement of individual rights on behalf of one person, helps to situate their contribution and to analyze their relative worth. We need to make the crucial conceptual shift that movement actors have already made: that direct participation on the side of the defense is not just about individual defendants but is also

185. See ACJPDEBUG, *We Beat a 10 Year Sentence in New York with a Social Biography Video!*, Albert Cobarrubias Just. Project (Jan. 7, 2015), <https://acjusticeproject.org/2015/01/07/we-beat-a-10-year-sentence-in-new-york-by-sharing-a-family-story-through-video/> [https://perma.cc/55H4-JNRJ].

186. *Id.*

187. *Southerners on New Ground*, *supra* note 66 (“This action allowed us to demonstrate our collective belief in a shared destiny with the dreams, demands and hopes of black women in all of our varieties at the center.”).

about larger democratic engagement and pushing for responsive justice in a system that continues to ignore the input of marginalized populations.¹⁸⁸

Imagining criminal procedure as a process of regulating popular intervention on both sides of the "v." opens up procedure to new ways of thinking and acting. We can take account of the voices we include and exclude in proceedings and realize these are not inevitable choices. We can pay careful attention to the ways in which our current procedures facilitate or impede bottom-up resistance to local police actions and prosecutions from those who otherwise do not have a voice in the process. We can move beyond perfecting the community input into prosecution and the police in recognition that prosecutors and police departments can never truly represent a "community." We can move toward a jurisprudence of constitutional criminal procedure that acknowledges communal harms and communal interests beyond the traditional idea of "public safety." And we can hesitate before discounting messy forms of grassroots contestation in favor of the calm decorum of juries, elections, or community policing.

In the sphere of policy, for example, state actors might overcome their aversion to agonistic participation by enacting policies that allow for disruptive but nonviolent forms of protest and intervention. States might change their regulations for posting bail to allow community groups to post bail for multiple people, for any defendant, and in any amount, without taking a percentage of the money before returning bail at the end of the case.¹⁸⁹ Courtroom rules might shift to allow audiences to visibly support defendants.¹⁹⁰ States might change both the law and practice of excluding from juries individuals with criminal records or a history of contact with the police.¹⁹¹ State and local legislatures, courtroom rule-makers, police departments, and local prosecutors all have a role to play in reexamining these official policies. This does not mean that state actors should take control of these bottom-up interventions, for example

188. Cf. Akbar, *Radical Imagination*, *supra* note 56, at 479 (underscoring the importance of taking movement visions seriously in thinking about criminal justice).

189. See Simonson, *Bail Nullification*, *supra* note 59, at 634–36 (describing state policies that limit the amounts that charitable bail funds can post, charge fees for posting bail, and otherwise make it difficult for community groups to post bail).

190. See Simonson, *Audience*, *supra* note 79, at 2222–32 (describing how courtroom policies can change to be more inclusive of audiences, especially audience members who support defendants).

191. See Kalt, *supra* note 21, at 142–48 (suggesting a series of statutory and judicially driven reforms to implement this idea); see also Kleinfeld et al., *supra* note 53, at 1697 ("Practices of excluding citizens from juries based on their attitudes toward or histories with the criminal justice system, both as a matter of law and as a matter of practice, should be reduced in favor of a presumption of random selection and inclusion.").

through the creation of state-sponsored bail funds.¹⁹² Rather, state actors should take the bold step of *ceding power*, of deliberately facilitating power shifts down to the marginalized populations who traditionally have the least input into everyday justice.¹⁹³

Although for the most part this Essay has focused on courthouse dynamics of contestation, these arguments hold with equal force in other domains of criminal justice, including interactions with police officers on the streets and roads, collective efforts to shift the policies of individual prosecutors, and collective resistance by people in custody in jails and prisons. In order to promote collective dissent against policing priorities, localities might enact policies that respect the right of the people to assemble, protest, record, and verbally dissent when observing police interacting with people in public.¹⁹⁴ And administrators of prisons and jails might allow incarcerated people to engage in hunger strikes and labor strikes, and to publicize their efforts beyond prison walls.¹⁹⁵

A vision of criminal procedure that sees the “public interest” on both sides of each criminal case should inform constitutional procedural doctrines as well. This applies most directly to the doctrines structuring public participation in the courtroom: Courts might interpret the First and Sixth Amendments to give community members the right to dissent and intervene in individual cases,¹⁹⁶ and recognize the asymmetry of Sixth Amendment rulings that sanction the exclusion of individuals with criminal records as “biased” but find no bias in those with pro-police or pro-prosecutorial attitudes.¹⁹⁷ Beyond these doctrines structuring public participation, constitutional jurisprudence along a range of individual rights would shift profoundly if it were to recognize the popular interest on the side of defendants via the communal harms of arrests, prosecutions,

192. See Simonson, *When the City Posts Bail*, *supra* note 67, at 13–16 (arguing that city bail funds are dangerous because they co-opt social movement tactics that shift power relations).

