

The Community in Criminal Justice: Subordination, Consumption, Resistance & Transformation

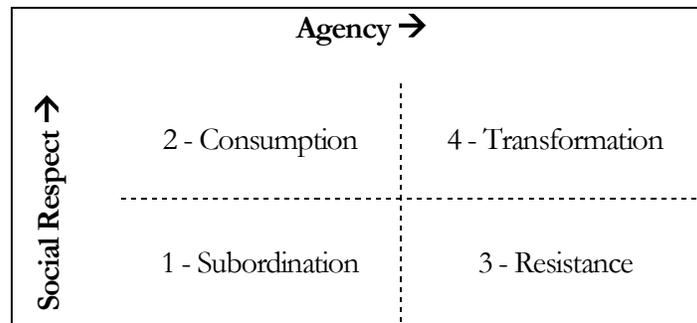
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*How are members of marginalized communities connected with the criminal legal system?
How might reformers understand the complexities of those entanglements?*

This paper sets forth four modalities of the relationship between marginalized community members and the criminal justice system: *subordination, consumption, resistance, and transformation*. These modalities attempt to break out of traditional ways of thinking about community members’ formal roles in the system—defendants, witnesses, victims, judges, prosecutors, police officers, correctional officers, and the indeterminate but oft-invoked “community.” Instead, these modalities are fluid and situational.

This paper also calls for new research, scholarship, and advocacy that takes seriously how members of marginalized communities engage in these fluid and situational modalities. In order to create lasting change, such as the democratization of justice systems and the drastic reduction of social marginality, policymakers, scholars, and advocates must be cognizant of all of these modalities, and must not attend to one or two modalities while neglecting the rest. Shallow understandings of the interconnectedness of these modalities is one reason that the link between social marginality and crime control remains so difficult to address. Moreover, a lens that focuses only on subordination produces limits forward-thinking, normative thought about policies that can encourage community members’ transformative engagement with the justice system.

Fig. 1: Modalities of Community-Criminal Justice Engagement



The field of community-criminal justice engagement, visually represented in Figure 1, might be organized around two axes. The horizontal axis describes the *amount of agency* associated with the modality, while the vertical axis describes the *amount of social respect* associated with the modality.

I. Subordination

How does the criminal justice system produce and reproduce the deprivation and dispossession of particular communities?

The overarching relationship between marginalized communities in the United States and the criminal justice system has been one of race-class domination and subjugation. From a subordination framework, members of marginalized communities are viewed as low in social esteem and low in agency. Regardless of

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their official role in the system—victim, defendant, witness—marginalized community members can be understood as system outsiders. Even the status of victim, which for some groups elicits social responses of protection and punitiveness, does not accrue to marginalized in the same way as it might, for example, to a white woman.¹ From a subordination perspective, attempts at agency may simply underscore the brutality of the system. For example, recent research by Matthew Clair shows that lower-status criminal defendants are less likely to trust their lawyer and thus are more likely to be involved in their case, but in ways that are ultimately unhelpful and elicit the ire of court authorities.² Nicole Gonzalez Van Cleve found that an array of court actors, including judges, prosecutors, and even public defenders, contributed to the racialized powerlessness within criminal adjudicative bodies.³

African Americans have been most central to the subordination story. As historian Khalil Gibran Muhammad has documented, the construction of African Americans as criminals began in earnest during the late 19th century, most prominently with the publication of Frederick L. Hoffman’s *Race Traits and Tendencies of the American Negro* (1896), which deployed statistical analysis to make sweeping claims about the tendencies of African Americans, a group that he called “a distinct element” that “presents more than at any time in the past the most complicated and seemingly hopeless problem among those confronting the American people.”⁴ Hoffman believed that his statistics—which were merely descriptive statistics comparing white and “colored” by a wide variety of indicators, far below the standard for making racially comparative claims today—“speak for themselves.”⁵

While scholars constructed black criminality, black people were recognizing and responding to the system’s misuse by developing a distrust of it. In the early twentieth century, W.E.B. Du Bois was likely the first scholar to empirically document this distrust.⁶ As part of a series of studies of African-American life, Du Bois and his collaborators collected survey, interview, and administrative data on crime, arrest, and incarceration. Du Bois and collaborators found, among other things, that white officials and black men had greatly divergent perspectives on the possibilities of justice for African Americans in Georgia courts. Du Bois reasoned that punishment practices prevalent at the time, such as lynching, “spread[] among black folk the firmly fixed idea that few accused Negroes are really guilty.”⁷ Du Bois also condemned the relative lack of legal protection for African Americans, as well as criminal justice practices such as the leasing of convicts, that sent a message to

¹ Most foundationally, see David Baldus’ *Procedural Reform Study*, discussed in *McCleskey v. Zant*, 580 F. Supp. 338, 353–55 (N.D. Ga. 1984), *rev’d in part, aff’d in part sub nom. McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *aff’d*, 481 U.S. 279 (1987). Advocates highlight ways in which African-American women and men who have been victims of crime are often treated negatively within the criminal justice system. See, e.g., Sarah Jaffe, Mariame Kaba, Randy Albelda & Kathleen Geier, *How to End the Criminalization of America’s Mothers*, NATION, Aug. 21, 2014; see also JODY MILLER, GETTING PLAYED: AFRICAN AMERICAN GIRLS, URBAN INEQUALITY, AND GENDERED VIOLENCE (2008); LAURENCE RALPH, RENEGADE DREAMS: LIVING THROUGH INJURY IN GANGLAND CHICAGO 3-5 (2014). Meanwhile, the trope of the truly vulnerable white female victim persists. See, e.g., I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826 (2013); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061 (2006).

² Matthew Clair, *Resources, Navigation, and Punishment in the Criminal Courts* (unpublished manuscript, on file with author).

³ NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT (2016).

⁴ FREDERICK L. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO 1 (1896).

⁵ KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 36 (2010).

⁶ See W.E. BURGHARDT DU BOIS, SOME NOTES ON NEGRO CRIME: PARTICULARLY IN GEORGIA (1904); ALDON MORRIS, THE SCHOLAR DENIED: W. E. B. DU BOIS AND THE BIRTH OF MODERN SOCIOLOGY (2015).

