The Shadow Criminal Law of Municipal Governance

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Although it often escapes attention, municipal governments possess significant authority to enact criminal laws consistent with their expansive home rule and police powers. In this article, Professor Logan explores the numerous ways in which this authority manifests, and reflects upon, several of the main concerns presented by the "shadow criminal law" thereby created. These concerns include the negative practical consequences for individuals and entire communities associated with the proliferation of criminal laws, in which municipalities play a significant part; the specter that such governments will indulge punitive or parochial tendencies; and the pitfalls associated with intra-state diversification of the criminal law. Professor Logan argues that while localization has intuitive appeal, consistent with the potent historic pull of local autonomy in American governance more generally, this should not blind courts and policy makers to its potential untoward effects. Rather than continuing to focus on police discretion to enforce local laws, heretofore the predominant concern of courts and commentators, Logan urges that attention be directed at the critically important role localities now play in the actual creation of the criminal law.

It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs.... [To assert otherwise] departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow.[1]

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[1] Powell v. Texas, 392 U.S. 514, 547–48 (1968) (Black, J., concurring).

I. INTRODUCTION

Despite its highly complex, heterogeneous character, modern America remains drawn to an idealized model of local democratic governance, harkening back to the halcyon days of Jefferson's citizen-farmers[2] and Tocqueville's illuminating visit to the young Republic's shores.[3] Inspired by the core belief that local decision-making promotes citizen involvement and optimizes responsiveness to local needs,[4] local governance endures as a potent force in the American body politic,[5] with its leitmotif "extreme decentralization."[6] While nominally a union made up of fifty states and the District of Columbia, held together by a federal constitutional infrastructure, in actuality America's governing foundation entails tens of thousands of local polities, each with its own aspirations, concerns, qualities, and interests.[7]

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[2] Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 12 THE WORKS OF THOMAS JEFFERSON 3, at 9 (Paul Leicester Ford ed., 1905) (referring to small-scale, local government as the "perfect exercise of self-government").

[3] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 62–63 (George Lawrence trans., 1969):

> [T]he strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not got the spirit of liberty.

[4] ROBERT J. DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 132 (1992) ("There is a strong and prevailing belief embedded in the American political culture that direct, participatory democracy is the best governmental form because its decisionmaking process is based clearly and directly on the consent of the governed."); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 113 (1990) [hereinafter *Localism I*] (stating that "[l]ocal autonomy is to a considerable extent the result of and reinforced by a systemic belief in the social and political value of local decision making"). For other expressions of this sentiment, see, for example, Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1123–28 (1996); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 391–95 (1997); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 271 (1993).

[5] *See generally* ROBERT H. WIEBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY (1995).

[6] Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2002 (2000). Of course, at the nation's origin and to this day, there has existed a countervailing distrust of local governance for many of the same reasons advanced in its support. *See* THE FEDERALIST NO. 10, at 70 (James Madison) (E. Bourne ed., 1901).

[7] *See* Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 625 (1997) ("The fracturing of local government is a basic concept in

Not surprisingly, this diverse governing arrangement has led to conflict over the course of the nation's history. For its part, the U.S. Supreme Court has shown an abiding ambivalence toward what Professor Richard Briffault has aptly called "our localism,"[8] at times recoiling from expressions of local autonomy and at others embracing them.[9] For the better part of the twentieth century, the Court adopted a dismissive stance, conceiving of localities as little more than impotent political subdivisions of their creators—the states.[10] Over the past twenty years, however, the Court, in keeping with its federalist-tendencies, has shown increasing deference to exercises of not just state[11] but also local[12] governmental

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American government . . . its creation was not happenstance, but rather a deliberate attempt to empower the individual.").

[8] Briffault, *Localism I*, *supra* note 4, at 113; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 346 (1990) [hereinafter *Localism II*]. Briffault notes that his allusion to "Our Federalism" is intentional:

> "Our Localism," like "Our Federalism," emphasizes that local autonomy is not simply a question of the structure of intergovernmental relations but also includes the ideology that structure has generated—an ideology which continues to provide support for the devolution of power to local governments.

Localism I, *supra* note 4, at 2 n.1.

[9] Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 927 (1999):

> [L]ocal difference is easily recast as factionalism and the courts toggle back and forth between the two perspectives. Sometimes local decisions are lauded because they supposedly reflect an organic lifestyle deserving of respect. At other times local decisions are denigrated as the result of the disproportionate and concentrated influence of a faction.

[10] *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978) (noting the "extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them"); Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal Constitution which it may invoke in opposition to the will of its creator."); City of Newark v. New Jersey, 262 U.S. 192, 196 (1923) ("The regulation of municipalities is a matter peculiarly within the domain of the State."); Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the State. . . .").