193. For a provocative account of the importance of power and control in criminal justice, see M Adams & Max Rameau, *Black Community Control over Police*, 2016 *Wis. L. Rev.* 515, 529 (arguing that race-based policing policies will change only by shifting the power dynamics between black communities and criminal justice system actors).

194. See Simonson, *Beyond Body Cameras*, *supra* note 18, at 1574–78.

195. See Goodman et al., *supra* note 56, at 12 (“[C]ollective action, individual refusals, and other acts of contestation within penal institutions can have major effects on the development of criminal justice.”); cf. Lisa Guenther, *Beyond Guilt and Innocence: The Creaturely Politics of Prisoner Resistance Movements*, in *Active Intolerance: Michel Foucault, the Prisons Information Group, and the Future of Abolition* 225, 227, 232 (Perry Zurn & Andrew Dilts eds., 2016) (describing a “community of resistance” that emerged during hunger strikes at Pelican Bay); Dan Berger, *Rattling the Cages*, *Jacobin* (Nov. 18, 2016), <https://www.jacobinmag.com/2016/11/prison-strike-slavery-attica-racism-incarceration/> [<https://perma.cc/8D8E-YT2P>] (describing the labor strike by people in prisons throughout the United States in 2016).

196. See Simonson, *Audience*, *supra* note 79, at 2226–32.

197. See Roberts, *Disparately Seeking*, *supra* note 21, at 1403–04.

incarceration, and punishment.¹⁹⁸ Recognizing communal harms of arrests and prosecutions would shift key constitutional calculations, such as with respect to substantive due process,¹⁹⁹ the Eighth Amendment right against excessive bail,²⁰⁰ and the Fourth Amendment right against unreasonable searches and seizures.²⁰¹

These are just examples. But they demonstrate that overcoming the people/defendant dichotomy can have real on-the-ground consequences for how we design and enforce our procedures and how we interpret our constitutional rules. Envisioning the public intervening on both sides of individual criminal cases requires resetting our assumptions about *who* counts as democratic subjects in the administration of criminal law and *how* democratic participation happens in individual cases. By expanding our notions of participation, we might be able to move closer to a criminal legal system that is more inclusive and responsive to the public it claims to serve.

IV. RESISTANCE, THE RULE OF THE LAW, AND DECARCERATION

In this concluding Part, I flesh out some implications of putting the people on both sides of individual criminal cases for the moment that the United States finds itself in today: facing a carceral state that has ballooned out of control.²⁰² Despite widespread, though not universal, acknowledgement of the urgent need for large-scale criminal law

198. See Baughman, Pretrial Detention, *supra* note 104, at 4–7 (describing the social and communal harms of pretrial detention); Bierschbach & Bibas, *supra* note 133, at 213–18 (describing the collective costs to the public of the punishment of individuals); Yang, *supra* note 104, at 1423–29 (same). Constitutional doctrine itself also has profound social harms. See, e.g., Capers, Good Citizen, *supra* note 25, at 663–79 (describing citizenship harms that come from Fourth Amendment doctrine); Carbado, Fourth Amendment, *supra* note 115, at 966 (describing the social harms of Fourth Amendment doctrines to black people in the United States).

199. See Simonson, Bail Nullification, *supra* note 59, at 625–28 (discussing how substantive due process analysis shifts in the context of bail and pretrial detention when “the community” is recognized as a force on both sides of the constitutional calculus).

200. *Id.* at 628–31.

201. See Baradaran, *supra* note 103, at 3–4 (describing how judges making Fourth Amendment reasonableness determinations tend to defer to government interests without considering benefits to the public of ruling in favor of a defendant); Bierschbach, *supra* note 47, at 1451 (“[C]ourts applying the Fourth Amendment could fold the outlooks of victims of police abuse, innocent civilians, and communities of color into their reasonableness analysis.”); I. Bennett Capers, Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle, 46 *Harv. C.R.-C.L. L. Rev.* 1, 37–48 (2011) (arguing that Fourth Amendment doctrine should take into account broader “citizenship harms,” particularly to African Americans).