⁷ Du Bois, *supra* note 6, at 65.

African Americans that the purpose of the system was to make money for the state rather than to rehabilitate supposed lawbreakers.⁸

Du Bois’ research was prescient, at least with respect to the direction of research and scholarship on African Americans’ relationship to the crime control system over the next century. The evidence confirming the existence of a tense and distrustful relationship between African Americans and law enforcement mounted over the ensuing decades.⁹ A high watermark was the 1968 Kerner Commission Report, commissioned by the Johnson Administration in the wake of twenty-three episodes of urban unrest during the mid- and late-1960s. The Report concluded that, for many African Americans, the “police have come to symbolize white power, white racism, and white repression.”¹⁰ The Report documented “tension” and “hostility” between law enforcement and urban African Americans, blaming the “abrasive relationship” on a combination of increased demands for protection and service and the police practices thought necessary to provide those services. Bayley and Mendelsohn concluded that African Americans, Hispanics, and whites “live in completely different worlds” with respect to policing. In the South and in the Northeastern and Midwestern Rust Belt cities where many African Americans relocated during the Second Great Migration, police forces often functioned to maintain the expulsion of African Americans from the center of social and political life, at times violating the law in service of racial control.¹¹ Despite pervasive harsh policing that ostensibly was intended to suppress and deter crime, African Americans felt neglected and inadequately protected.¹²

Recent events only underscore both the perception and the reality that criminal justice constitutes and reconstitutes racial subjugation by denying marginalized groups, especially young African American men, full educational and employment opportunities.¹³ While consequences are most severe for people with felony convictions who experience prison sentences, lower level criminal justice involvements have deleterious effects on the hardest-hit communities.¹⁴

Poverty and other forms of disadvantage multiply the racial character of criminal justice system interaction. Perceived police nonchalance about crimes against residents of struggling communities further alienates the community from the government officials tasked with protecting them, a perceived indifference

⁸ *Id.*

⁹ *See, e.g.*, DAVID H. BAYLEY & HAROLD MENDELSON, *MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA* (1969); RONALD WEITZER & STEVEN A. TUCH, *RACE AND POLICING IN AMERICA: CONFLICT AND REFORM* (2006); John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 AM. J. SOC. 329 (1982); Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445 (2006); David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. Soc. 1190 (2011); Christopher Muller & Daniel Schrage, *Mass Imprisonment and Trust in the Law*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 139 (2010); Rashawn Ray, Kris Marsh & Connor Powelson, *Can Cameras Stop the Killings? Racial Differences in Perceptions of the Effectiveness of Body-Worn Cameras in Police Encounters*, 32 SOC. FORUM 1032 (2017).

¹⁰ NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 5 (1968).

¹¹ *E.g.*, MARILYNN S. JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY*; MUHAMMAD, *supra* note 5.

¹² *E.g.*, JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* (2015); SUDHIR ALLADI VENKATESH, *AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO* (2000).

¹³ *E.g.*, DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007); BECKY PETITT, *INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS* (2012); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

¹⁴ *E.g.*, ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018); Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255 (2015).

with deep history and ongoing salience.¹⁵ Residents of black disadvantaged neighborhoods often suspect that police uses of force are merely displays of power, and are not born of a desire to meet communities’ safety needs.¹⁶ Contemporary events have shed new light on longstanding tensions between African Americans and law enforcement. Disproportionate use of fines and warrants, along with controversial policies like broken windows policing and “stop-and-frisk,” have exacerbated the troubled relationship between poor African Americans and law enforcement.¹⁷ Of course, the various potential “back ends” of the criminal justice system—repeated arrest and processing,¹⁸ probation,¹⁹ parole,²⁰ incarceration²¹—reinforce race and class hierarchy.

Community members recognize these injustices, and it shapes their broader perceptions of the criminal justice system.²² Professor Carla Shedd, in a rich study of youth, school, and policing, finds that unequal policing of African-American students in diverse contexts makes them more aware of their social position and thus exacerbates their distrust of legal authority and perception of social injustice relative to youth who attend more segregated schools.²³ Professor Forrest Stuart shows that residents of Los Angeles’ Skid Row, largely African-American and Latino, moves away from a trust/distrust framework and describes a number of strategies of “cop wisdom” that Skid Row residents use to navigate policing in daily life, hoping to avoid the harshness of even “therapeutic” policing.²⁴ In these works and others,²⁵ the relevant question is not how people who are in marginalized communities *feel* about the police affectively or even whether they trust the police to deliver certain goods. Instead, the broad, common set of questions might be: How does policing send messages to groups about their place in the social order? How do members of those groups cope with the daily realities and consequences of those messages?

Contemporary social science research on policing has often focused on the *legitimacy* of legal authorities. This research, operating from a social psychological angle, has used a conception of legitimacy that tends to focus more on whether people, generally speaking, are more or less likely to comply or cooperate with law enforcement based on how the police treat them.²⁶ In some work, Tyler and colleagues have been more

¹⁵ *E.g.*, ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (1999); JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015).

¹⁶ ANDERSON, *supra* note 15; Rod K. Brunson, “*Police Don’t Like Black People*”: *African-American Young Men’s Accumulated Police Experiences*, 6 *CRIMINOLOGY & PUB. POL’Y* 71 (2007).

¹⁷ ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016); FORREST STUART, *DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW* (2016); Jeffrey Fagan, *Law, Social Science, and Racial Profiling*, 4 *JUST. RES. & POL’Y* 103 (2002).

¹⁸ *See* MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979); KOHLER-HAUSMANN, *supra* note 14.

¹⁹ Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 *GEO. L.J.* 291 (2016); Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 *PUNISHMENT & SOC’Y* 53 (2017).

²⁰ JOAN PETERSILLA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003); JONATHAN SIMON, *POOR CONTROL* (1993).

²¹ NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (2014).

²² *E.g.*, WEITZER & TUCH, *supra* note 9; William Terrill & Michael D. Reisig, *Neighborhood Context and Police Use of Force*, 40 *J. RES. CRIM. & DELINQUENCY* 291 (2003).