[11] *See, e.g.*, Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); United States v. Morrison, 529 U.S. 598 (2000); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

[12] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); Papasan v. Allain, 478 U.S. 265 (1986); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982). The Court's decision in *Romer* warrants particular mention because it invalidated a state's effort to abrogate a local law, in that case Colorado's Amendment 2, which precluded local governments from enacting laws protective of gays and lesbians, as the plaintiff-municipalities had done. Unfortunately, the Court's pronounced emphasis on localism has been largely obscured by the broader civil

power. Academics of late have also championed local governance, advancing compelling arguments sounding in communitarianism,[13] public and rational choice theory,[14] civic republicanism,[15] and even local constitutional theory.[16] Adding still to the gravitational pull of localism is the notion that Americans lack a sense of "belonging,"[17] for which the greater intimacy of local governance might serve as a tonic.[18] In short, notions of "community" and "place,"[19] while historically enjoying enormous symbolic and emotive appeal,[20] are increasingly

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liberties issues raised, as reflected in scholarly commentary. *See, e.g.*, Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled* Bowers v. Hardwick, *Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559 (2000). *But see* Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1410–11 (1997) (noting the underlying localist importance of *Romer*); Lawrence Rosenthal, Romer v. Evans *as the Transformation of Local Government Law*, 31 URB. LAW. 257, 257 (1999) (characterizing *Romer's* "implications for local government law [as] unmistakable and dramatic").

[13] *See, e.g.*, AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY (1996); AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA (1993); PHILLIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY (1995); NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES (Amitai Etzioni ed., 1995).

[14] *See, e.g.*, Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991).

[15] *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

[16] *See, e.g.*, David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999).

[17] *See, e.g.*, ROBERT N. BELLAH ET AL., THE GOOD SOCIETY (1991); ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000); ALAN WOLFE, ONE NATION, AFTER ALL (1998).

[18] *See* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 94–102 (1999) (arguing same).

[19] *See, e.g.*, JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY (1990); *see also* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1 (1989); Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261 (1991).

[20] *See* ADAM CRAWFORD, THE LOCAL GOVERNANCE OF CRIME: APPEALS TO COMMUNITY AND PARTNERSHIPS 273 (1997) (noting that invocations of "community" enjoy "profound emotional legitimacy"); 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 (noting the "appealing but highly manipulable rhetoric of 'community,' a rhetoric that is

fostering tangible changes in methods of governance and, as importantly, how social problems are conceived and the means by which such problems should be addressed.[21]

This article focuses on a critically important aspect of this orientation: the role of local governments, municipalities in particular,[22] in legislating against crime.[23] Although municipalities traditionally have enjoyed wide leeway in matters pertaining to zoning,[24] taxes,[25] education,[26] and the regulation of obscenity,[27] it

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increasingly prevalent in contemporary discourse. It is easy to appreciate the attractions of a sense of place, shared values, and neighborhood empowerment . . . .").

[21] To a significant degree, this shift is the culmination of a path blazed in 1961 by urbanologist Jane Jacobs, who stressed the value and importance of engaged community (especially urban) life. *See* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961). Modern traces of the orientation are found not just in the current emphasis on "community," but also in calls for a myriad of ever more super-localized institutions such as residential community and neighborhood associations, business improvement districts, block improvement districts, and the like. *See* GEORGE W. LIEBMANN, THE LITTLE PLATOONS: SUB-LOCAL GOVERNMENTS IN MODERN HISTORY (1995) (discussing same); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance,* 82 MINN. L. REV. 503 (1997); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998).

[22] This category is intended to include local, general purpose governments encompassing cities, as well as large towns and villages. *See* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 83 n.1 (1986) (conceiving of category in similar terms). The designations "locality," "municipality," "local government," and "city," used here throughout, are intended to refer to this same category. Counties, larger and quite distinct governmental units, are not the focus. Nor are so-called "private" or "gated" communities, whose crime control efforts present equally interesting yet quite distinct constitutional and policy issues. *See generally* EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA (1997); Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After* Marsh v. Alabama, 6 WM. & MARY BILL RTS. J. 461 (1998).

[23] The predominant focus here on municipalities is in keeping with the practical recognition that such governments possess considerably greater police power authority, compared to county governments, necessitated by the more substantial and complex social control needs of municipal areas. *See* EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24.34, at 101–03 (3d ed. rev. 1997 & Supp. 2000); *see also infra* notes 83–84 and accompanying text (discussing same).

[24] *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *See generally* Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659 (1997).

[25] *See, e.g.*, McCormick v. City of Dillingham, 16 P.3d 735 (Alaska 2001); Trebilcox v. City of Sacramento, 266 P. 1015 (Cal. 1928); Brown v. City of Atlanta, 143 S.E.2d 388 (Ga. 1965).