202. See generally Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Jeremy Travis et al. eds., 2014) (examining the massive increase in incarceration in the United States since the 1970s).

reform,²⁰³ mainstream reforms have yet to truly change the fundamental aspects of a system that arrests, prosecutes, and imprisons vast swaths of its population,²⁰⁴ with striking inequalities along lines of race, class, and gender.²⁰⁵ The most marginalized populations in the country are stuck in a cycle of imprisonment and supervision; they are “Caught,”²⁰⁶ “Locked In,”²⁰⁷ and suffocated in a “Chokehold”²⁰⁸—to name the titles of three recent scholarly books analyzing the problem. Marie Gottschalk (author of *Caught*) argues that the only way to achieve large-scale decarceration is to allow ourselves to be open to “convulsive politics from below”²⁰⁹—to collective resistance that can open up political room for transformation.²¹⁰ A number of other scholars, including Amna Akbar, Paul Butler, Allegra McLeod, Janet Moore, Dorothy Roberts, and Jonathan Simon, echo this idea: that our current moment demands extraordinary kinds of interventions into our modes of criminal justice, and that, today, the most inspiring visions for how to do this are found in on-the-ground movements for social and racial justice.²¹¹

203. Cf. Levin, *supra* note 37, at 260–65 (arguing that this “consensus” for criminal justice reform actually contains conflicting accounts of the problems and solutions to dismantle the carceral state).

204. Cf. Pfaff, *supra* note 177, at 1 (“The statistics are as simple as they are shocking: the United States is home to 5 percent of the world’s population but 25 percent of its prisoners.”).

205. See Natapoff, *The Penal Pyramid*, *supra* note 29, at 75 (“But there are at least five factors—classics, if you will—that capture much of the dynamic and explain how the law often works differently for different people under different circumstances. Those five phenomena are *offense severity*, *race*, *gender*, *class*, and *defense counsel* . . .”); Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America’s Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 *Nw. U. L. Rev.* 1625, 1627 (2017) (“With striking evidence of racial disproportionality in all aspects of its operations, the U.S. carceral state confronts an acute deficit, or even crisis, of legitimacy.”).

206. Gottschalk, *supra* note 56.

207. Pfaff, *supra* note 177.

208. Paul Butler, *Chokehold: Policing Black Men* (2017) [hereinafter Butler, *Chokehold*].

209. Gottschalk, *supra* note 56, at 282 (calling for “convulsive politics from below that we need to dismantle the carceral state and ameliorate other gaping inequalities”).

210. *Id.* at 2 (“For those seeking to dismantle the carceral state, . . . [t]he real challenge is figuring out how to create a political environment that is more receptive to . . . reforms and how to make the far-reaching consequences of the carceral state into a leading political and public policy issue.”).

211. See, e.g., Paul Butler, *Chokehold*, *supra* note 208, at 247 (calling for a “more open-minded perspective on . . . resistance” within the Movement for Black Lives); Butler, *Hip-Hop Theory of Justice*, *supra* note 119, at 133 (“[T]he hip-hop nation, and especially its black and Latino citizens, are best situated to design a criminal justice system.”); Akbar, *Radical Imagination*, *supra* note 56, at 473 (arguing that we should study and listen to the “radical imagination” of movement actors and their visions for change); McLeod, *Carceral State*, *supra* note 56, at 705 (arguing that the “ambitious visions of decarceration [from movement actors] offer a set of transformative aspirational ideas which might orient current reform efforts, rescuing more moderate criminal-law reform from its weakest and most disappointing possible futures”); Roberts, *Democratizing Criminal Law*, *supra* note

But does “convulsive politics from below” really belong *inside* the criminal courthouse? This Essay’s vision of criminal procedure would bring bottom-up contestation over criminal law and policy directly into courtrooms, and directly into individual cases, presenting a challenge to conventional understandings of the rule of law and procedural uniformity. In this Part, I confront this tension, defending a conception of criminal procedure in which “the People” are on both sides against the charge that doing so presents an insurmountable problem for the rule of law. I argue that in our present historical moment the risk of partially undermining the dominant idea of the rule of law is, overall, worth the upside of facilitating popular engagement by marginalized populations into a criminal legal system characterized by mass incarceration and supervision of those very populations. This is because popular interventions on behalf of defendants, and in opposition to a state claiming to represent “the People,” provide a method of opening up a closed and alienating criminal justice system to a set of beliefs in the need for decarceration and even abolition held by subsets of the public that have for too long been excluded from public discourse.