²³ CARLA SHEDD, *UNEQUAL CITY: RACE, SCHOOLS, AND PERCEPTIONS OF INJUSTICE* (2015).

²⁴ STUART, *supra* note 17, at 19.

²⁵ *E.g.*, ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014); NIKKI JONES, *BETWEEN GOOD AND GHETTO: AFRICAN AMERICAN GIRLS AND INNER-CITY VIOLENCE* (2010); VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011).

²⁶ *E.g.*, TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW* (2002); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC’Y REV.* 513 (2003); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 *OH. ST. J. CRIM. L.* 231 (2008). To be clear, the procedural justice-legitimacy literature *does* take account of concerns like individually signaling inclusion and group value, but generally inclusion is discussed as a means

attentive to the racialized milieu of police-community contacts and relations.²⁷ Yet, because of the individualist and direct interaction-focused framing applied even in that work, this body of research tends to imply that the core issues shaping trust in law enforcement relate to the respect shown in encounters, not the social meanings of law enforcement to particular social groups, or the deep structures that link up with those meanings.²⁸

Sociologists Robert J. Sampson and Dawn Jeglum Bartusch have described “‘anomie’ about law” in predominantly black and poor neighborhoods in Chicago, a phenomenon they label “legal cynicism.”²⁹ Sampson and Bartusch were describing ruptures in the social bonds that connect individuals to their community and, in particular, to the state through law enforcement, thereby perpetuating criminal offending.³⁰ Rebutting the idea that crime was high in predominantly African-American neighborhoods because African Americans were more accepting of criminal behavior than other groups, Sampson and Bartusch found that African Americans and Latinos were *less* tolerant of deviance than whites, but higher in cynicism about the law and legal authorities because of concentrated disadvantage. In the years since Sampson and Bartusch developed the legal cynicism concept, numerous scholars have built on the notion.³¹

Kirk and Papachristos offer an important reiteration and slightly more specific interpretation, describing legal cynicism as a “cultural orientation in which the law and the agents of its enforcement, such as the police and courts, are viewed as illegitimate, unresponsive, and ill equipped to ensure public safety.”³² However, their definition still emphasizes the subjective outcome of perceived illegitimacy rather than embedding a specific set of processes, or the precise structural conditions thought to produce it, into the theory.

of reaching the goal of building trust in and compliance with the law and legal authorities. See Tom R. Tyler, Jonathan Jackson & Avital Mentovich, *The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact*, 12 J. EMP. LEGAL STUDS. 602 (2015); Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy? The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALBANY L. REV. 1095 (2014)

²⁷E.g., Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253 (2004); Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 POLICE Q. 322 (2005).

²⁸ See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 102 (2016); Monica C. Bell, *Police Reform & the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017). Cf. Justice Tankebe, *Public Cooperation with the Police in Ghana: Does Procedural Fairness Matter?*, 47 CRIMINOLOGY 1265 (2009). But see Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQUETTE L. REV. 651 (2009).

²⁹ Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 32: 777, 778 (1998).

³⁰ To be sure, and as noted above, scholars have long captured some of these dynamics, both before and as contemporaries with Sampson and Bartusch. For example, Elijah Anderson credits the tendency to use extra-legal forms of violence to “the profound sense of alienation from mainstream society and its institutions felt by many poor inner-city black people . . .” ANDERSON, *supra* note 15, at 34.

³¹ See, e.g., John Hagan & Sanja Kutnjak Ivković, *War Crimes, Democracy, and the Rule of Law in Belgrade, the Former Yugoslavia, and Beyond*, 506 ANN. AM. ACAD. POL. & SOC. SCI. 129 (2006); Christopher R. Browning, *Illuminating the Downside of Social Capital: Negotiated Coexistence, Property Crime, and Disorder in Urban Neighborhoods*, 52 AM. BEHAV. SCI. 1556 (2009); Brooklynn K. Hitchens, Patrick J. Carr & Susan Clampet-Lundquist, *The Context for Legal Cynicism: Urban Young Women's Experiences with Policing in Low-Income, High-Crime Neighborhoods*, 8 RACE & JUST. 27 (2018); Joanna M. Lee, Laurence Steinberg, Alex R. Piquero & George P. Knight, *Identity-Linked Perceptions of the Police Among African American Juvenile Offenders: A Developmental Perspective*, 40 J. YOUTH & ADOLESCENCE 23 (2011); Patrick J. Carr, Laura Napolitano & Jessica Keating, *“We Never Call the Cops and Here Is Why”: A Qualitative Examination of Legal Cynicism in Three Philadelphia Neighborhoods*, 45 CRIMINOLOGY 445 (2007); see also Marc Hertogh, *“No Justice, No Peace!” Conceptualizing Legal Alienation in the Aftermath of the Trayvon Martin Case*, in LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL 187 (R. Nobles and D. Schiff eds., 2014); Jonathan Jackson, Ben Bradford, Mike Hough & Katherine Helen Murray, *Compliance with the Law and Policing by Consent: Notes on Police and Legal Legitimacy*, in LEGITIMACY AND COMPLIANCE IN CRIMINAL JUSTICE 29 (A. Crawford & A. Hucklesby eds., 2010).

³² Kirk and Papachristos, *supra* note 9, at 1191.

Regardless of how trust is conceived or measured or conceived, much literature has shown that African Americans, particularly those who are poor or who live in high-poverty or predominantly African-American communities, tend to be less trustful not only of police, but also other governmental institutions, their neighbors, and even their intimate partners in comparison to other racial and ethnic groups in the United States.³³ The picture that emerges from the research on race, poverty, and trust—separately from policing—is one of profound social diminishment. As explained in coming sections, distrust and subjugation do not encapsulate the fullness of the African-American experience with criminal justice. Yet, it is clear that poor African Americans as a group tend to have a distinctive social experience from those of other ethnic and socioeconomic groups in the United States, mediated through the criminal legal system. Thus, most discussions of African-American “distrust” of the police only skirt the edges of a deeper, hierarchy-driven fracture between these communities and legal authorities.