A. *Communal Resistance and the Rule of Law*

There is not a neat relationship between opening up criminal adjudication to direct participation on the side of defendants and protecting rule of law values. Many forms of direct participation in everyday adjudication operate squarely within established legal rules, for example when community bail funds post bail for strangers while following state and courthouse rules regarding the posting of bail, or courtwatching groups exercise their First Amendment right to observe courtroom proceedings.²¹² And yet, structuring local courtrooms to facilitate popular interventions on behalf of defendants may present dangers to the rule of law by facilitating unequal, irregular, or even oppressive forms of resistance to the ordinary criminal process. Here we might imagine, for instance, a version of white supremacist jurors nullifying

47, at 1607 (calling for a vision of democracy in which “black communities have greater freedom to envision and create democratic approaches to social harms—for themselves and for the nation as a whole”); Simon, *supra* note 205, at 1650 (“Reconstructing the carceral state will require a democratic process that involves impacted communities first and foremost in re-norming the abnormality against which the carceral state operates.”); Moore, *Decarceral Constitutionalism*, *supra* note 80, at 57–73 (connecting participatory defense and other movement-led tactics to the possibility of decarceration).

212. Indeed, one danger with communal interventions that promote the rule of law in this way is that they will legitimize an unjust system by giving it the appearance of fairness and regularity. See Simonson, *Bail Nullification*, *supra* note 59, at 635–37 (describing this danger in the context of community bail funds); cf. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *Yale L.J.* 1394, 1406 (2009) (describing how some law reform can “legitimate a deeper or broader injustice with the legal institution so improved, thus further insulating the underlying or broader legal institution from critique”).

extralegal lynchings of African Americans in the South:²¹³ A contemporary group intervening in a criminal case and driven by prejudice might promote rather than counter oppression and inequality.²¹⁴ Or, if a group is not acting out of prejudice, the group may be acting with the knowledge that they are not contributing to the good of the greater community by supporting a defendant. And even with good intentions, a collective intervention in an individual case might still undermine broader goals of uniformity and regularity when social movement actors choose to intervene in some, but not other, courtrooms and cases.

Whether these communal interventions into individual cases seem problematic will depend on one's idea of the rule of law—a notoriously contested concept.²¹⁵ For example, a traditional formalist conception of the rule of law, one insisting that judges must enforce all procedural rules in a neutral and uniform way, free of prejudice or popular meddling, might clash with a vision of popular intervention on the side of defendants.²¹⁶ Opening up decisionmaking at the individual level to the impulsive or biased preferences of unelected groups would imperil the neutrality and generality of criminal justice on the ground. In contrast, a more “responsive” conception of the rule of law might welcome popular intervention when it allows members of the public to engage in the process of defining the contours of legal meaning in adjudication.²¹⁷ This

213. See Michal R. Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South* 20, 25, 32, 54–55, 120–24 (1987) (detailing numerous cases in which Southern juries acquitted defendants of racial-violence charges despite significant evidence of guilt).

214. Cf. *Brown*, supra note 120, at 1196 (“There is a class of nullification verdicts that violates the rule of law; decisions by southern white juries are one example of that class. Closely examined, however, those instances are likely to involve circumstances in which the rule of law would fail regardless of juries’ involvement.”).

215. See, e.g., Fallon, supra note 42, at 10–24 (describing four differing conceptions of the rule of law).

216. Compare *id.* at 18–19, 31–32 (describing the Legal Process conception of the rule of law, which “attempt[s] to root law at least partly in a current normative consensus perceived as adequate to validate particular decisionmaking processes and their outcomes as lawful”), with supra notes 42–46 and accompanying text (describing a conception of the rule of law that focuses on systemic inputs during the lawmaking process and neutral application during the adjudication process). This formalist conception of the rule of law accords with what Philippe Nonet and Philip Selznick call “autonomous law,” in which “[r]egularity and fairness, not substantive justice, are the first ends and the main competence of the legal order.” Nonet & Selznick, supra note 23, at 54.

217. See, e.g., Nonet & Selznick, supra note 23, at 96 (defending the similar idea of legal pluralism, in which “legal action comes to serve as a vehicle by which groups and organizations may participate in the determination of public policy”); see also *id.* at 77 (describing responsive legal institutions as those which open themselves up to adaptation by “perceiv[ing] social pressures as sources of knowledge and opportunities for self-correction”); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 *B.U. L. Rev.* 209, 259 (2015) (“Responsive theories of law tend to be receptive to increased opportunities for participation in the legal process and to relatively expansive notions of the role of law.”).

conception of the rule of law would welcome multiple sources of legal authority²¹⁸ and might even welcome some *irregularity* in the interest of promoting legal decisionmaking that is more responsive to social needs and local democratic inputs. Many communal interventions into everyday justice fit comfortably into an idea of the rule of law that encourages multiple sources of legal authority, including direct public participation. When community bail funds post bail, for example, they help shape legal and constitutional understandings of the institution of money bail and the meanings of concepts like "community" and "public safety."²¹⁹ Under a responsive ideal of the rule of law, such communal interventions on the side of defendants represent a desirable form of popular participation in the production of legal meaning.

One's view of how communal resistance in the criminal courthouse fits within the rule of law will therefore go hand in hand with one's conception of how the contours of the rule of law interact with democracy, participation, and lawmaking. Moreover, it will depend on how one views the potential of political engagement in individual criminal cases, a theme echoed in the scholarly debate over jury nullification.²²⁰ Although beyond the scope of this Essay, this complex analysis will be an important job for future work: to parse through various mechanisms of facilitating popular participation, and to reject some while embracing others, along a range of conceptions of the rule of law and its relationship to substantive justice. For now, one might agree with the central argument of this Essay—that our methods of everyday adjudication would benefit from moving beyond a neat dichotomy between the interests of the public and the interests of the defendant—without endorsing all forms of communal

218. See Brown, *supra* note 120, at 1161–66; see also *id.* at 1164 (“[T]he rule of law not only permits interpretation of rules through such sources [outside of the written law] in a manner that may yield results very different from literal rule application, but may require it.”); cf. Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 *Yale L.J.* 561, 566 (1977) (book review) (“[The rule of law] creates formal equality—a not inconsiderable virtue—but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes.”).

219. See Simonson, *Bail Nullification*, *supra* note 59, at 612–31 (describing how community bail funds contest the meaning of “community” and engage in legal and political change).

220. Compare Brown, *supra* note 120, at 1169–71 (arguing that jury nullification falls within the rule of law), and Carroll, *Nullification*, *supra* note 120, at 621 (stating that jury nullification “creates a mechanism to lend predictability and knowability to the law when formal constructs have failed to align themselves with the citizen’s own expectations”), with Andrew D. Leipold, *Rethinking Jury Nullification*, 82 *Va. L. Rev.* 253, 299–300 (1996) (“There is some force to [the] arguments [for jury nullification], but not enough to justify the existing nullification doctrine.”), and Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L.J.* 677, 705 (1995) [hereinafter Butler, *Black Power*] (“The idea that jury nullification undermines the rule of law is the most common criticism of the doctrine.”). For a summary of this debate, see Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 *Wis. L. Rev.* 1115, 1131–33 (2003).

resistance in the courthouse. And one could support changes in formal rules—for example, changing rules for posting bail that inhibit the work of community bail funds—in an effort to bring existing strategies of communal intervention in sync with formal ideals of the rule of law.

But this is not the end of the matter. Running alongside divergent conceptions of the rule of law is yet another idea: that we might need to set aside our complete fidelity to the rule of law (however conceived) in the face of widespread injustice. Carol Steiker's writings on the relationship between mercy and the rule of law bring out this idea. Steiker argues that when institutional relationships result in overly harsh treatment and punishment of defendants, the idea of mercy can provide a "necessary counterbalance."²²¹ In this account, opening up the processing of individual criminal cases to mechanisms of discretionary mercy might be scary and unpredictable, and even run counter to the rule of law; and yet, the ideal of mercy may still be necessary to combat the harsh nature of everyday criminal justice.²²² As Steiker writes of the alarming nature of some forms of jury nullification, "[I]n our time, the alternative—the unending spiral of mass incarceration—looks a lot worse."²²³ In a similar vein, Paul Butler has written with respect to race-based jury nullification that "[i]f the rule of law is a myth, or at least is not applicable to African-Americans, the criticism that jury nullification undermines it loses force."²²⁴ Under this view of the relationship between justice and the rule of law, the importance of the rule of law bends in the face of widespread injustice such as that found in the American carceral state. If in the vast majority of cases we do not have a baseline of the rule of law, then our fidelity to it is misplaced.