The image above is a public art display in West Baltimore, Maryland, created shortly after the arrest and death of Freddie Gray in police custody in April 2015.³⁴ The display, created by Baltimore religious artist Loring Cornish—best known for his mosaic art about love and God—includes two signs. One sign, painted in black on a red background reads, “Lynching still exist, white police use bullets and law to lynch blacks legally.” The other sign, painted in white on a black background, reads, “Freddie Gray victim of Baltimore City police brutality.” Jarringly, the display features several small figurines that look like dolls, painted in black, wrapped in rope, and hung from the trees in front of Cornish’s studio. The figurines drive home the connection Cornish sees between racist lynching and police violence.

While Cornish’s work does not necessarily represent the views of other African Americans, it is a searing illustration of what research suggests about the overarching relationship between African American communities and the criminal justice system: Many African Americans see the criminal justice system not merely

³³ See Sandra Susan Smith, *Race and Trust*, 36 ANN. REV. SOC. 453 (2010).

³⁴ Loring Cornish Studio and protest art, West Baltimore, MD. Photograph taken June 22, 2015.

as a bundle of interactions with street-level bureaucrats whom they may or may not trust depending on how they are treated in a given moment, as implied in procedural justice and legitimacy interventions, but rather as a “total” or “greedy” institution³⁵ that arbitrarily affects African Americans regardless of criminal behavior. From this perspective, the criminal legal system functions primarily as a means of racial control and estrangement.³⁶

Finally, while this brief largely focuses on African-American communities and the criminal legal system, there are particular—and growing—concerns related to the carceral system and other groups, all of which need further explication in the literature and in policy. For example, Native Americans are overrepresented in the U.S. criminal justice system, and some research claims that young Native American males are sentenced more harshly for the same offenses than Black men or White men are.³⁷

The nation’s largest minority group, members of the Latinx community, is also disproportionately subordinated via the crime control system. Sometimes, in places where Latinx and black people have long lived alongside each other, the processes of criminalization are somewhat similar.³⁸ Under other circumstances, perceived or real differences in immigration documentation structure how and why people engage or avoid the criminal justice system. For example, Cecilia Menjívar and Leisy Abrego have written of the “legal violence” of the intersection of criminal law and immigration law at the local, state, and federal levels, a term that they argue is “captures the suffering that results from and is made possible through the implementation of the body of laws that delimit and shape individuals’ lives on a routine basis.”³⁹ Menjívar and Abrego focus on the violence of immigration enforcement on Latinx undocumented immigrants, but documented Latinx immigrants, too, may live with concern about the linkages between criminal legal authority and immigration enforcement, in part because documentation makes them legible to these interlocking systems.⁴⁰ Although the immigration system itself is not a criminal justice system, their processes often intersect.⁴¹ They intersect, for example, via the use of deportation as punishment for “crimes of moral turpitude” and a very broad range of “aggravated felonies,”⁴² the similarities between (and often shared private administration of) immigration detention centers and prisons, and the occasional housing of immigration detainees in federal prisons.⁴³ A growing body of scholarship is beginning to reckon with the ways immigration and crime control operate together to make it difficult for people in particular communities to find modes of productive engagement with the criminal justice system.

II. Consumption

How do members of communities make use of the criminal justice system?

³⁵ See LEWIS A. COSER, *GREEDY INSTITUTIONS: PATTERNS OF UNDIVIDED COMMITMENT* (1974); ERVING GOFFMAN, *ASYLUMS* 11 (1968).

³⁶ Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 *PUNISHMENT & SOC’Y* 95 (2001); Bell, *supra* note 28.

³⁷ Travis W. Franklin, *Sentencing Native Americans in US Federal Courts: An Examination of Disparity*, 30 *JUST. Q.* 310 (2013).

³⁸ *E.g.*, RIOS, *supra* note 25.

³⁹ Cecilia Menjívar & Leisy Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 *AM. J. SOC.* 1380, 1387 (2011).

⁴⁰ *See, e.g.*, Asad L. Asad, Documented and Afraid: System Embeddedness and Immigrants’ Perceived Risk of Deportation (unpublished manuscript, on file with author).

⁴¹ *E.g.*, Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 4 *U. PA. J. CONST. L.* 1084 (2004).

⁴² *E.g.*, Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 *N.Y.U.L. REV.* 1669 (2011).

⁴³ *E.g.*, Sarah N. Lynch & Kristina Cooke, *Exclusive: U.S. Sending 1,600 Immigration Detainees to Federal Prisons*, *REUTERS*, June 7, 2018.

Quadrant 2 considers the more esteemed but low-agency position of being a *consumer* of the criminal justice system, someone who occasionally tries to use it like a good or service.⁴⁴ This is the way the police, at least, might imagine a passive public using the system: When a crime occurs, the member of the public calls the police, provides information, and steps out of the way.

The overarching body of scholarship and analysis of community-focused criminal justice research finds that marginalized people generally avoid official channels for public safety, governing themselves instead according to a “code of the street” whereby violence becomes an acceptable extra-legal strategy of protecting oneself or resolving disputes.⁴⁵ As writer Ta-Nehisi Coates has written, the police in some communities are largely “indistinguishable from any other street gang.”⁴⁶

However, the “code of the street” has never been fixed or universal on either an individual or collective level. Critically, consumptive engagement with the criminal legal system, for marginalized people is not *fully* agentic. The choice to engage with the criminal justice system is structured by other structural and institutional factors, including the failure of other arms of government and institutions to provide alternatives. At a collective policy level, James Forman and Michael Javen Fortner describe African-American support for some of the policies that ultimately produced mass incarceration, explain that there was for many an earnest desire for safer neighborhoods and a tentative hope that crime control—coupled with social safety net expansion—would have positive results.⁴⁷ Yet many African American leaders ultimately lacked the political power to ensure that the safety net was expanded *alongside* the carceral state.⁴⁸

Policing scholars have long reported that poor people called the police more often than wealthier people because they “depend upon police assistance in times of trouble, crises, and indecision,” often to resolve noncriminal issues.⁴⁹ Research using administrative data on police reporting has shown that—even controlling for crime rates—African Americans, women, and residents of high-poverty neighborhoods are equally or more likely to call the police than other groups.⁵⁰

Qualitative studies have identified poor African-American women, especially women with children, as a population of particular interest given their occasional use of police to control male partners and children, to find support that is mostly unavailable through the welfare state, or to avoid harsh outcomes associated with child protection and other punitive social services.⁵¹ Victor Rios, in a qualitative study of black and Latino boys in Oakland, California, finds that mothers are part of a “youth control complex” along with police, probation

⁴⁴ The sociology of consumption is generally not central to conversations on public goods, but some scholars have begun to use a consumption framework to think about the purchase of private security. *See, e.g.*, Benjamin Goold, Ian Loader & Angelica Thumala, *Consuming Security? Tools for a Sociology of Security Consumption*, 14 THEORETICAL CRIMINOLOGY 3 (2010).

⁴⁵ ANDERSON, *supra* note 15; VENKATESH, *supra* note 12; *see also* Black 1976, 1983).

⁴⁶ Ta-Nehisi Coates, *The Near Certainty of Anti-Police Violence*, ATLANTIC, July 12, 2016.

⁴⁷ FORMAN, *supra* note 12; FORTNER, *supra* note 12.

⁴⁸ FORMAN, *supra* note 12.

⁴⁹ ALBERT J. REISS, JR. THE POLICE AND THE PUBLIC 63 (1972). *Cf.* SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (on civil disputes among working-class and poor community members).

⁵⁰ *See* Edem F. Avakame, James J. Fyfe & Candace McCoy, “Did You Call the Police? What Did They Do?” *An Empirical Assessment of Black’s Theory of Mobilization of Law*, 16 JUST. Q. 765 (1999); Eric P. Baumer, *Neighborhood Disadvantage and Police Notification by Victims of Violence*, 40 CRIMINOLOGY 579 (2002); Stacey Bosick, Callie Rennison, Angela R. Gover & Mary Dodge, *Reporting Violence to the Police: Predators through the Life Course*, 40 J. CRIM. JUST. 441 (2012); Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857 (2016); Lonnie Schaible & Lorine A. Hughes, *Neighborhood Disadvantage and Reliance on the Police*, 58 CRIME & DELINQUENCY 245 (2012).

⁵¹ JONES, *supra* note 25, at 39-45; VENKATESH, *supra* note 12; Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOC. REV. 339 (2009).

officers, schools, community centers, the media, and other institutions.⁵² According to Rios, because mothers acquiesce to institutional messages about appropriate parenting behavior, they call the police on their children and thereby label them as criminal.⁵³ Alice Goffman, in an ethnographic study of a Philadelphia neighborhood, finds that women sometimes proactively contact the police as a means of socially controlling their male intimate partners, and at other times are actively coerced to report their partner's, son's, or grandson's whereabouts through threats of arrest, loss of child custody, and physical force.⁵⁴ Nikki Jones tells the story of “Shante,” a young woman who got hit in the head with a brick during a fight and whose mother decides to “let the law deal with it” instead of using their usual tactic of retaliating.⁵⁵ Shante's mother, who had formerly been incarcerated, did not want to risk familial stability.⁵⁶ Shante's mother did not expect “the law” to do much, and it didn't—she and Shante were disappointed with the outcome, which was a very short detainment of the young woman who had thrown the brick. Shante and her mother wanted the other young woman to experience a harsher punishment. Even after the police responded, Shante daily fights the urge to “blow this heifer.”⁵⁷

In my own work, I find similar reasons that marginalized people, especially women, consume the carceral state despite their disdain and distrust of it. I find that women justify occasional semi-agentive engagement with the criminal legal system in four ways, including making exceptions for especially helpful individual officers, emphasizing protection of their physical home rather than the broader community, explaining the possibility of therapeutic consequences for their partners or children, and emphasizing the ways police reports are helpful for navigating other government institutions such as the Housing Authority or child protection.⁵⁸

Conversations that focus on the subordinating relationship that marginalized communities have with the carceral state give short shrift to the reality that people who live in marginalized communities often engage the criminal legal system by deploying it. This is not to say that this is a *natural* response—perhaps reliance on the criminal legal system despite distrusting it underscores the hegemonic nature of criminal legal ideology. As Carr, Napolitano, and Keating found in their study of a diverse group of Philadelphia youth, even young people who had negative experiences with the criminal justice system thought increasing the presence of police was a good solution to the problem of crime.⁵⁹

Recognizing that marginalized communities contain many consumers of crime control does not suggest a specific policy direction. Some reformers, such as those who operate from an abolitionist framework, are using community organizing to denaturalize police and prison as the obvious response to crime.⁶⁰ These abolitionist reformers support some incremental policy and practice changes, but only those that in their estimation lead directly toward a smaller criminal justice system. This means, for example, they oppose training police to respond more effectively to mental health crises, strongly discourage community members from

⁵² RIOS, *supra* note 25, at 40-42.

⁵³ *Id.* at 82-83.

⁵⁴ GOFFMAN, *supra* note 25, 55-90.

⁵⁵ JONES, *supra* note 25, at 38-40.

⁵⁶ *Id.* at 40.

⁵⁷ *Id.* at 41.

⁵⁸ Monica C. Bell, *Situational Trust: How Mothers Reconceive Legal Cynicism*, 50 LAW & SOC'Y REV. 314 (2016).

⁵⁹ Patrick J. Carr, Laura Napolitano & Jessica Keating, *We Never Call the Cops and Here Is Why: A Qualitative Examination of Legal Cynicism in Three Philadelphia Neighborhoods*, 45 CRIMINOLOGY 445, 461-63 (2007).