This critique continues to resonate in the United States today, where we face an "unending spiral of mass incarceration," in the context of a set of criminal procedures that lead people most impacted by everyday criminal adjudication to conclude that the rule of law is, indeed, a myth. This is especially true at the bottom of the "the penal pyramid," where "rules hardly matter at all" as state actors rush poor people and people of color through the court system without careful attention, purpose-giving, or adjudication of guilt or innocence.²²⁵ At the bottom of the penal

221. Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in *Forgiveness, Mercy, and Clemency* 16, 31 (Austin Sarat & Nasser Hussain eds., 2007) [hereinafter Steiker, *Tempering or Tampering*].

222. *Id.* at 30–32; see also Carol S. Steiker, *Sculpting the Shape of Nullification Through Jury Information and Instruction*, in *Criminal Law Conversations* 553, 553–54 (Paul H. Robinson et al. eds., 2009) [hereinafter Steiker, *Sculpting the Shape*] (arguing that although jury nullification may be alarming in some instances, nullification is necessary to counteract the spread of mass incarceration).

223. Steiker, *Sculpting the Shape*, *supra* note 222, at 554.

224. Butler, *Black Power*, *supra* note 220, at 708. See generally Steiker, *Tempering or Tampering*, *supra* note 221 (arguing that mercy is a potentially appropriate way of mitigating the "draconian harshness of our current penological regime").

225. Natapoff, *The Penal Pyramid*, *supra* note 29, at 72.

pyramid, the rule of law begins to disappear.²²⁶ This recognition might relax our idea of what kind of participation the system allows, up to when it clashes with due process concerns for individual defendants.²²⁷ Depending on the "rules" governing any one mechanism of participation, to open up the criminal courtroom to new forms of participation might require being comfortable undermining the rule of law in order to promote larger ideals of substantive justice in an unequal or unfair system. Indeed, it may be that it is precisely these forms of popular participation that offer the greatest hope for pushing back against the "unending spiral[s]" of mass incarceration, supervision, and police violence that make up the carceral state. Drawing inspiration from this conception of the place of the rule of law in a profoundly unjust system, in the next and last section of this Essay I gesture toward a direct connection between facilitating communal interventions in criminal adjudication on behalf of defendants and the possibility of large-scale decarceration.

B. *Procedure and the Possibility of Decarceration Today*

We cannot separate out the intractability of mass incarceration from the powerlessness of those caught up in it.²²⁸ Part of the path toward decarceration may therefore lie in opening up criminal justice institutions to the relatively powerless voices who have not played a large role in getting us to the place where we are.²²⁹ There is reason to believe that if we open up criminal procedure to more popular input from below, the result would be a system that is profoundly skeptical of much of the status quo in criminal justice today. To be sure, not all bottom-up interventions on behalf of defendants will be interventions that we all can agree are

226. Carroll, Nullification *supra* note 120, at 581 ("[A]dhering too closely to any particular ideal of the rule of law leaves large swaths of the actual experience of governance and lawmaking unaccounted for.").

227. See Simonson, Audience, *supra* note 79, at 2204–05 (discussing how the individual rights of a defendant to due process and a fair trial trump the rights of audience members to participate in everyday courtroom proceedings).

228. See Walker, *supra* note 41, at 8 ("At every point in the history of [American] criminal justice, the people arrested, prosecuted, and punished have been mainly the poor and powerless."); Roberts, Constructing a Criminal Justice System, *supra* note 24, at 279–86; Moore, Decarceral Constitutionalism, *supra* note 80, at 9–11.

229. Cf. Barker, *supra* note 133, at 2 (arguing that "increased democratization can support and sustain less coercive penal regimes" by bringing in less privileged political opinions); Miller, Mob Rule, *supra* note 133, at 8 ("The more non-elites can successfully influence government policy over collective securities—the more the mob rules—the more likely the political system will address security from violence as a collective good and will moderate its use of repressive practices."); Sklansky, Democracy, *supra* note 27, at 191 ("[S]ensitivity to the oppositional side of democracy—the tradition of anti-inegalitarianism—can help to keep us focused on the ways in which policing can buttress, or alternatively can destabilize, entrenched patterns of illegitimate domination."); Simon, *supra* note 205, at 1648–50 (arguing that the rising illegitimacy of the criminal justice system in the era of Black Lives Matter presents an opportunity for transformative change).

good ones, but they will tend to be interventions that shift power imbalances: not just shifting power away from prosecution but also shifting power away from the dominant idea that the criminal legal system is the best and only way to contend with communal ills. In this way, opening up criminal procedure to allow “the People” to support defendants facilitates discourses that are part of an “abolitionist ethic”—what Allegra McLeod describes as a “gradual project of decarceration,” changing how we think about the purposes of criminal law and procedures themselves.²³⁰

Drawing a direct line between collective participation in individual cases and the larger project of decarceration surely requires more study. And perhaps recent electoral victories by “progressive” prosecutors, such as former civil rights lawyer Larry Krasner in Philadelphia,²³¹ undermine the notion that it is the only way to achieve decarceration.²³² But, significantly, this is how movement actors engaging in collective practices on behalf of defendants understand their work: as a way to build the power necessary to truly transform criminal justice. When activists post bail for a stranger, or engage in a participatory defense campaign, they see themselves as “practicing abolition every day”²³³ and engaging in “abolition in the now”²³⁴—moving away from the incarceration of poor people and people of color, and toward other ways of addressing wrongdoing and promoting public safety. These movement actors bring with them sophisticated understandings of the history and discourse surrounding seemingly neutral procedures—their intention is not simply to intervene using existing procedures but also to disrupt the normalcy of those procedures by laying bare the ways in which they function to perpetuate

230. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. Rev.* 1156, 1161 (2015); see also Butler, *Chokehold*, *supra* note 208, at 229–47 (describing approaches to criminal justice reform that fit into an abolitionist ethic); Akbar, *Radical Imagination*, *supra* note 56, at 460–73 (describing the abolitionist ethic of the Movement for Black Lives).

231. See Harrison Jacobs, *The Inside Story of How Trump United a City of Activists to Elect the Most Progressive District Attorney in a Generation*, *Bus. Insider* (Nov. 12, 2017), <https://www.businessinsider.com/larry-krasner-philadelphia-election-platform-trump-2017-11> [<https://perma.cc/KL9U-9EPR>].

232. See generally Sklansky, *Progressive Prosecutor*, *supra* note 184, at 26 (describing a growing number of prosecutors who have won local elections based on a “more balanced approach to criminal justice”).

233. Mariame Kaba, *Take No Prisoners*, *Vice* (Oct. 15, 2015), https://www.vice.com/en_us/article/mending-our-ways-0000775-v22n10 [<https://perma.cc/X86N-FTEJ>] (describing how a number of activist organizations, including that of the author, “are practicing abolition every day . . . by creating local projects and initiatives that offer alternative ideas and structures for mediating conflicts and addressing harms without relying on police or prisons”).

234. Grant, *supra* note 65 (quoting Mary Hooks of SONG as describing Mama’s Bail Out Day as a form of “abolition in the now”).

structural inequalities.²³⁵ With bail, for example, the goal of community bail funds is rarely to become permanent fixtures of a local pretrial system, but rather to push for the abolition of bail and even pretrial detention altogether.²³⁶ These groups do not simply study or document widespread forms of inequality; rather, they practice the undoing of those forms of inequality through collective acts of intervention in individual cases.

Communal support of a defendant can thus be disruptive in the sense that it can call into question basic assumptions about the operation of everyday justice. But such collective resistance is not mere protest or civil disobedience; it is a method of democratic contestation over the meaning of justice in a structured and civil setting. Agonistic participation is a way to bring in collective viewpoints that call into question our modes of criminal law and procedure themselves and yet do so under regulated conditions that demand respect for both sides.²³⁷ To allow the people in on both sides does not require that we abolish the police, end all prosecutions of misdemeanors, or close all jails and prisons, but it does demand that we be open to putting those options on the table.²³⁸ In this way, constructing criminal procedures so that they allow participation on the side of the defendant can help produce a more substantial public discourse over legal, political, and constitutional meaning in the realm of criminal law.

Maintaining an adversarial system with the people on both sides makes room for forms of popular intervention that either deny that a

235. Cf. Akbar, *Radical Imagination*, supra note 56, at 421–60 (describing the nuanced legal thinking of social movement actors in the Movement for Black Lives).