⁶⁰ See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 NYU L. REV. 405 (2018); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2204 (2013); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Dorothy R. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2017); Derecka Purnell, *What Does Police Abolition Mean?*, BOSTON REV., Aug. 23, 2017.

calling 911, and propose investment in alternative pathways for getting people mental health support.⁶¹ They might, for example, be skeptical of reforms like Seattle’s Law Enforcement Assisted Diversion (LEAD) program—not because of the premise of the program, which diverts low-level offenders pre-booking—but because the police department runs it. This is reflective of a deep skepticism shared by some activists and many community members, in line with a legal estrangement perspective, that police cannot be trusted even when the agenda they are promoting sounds appealing. (“Community policing” is another troubling example in which rhetoric and deeds are often misaligned.)

Other reform-minded people would argue that paying attention to marginalized peoples’ strategies and reasons for consuming the criminal justice system should support reform that *improves* these systems—turning them into “public goods”—rather than dismantling them.⁶² While some activists in the Black Lives Matter movement may support reforms that would increase the criminal justice system’s legitimacy,⁶³ others have adopted a more decisively radical perspective.⁶⁴ These cleavages and debates, even within the reform community, shed light on the complexity of figuring out the problem of consumption. Identifying a path forward requires dialogue that does not just examine how the system oppresses marginalized community members, but also whether and how it provides—or *should* provide—security and support.

III. Resistance

How do community members express unwillingness to yield to the criminal justice system?

Quadrant 3 invites discussion of the seemingly high-agency but low-esteem position of *resistance*. Resistance can be defined in many ways, but here I focus on intentional resistance to legal ideology. As Richard Brisbin has explained, “[r]esistance to law requires a consciousness of how legality denies or excludes recognition of an individual’s desires, is arbitrarily applied, or establishes unjust distributions of power, wealth, or status.”⁶⁵ Thus, mere deviance from the law is not resistance. This understanding of resistance is akin to what James C. Scott has called “weapons of the weak,” the ways subordinated people signal that they do not passively accept domination but instead struggle against it.⁶⁶

⁶¹ See, e.g., Critical Resistance, Oakland Power Projects – Health Resources, <http://criticalresistance.org/opphealthresources/> (describing organizational efforts to “think through the connections between policing and health care in order to more successfully work to sever these connections.”).

⁶² E.g., Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOSTON REV., Aug. 1, 2017.

⁶³ For example, at least one prominent BLM activist served on the Obama Administration’s Task Force on 21st Century Policing, which embraced procedural justice training and other system legitimacy-building reforms. The Report operated from a starting point that a somewhat robust criminal legal system is necessary. Its opening lines posit that, “[t]rust between law enforcement agencies and the people they protect and serve is essential in a democracy. It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.” PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1 (2015). To be sure, membership on a committee does not mean that one endorses all of the committee’s positions, but the centrality of this perspective suggests at least an openness to legitimacy-building strategies.

⁶⁴ See, e.g., Akbar, *supra* note 60; see also THE MOVEMENT FOR BLACK LIVES, A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM & JUSTICE, <https://policy.m4bl.org/end-war-on-black-people/> (“Until we achieve a world where cages are no longer used against our people we demand an immediate change in conditions and an end to all jails, detention centers, youth facilities and prisons as we know them”) (calling for prison abolition but stopping short of police abolition).

⁶⁵ Richard A. Brisbin, Jr., *Resistance to Legality*, 6 ANN. REV. L. & SOC. SCI. 25, 27 (2010).

⁶⁶ JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE 304 (1985); see also JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE (1990).

In 2003, Patricia Ewick and Susan Silbey invited scholars to study community members’ everyday resistance to legality more extensively, pointing out the thinness of this body of scholarship.⁶⁷ Yet, fifteen years after they wrote—and despite their high citation count—the body of research focusing on everyday resistance to the law remains relatively shallow. Scholarship on everyday resistance to *criminal* legal authority in the United States is especially minimal. Some notable exceptions include Ashley Rubin’s important work on prisoners’ resistant daily behaviors⁶⁸ and Robert Werth’s scholarship on parolees, which reveals strategies that parolees use to selectively engage with their parole officers in order to “go[] straight,” but “on their own terms.”⁶⁹

To be sure, emphasizing community resistance can feel beside the point. The “big story” in the relationship between marginalized communities and the criminal justice system is subordination. Thus, it is reasonable to pay more attention to subordination, and to consumption as another mode of subordination, than to resistance. Moreover, scholarship on resistance is often mired in jargon and theory about ideology and hegemony, which might make it harder to use and might distract from its description of daily practices that people in marginalized communities use to resist.

However, an understanding of community members’ everyday resistance is critical for illuminating pathways toward more innovative systemic criminal justice transformation, for finding touchpoints that community members find the most dehumanizing or the least productive, and for building a legal structure that is more responsive to community concerns. A new agenda might stop seeing resistance as a problem that research can help police overcome and instead understand resistance as a response to an overzealous state. Instead of trying to “fix” resistance or simply to theorize it, scholars can try to really understand it in ways that might illuminate pathways forward for policymakers, decisionmakers, practitioners, and activists.

For example, in *Commonwealth v. Warren* (2016), the Massachusetts Supreme Judicial Court famously ruled that a black man’s decision to run from police officers is not on its own evidence of wrongdoing that could support officers’ reasonable suspicion that the black man is committing a crime.⁷⁰ Drawing from a statistical study of racial profiling in Boston, the court reasoned that a black man fleeing “might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.”⁷¹ In other words, the court understood that black men might reasonably choose flee to resist racial inequity, not because of their own criminality. The statistical racial profiling research made this outcome possible, but the evidentiary base for the court’s ruling would have been even stronger if it had also included narratives of African American male Bostonians describing flight as resistance to racialized criminal legal power.

Individual acts of resistance present a challenge for some reformers: Individual resistance to the criminal justice system raises moral questions because it seems antithetical to the rule of law. Some resistance, such as talking back to an officer, can seem harmless from a distance. But what about when individual acts of resistance are harmful? For example, Trevor Gardner has argued that when African Americans commit street crime, they are engaging in a form of resistance that has roots in historical political struggle.⁷² If he is right, does this information matter for how criminal justice institutions should respond to street-level crimes when black people commit them?

⁶⁷ Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 108 AM. J. SOC. 1328, 1329 (2003); see also PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* 184-89 (1998).

⁶⁸ E.g., Ashley T. Rubin, *Resistance as Agency? Incorporating the Structural Determinants of Prisoner Behavior*, 57 BRIT. J. CRIMINOLOGY 644 (2017).

⁶⁹ E.g., Robert Werth, *I Do What I’m Told, Sort Of: Reformed Subjects, Unruly Citizens, and Parole*, 16 THEORETICAL CRIMINOLOGY 329, 342 (2011).

⁷⁰ No. 11596, slip op. at 15-17 (Mass. Sept. 20, 2016).

⁷¹ *Id.* at 19.

⁷² Trevor Gardner II, *The Political Delinquent: Crime, Deviance, and Resistance in Black America*, 20 HARV. BLACKLETTER L.J. 141 (2004).

If one believes that law reflects collective moral rules,⁷³ then it is a deep problem for people to break the law or disobey the commands of legal authorities. If, however, one sees law primarily as a means of organizing social power, concerns about the morality of resistance fade.⁷⁴ Thus, reformers who want to understand the modality of resistance in community engagement with criminal justice must think deeply about the value of resistance in a system that is thought to be at least in the ideal governed by law. How can we destigmatize resistance—or at least, certain forms of it—while being supportive of rule of law principles? How should we weigh community members’ resistance to the law when it causes harm?

IV. Transformation

How do community members, individually and collectively, seek to reform and reimagine the criminal justice system?

Transformative engagement (Quadrant 4) occupies position in the chart that is of highest social esteem and highest agency. I define transformation as community engagement in deliberate, organized, and often collective action to ease the negative impact of the criminal legal system on members of marginalized communities. Transformative engagement is hard, and I would wager that it is the rarest modality.

Movement Activism & Collective Action

Transformative community engagement sometimes involves movement activism. The criminal justice reform movement has brought together a wide array of people from various ideological perspectives and backgrounds. That movement has produced a small decline in the incarceration rate. While many activists are concerned about the lack of a shared set of commitments in this movement, it has, no doubt, operated in an organized fashion and produced positive—though perhaps not truly transformational—results.

Black Lives Matter, too, represents collective community response aimed at system change that operates through both persuasion and adversarialism. One challenge for that movement’s legibility in mainstream audiences has been an inconsistency in precise legal “asks” *within* the criminal justice system. This is not to say that law is unimportant to Black Lives Matter: As Amna Akbar has helpfully explained, “The movement is not attempting to operate outside of law, but rather to reimagine its possibilities within a broader attempt to reimagine the state. Law is fundamental to what movement actors are fighting against and for.”⁷⁵ However, this transformative legal engagement is not really with the criminal justice system, but with the state writ large. Thus, criminal justice policymakers may have difficulty translating this mode of engagement into action. Criminal justice policymakers have an easier time understanding community movements regarding specific cases, of which there have been many.⁷⁶ These movements around individual cases tend to request

⁷³ See, e.g., ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 225-28 (equating legal cynicism and moral cynicism).

⁷⁴ For example, Ewick and Silbey’s perspective on legal authority is divorced from morality and emphasizes law as a mode of power relation: “Rather than seeing legal authority as deriving from some moral principles, this view of legality understands power as producing the normative grounds upon which power is exercised.” EWICK & SILBEY, *supra* note 67, at 189.

⁷⁵ Akbar, *supra* note 60, at 409.

⁷⁶ One of the first was the movement in the 1970s to acquit Joan Little for killing a correctional officer who had attempted to sexual assault her. See, e.g., James Reston Jr., *The Joan Little Case*, N.Y. TIMES MAG., Apr. 6, 1975, at 40. One of the most recent was the #FreeMeekMill effort, in which people (including a large number of African American celebrities) objected to the incarceration of rapper Robert Rihmeek Williams, or Meek Mill. In 2017, Mill was sentenced two-to-four years for relatively minor probation violations. After initially being denied bail, massive public outcry eventually led the judge to grant bail, which Mill paid.

releasing someone or reducing a harsh sentence, and their lack of structural demands make them less of a systemic threat.

One mode of collective response that adopts a more cooperative positionality is “reconciliation,” a set of strategies proposed by David Kennedy’s National Network for Safe Communities that has been embraced by some community movements. The reconciliation model focuses on police departments, not the entire criminal justice system. It requires that (1) police publicly acknowledge harm that they have done, whether it be individual, departmental, or institutional harm; (2) police and community members engage by sharing narratives and listening to each other; (3) someone compile a set of facts that is “clear” and “objective”; and (4) police and community members work together to develop policies and practices that respond to the narratives and history revealed earlier in the reconciliation process.⁷⁷ While reconciliation has some promise conceptually, it is still largely untested. While it has transformational ambitions, it is not clear whether it is actually transformative. Moreover, the degree to which community members actively support these approaches remains uncertain. One important area for research in coming years will be whether approaches like this produce positive outcomes, and if so, how and under what circumstances.

Finally, there is a long history of bureaucratically endorsed civilian/community committees that are meant to either soften the blow of crime control in marginalized neighborhoods generally or to make officers more accountable for misconduct.⁷⁸ These are somewhat collective efforts, but they are limited because only a small number of community members can meaningfully participate. They do not fundamentally restructure the distribution of power in the criminal justice system.

Local & Individual Transformative Engagement

Although transformation requires some collective action, some community members at local and individual levels are aiming to transform the criminal justice system. One of the most celebrated modes of transformative engagement is “restorative justice,” a bundle of practices such as victim-offender mediation, circles and conferences that include family members and community members along with victims and offenders, community-based alternatives to sentencing, and sometimes reparative methods that aim to make victims, offenders, and communities whole again after a crime. These are often more local modes of engagement—deeply of the community—and may look different depending on local characteristics and the nature of the harm. One of the worries with restorative justice, however, is precisely the local variation in approaches. In some places, “restorative justice” has just been used as code for justice that elevates the voices of victims.⁷⁹ While victim involvement can be valuable, it can also be used as a way to justify system harshness, thereby feeding back into the subordinating relationship between marginalized communities and the criminal justice system.