236. See Brian Sonenstein, *As Abolition Becomes More Likely, Chicago Bond Fund Sees Future Where They Aren't Needed*, *Shadowproof* (May 9, 2017), <https://shadowproof.com/2017/05/09/chicago-bond-fund-series-part-two/> [<https://perma.cc/2MLF-UXC7>]; see also Weiss, supra note 59 (describing the abolitionist goals of many community bail funds, which aim to “create space to identify and then experiment with new structures that hold people in crisis in ways that are not punitive but instead accountable to communities and concerned with repair and prevention”). Bail funds demonstrate, for example, that “transformative” bail reform will require “a historically grounded understanding of the inherent anti-Blackness of our criminal punishment system and an exploration of how many proposed reforms continue to re-entrench oppression and to prioritize profit over people.” Color of Change et al., *Transformative Bail Reform: A Popular Education Curriculum 3* (2016), <https://policy.m4bl.org/wp-content/uploads/2016/07/Transformative-Bail-Reform-5.pdf> [<https://perma.cc/2NXA-XMZK>].

237. See Mouffe, *Agonistics*, supra note 25, at 9 (“In an agonistic politics, . . . what is at stake is the struggle between opposing hegemonic projects which can never be reconciled rationally, one of them needing to be defeated. It is a real confrontation . . . played out under conditions regulated by a set of democratic procedures accepted by the adversaries.”).

238. Cf. Akbar, *Radical Imagination*, supra note 56, at 471 (“One might disagree with the argument to abolish police, but having the debate is itself productive, as it forces conversations about the otherwise-taken-for-granted values of police and incarceration.”); Simon, supra note 205, at 1650 (describing the need “to lay the ground work for any serious democratic discourse over how to reshape the carceral state”).

wrong has been committed at all, or, more provocatively, seek to unearth the ways in which the allegation of a wrong can serve as a cover for forms of social control and group domination. Our consensus-based methods of trying to facilitate discussions and deliberation around issues of local justice have not been up to the task of lifting up these ideas on their own. Moving beyond consensus, we can also create contestatory spaces in which the public can hash out competing perspectives on the meaning of justice in their communities, pushing us to consider new ways of thinking about and reacting to violent or undesirable conduct. If these voices, opinions, and visions are not a part of the discourse around criminal law and procedure, then we risk failing to ask ourselves the most difficult questions about whether our dominant modes of processing criminal cases are right or just. Public participation on both sides of criminal cases therefore carries with it the potential to lead us not just to more democratic criminal law but also to *less* criminal law.²³⁹

CONCLUSION

Herbert Packer believed that by theorizing competing models of criminal procedure, he could in turn shift on-the-ground practices and understandings of why and what we punish.²⁴⁰ At the same time, Packer cautioned that there was a limit to due process, writing that “[w]e sorely need to . . . ask ‘what’ and ‘why’ [we punish] before we ask ‘how.’”²⁴¹ In this Essay, I have attempted to argue the inverse proposition: By expanding the “how”—by opening up our procedures to communal contestation—we can facilitate more productive interchanges on “what” and “why” criminal adjudication should be. Without the voices of the most marginalized, that conversation—over the meaning of justice, over how to best respond to wrongdoing—will not truly reflect the full scope of the multiple publics who are a part of everyday justice.

We are in the throes of a new age of local criminal law and policy reform in the United States, reform that goes beyond changing substantive criminal law statutes and rewriting sentencing laws to include big-picture rethinking of our criminal processes. If we can value public participation beyond representation by the police and prosecution, then

239. It is no coincidence that Nonet and Selznick, in their typology of conceptions of the rule of law, identified “responsive law” with a decrease in the use of the criminal law and criminal sanctions overall. See Nonet & Selznick, *supra* note 23, at 89–92 (describing how responsive law involves a reduction in the use of criminal sanctions).

240. In particular, Packer believed that the preferable model—the “due process model”—would provide enough roadblocks to “assembly-line justice” so as to make us realize the need to eliminate “the endless procession of look-alike cases, especially through the lower criminal courts.” Packer, *Limits*, *supra* note 28, at 292; cf. Aviram, *supra* note 29, at 238–45 (analyzing Herbert Packer’s models of criminal procedure within the context of the Warren Court’s criminal procedure jurisprudence).

241. Packer, *Limits*, *supra* note 28, at 366.

we can open up our visions of how we craft criminal procedure and interpret doctrine in new and important ways, moving toward local criminal adjudication that is more responsive to the multidimensional demands of the popular will.