More localized movements, such as organized copwatching, represent transformative community engagement with the criminal justice system. Rather than using consensus and cooperation to persuade criminal justice officials to adopt reforms, organized copwatching seeks criminal justice transformation through

⁷⁷ NATIONAL NETWORK FOR SAFE COMMUNITIES, RECONCILIATION BETWEEN POLICE AND COMMUNITIES: CASE STUDIES AND LESSONS LEARNED 3 (2018).

⁷⁸ See, e.g., SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT (2001); U.S. COMM’N CIV. RTS., HEARING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS: HEARING HELD IN CLEVELAND, OHIO, April 1-7, at 534 (1966) (testimony of Margaret Weathers, describing her involvement in the Police-Citizens Committee in Hough, Cleveland, to which she was appointed in 1964).

⁷⁹ See, e.g., James Bonta, Suzanne Wallace-Capretta, Jennifer Rooney & Kevin Meanoy, *An Outcome Evaluation of a Restorative Justice Alternative to Incarceration*, 5 CONTEMP. JUST. REV. 319 (2002).

“adversarialism” and “agonism.”⁸⁰ Engaged community members have also engaged in participatory community defense, set up community bail funds, and created and participated in prison education efforts.⁸¹ This type of transformative engagement, which is growing in prominence, needs to be a part of a serious research agenda on criminal justice. Currently there is very little on-the-ground empirical research that probes this type of organized local advocacy and community work.

More controversially, one could think about the *employment* of members of marginalized community members within the criminal justice system as police officers, correctional officers, judges, prosecutors, and more as a mode of transformative engagement. For example, at various points in history, the diversification of police forces has been a rallying point for racial justice activists. In the past, some racial justice advocates believed that force diversity would make the system less racially oppressive. In the late 1960s, Cleveland’s first African-American mayor, Carl B. Stokes, made police force diversification the centerpiece of his political agenda.⁸² Some scholars, such as David Sklansky, have more recently celebrated increased racial, gender, and sexual orientation diversity on American police forces as a key achievement of criminal justice reform.⁸³ Yet, at least with respect to race and policing, it is unclear to what extent bringing more African Americans into the police force produces the dividends for black communities that it ideally would; some argue that benefit accrues only when departments gain a “critical mass” of black officers.⁸⁴ Some scholars and advocates have suggested that lawyers of color can help reform the system by becoming prosecutors, and there is a burgeoning but robust group of progressive prosecutors, some who are of color and some who are not, but who ostensibly aim to make the criminal justice system less arbitrarily punitive. We tend not to think of system diversification as “community” effort, but given that certain groups of people of color—across class—are at risk of subordinating relationships with the criminal justice system, perhaps it makes sense to imagine justice system employment as a mode of transformative engagement. To be sure, this type of reform would be viewed as profoundly unsatisfying, non-transformative, and perhaps even counterproductive to many progressive advocates.

Conclusion

In this brief, I have introduced four fluid and situational modalities of community criminal justice involvement: *subordination, consumption, resistance, and transformation*. In some ways, this framework encourages

⁸⁰ See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 435-38 (2016); see also Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017). Although Simonson follows community groups in referring to copwatching as “resistance,” this activity does not meet the definition of how social scientists typically understand resistance—it is organized and taken up with the purpose of change. It is not meant to affirm individual agency under conditions of oppression, but rather to harness collective power. For more scholarly discussion of organized copwatching by community members, see Karl T. Muth & Nancy Jack, *Watching the Watchers: Monitoring Police Performance as Public Servants*, 73 NAT’L LAW. GUILD. REV. 23 (2016); Mary Angela Bock, *Film the Police! Cop-Watching and Its Embodied Narratives*, 66 J. COMM. 13 (2016).

⁸¹ See, e.g., Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715 (2018); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017); Clint Smith, *Complex Sentences: Searching for the Purpose of Education Inside a Massachusetts State Prison*, 87 HARV. EDUC. REV. 81 (2017); Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. POVERTY L. & POLY 451 (2018); Families for Justice as Healing, About Us, <http://justiceashealing.org/about> (describing an array of initiatives including participatory defense, creating alternatives to prison for women and girls, and community organizing).

⁸² LEONARD N. MOORE, CARL B. STOKES AND THE RISE OF BLACK POLITICAL POWER 44 (2002); CARL B. STOKES, PROMISES OF POWER 139 (1973).

⁸³ David Alan Sklansky, *Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1242 (2006).

⁸⁴ There is a large body of work on police force diversity, and it has very mixed results. See, e.g., Rod K. Brunson & Jacinta M. Gau, *Officer Race Versus Macro-Level Context: A Test of Competing Hypotheses About Black Citizens’ Experiences with and Perceptions of Black Police Officers*, 61 CRIME & DELINQUENCY 213 (2015); Sean Nicholson-Crotty, Jill Nicholson-Crotty & Sergio Fernandez, *Will More Black Cops Matter? Officer Race and Police-Involved Homicides of Black Citizens*, 77 PUB. ADMIN. REV. 206 (2017).

more general thinking because it deemphasizes the precise functions individuals play in the system and suggests that even across functional roles, modes of engagement could differ based on time and other circumstances. However, more importantly, as a way of understanding *community* engagement, this framework aims to provoke bring richer and more nuanced research and advocacy. Instead of thinking in a static way about what “the community” wants or needs, it encourages recognition of how members of marginalized communities who seem similarly situated can simultaneously have multiple types of relationships with the crime control apparatus.

This framework also intends to encourage forward-looking and normative thought about linkages between the criminal justice system and the community. Social science research on this topic is, by necessity, often retrospective and descriptive. Because social scientists usually try to study meaningful social phenomena, research on criminal justice often examines the subordinating relationship that members of marginalized communities have with the criminal justice system. Yet, this framework shows how the laser-focus on subordination leaves out modalities of community engagement that are important but understudied—and might suggest workable paths forward. Increased study of consumption, resistance, and transformation will build an evidentiary base that takes complex community concerns more seriously, and it could provide a more substantive groundwork to support deeper reforms. Understanding these modalities of relationship could ultimately help increase the power of individuals and communities to determine the type of criminal justice they want and need.