[26] *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); *cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (evincing strong deference to local control of

often escapes attention that they also enjoy considerable authority to enact criminal laws[28] pursuant to their expansive home rule and police powers.[29] This authority is especially pronounced today in the prevalent municipal effort to legislate against public disorder and "quality of life" offenses, given effect by such strategies as "zero tolerance" and "community" policing, which have become mainstays of contemporary law enforcement.[30]

The local power to criminalize is neither new nor novel; since colonial times localities have wielded considerable power to legislate against perceived forms of social disorder in tandem with, and very often independent of, state government.[31]

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public schools in rejecting equal protection claim premised on disparate funding of school districts on basis of state law). *See generally* Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231 (1998).

[27] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957). *See generally* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989); Kevin J. Worthen, *The Role of Local Governments in Striking the Proper Balance Between Individualism and Communitarianism: Lessons for and from Americans*, 1993 BYU L. REV. 475 (1993).

[28] Although for decades sanctionable offenses prescribed by municipal governments defied categorization as "crimes," instead being euphemistically called "public torts," "public welfare," "police," or "regulatory" offenses, today the criminal character of such laws is widely accepted. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE: A TREATISE § 1.7(d) (2d ed. 2000).

[29] *See, e.g.*, *Pap's A.M.*, 529 U.S. at 296 (noting that "efforts to protect public health and safety are clearly within the city's police powers").

Although an inherent power of municipal government, the legal concept of "police power" historically has evaded precise definition. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) (deeming "fruitless" any effort to "define its reach or trace its outer limits"); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS iii (1904) (stating that "[t]he term police power . . . has remained without authoritative or generally accepted definition"). Providing as accurate a definition as perhaps any to date, one nineteenth-century commentator broadly defined police power as the authority to "prescribe regulations to preserve and promote the public safety, health and morals, and to prohibit all things hurtful to the comfort and welfare of society." Lewis Hockheimer, *Police Power*, 44 CENTRAL L.J. 158, 158 (1897). *See generally* McQuillin, *supra* note 23, §§ 24.01–.02, 24.08–.09 (surveying the origins of municipal police power authority and its continued breadth and dynamism).

[30] *See generally* Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 422–40 (2000) (surveying the variety of recent policing strategies that predominantly target such offenses). As Professor Herman Goldstein has noted, "the new forms of policing expand the police function from crime fighting, without an abdication of that role, to include maintaining order, dealing with quality-of-life offenses, and fixing 'broken windows.'" Herman Goldstein, *The New Policing: Confronting Complexity*, *in* CRIME AND JUSTICE IN AMERICA: PRESENT REALITIES AND FUTURE PROSPECTS 97 (Paul F. Cromwell & Roger G. Dunham eds., 1997).

[31] *See infra* notes 85–169 and accompanying text; *see also* James B. Jacobs, *Legal and Political Impediments to Lethal Violence Policy*, 69 U. COLO. L. REV. 1099, 1100 (1998)

Indeed, in recent decades the Supreme Court has had repeated occasion to address municipal laws directed against loitering and vagrancy, most often invalidating the laws on notice and/or overbreadth grounds.[32] The Court's jurisprudence in this area, and the ongoing efforts of municipalities to enact and enforce such laws, have obsessed academic commentators over the years to the point of distraction.[33]

The focus of discussion, however, has been (and primarily remains) on the age-old concerns raised by the expansive application of the laws, especially whether the quantum of discretion the laws afford police is constitutionally acceptable.[34] Importantly, neither the Court nor the legion of commentators has expressed concern over the significant basic power of localities to enact criminal

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(observing that "[o]ur federal system allows (indeed provides for) a great deal of overlapping authority and responsibility among federal, state, and local governments, and among the various branches of government at each level").

In this sense, the teaming up of localities with coordinate state and federal governments is consistent with the view, advanced most prominently by Michel Foucault, of an expansive "disciplinary society." MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 216 (Alan Sheridan trans., 1977); *see also* ANTHONY GIDDENS, THE NATION-STATE AND VIOLENCE 120 (1987) (referring to government, in its various forms, as a "power container").

[32] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41 (1999); Kolender v. Lawson, 461 U.S. 352 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971).

[33] *See, e.g.*, David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999); William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process*, 69 YALE L.J. 543 (1960); Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 RUTGERS L. REV. 1289 (1999); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Rollin M. Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237 (1958).

[34] The relentless obsession with discretion, it warrants mention, is both misdirected and futile. It is misdirected because the focus on police discretion has displaced critical scrutiny of the substantive criminal law, thereby effectively freeing up legislative bodies to enact an expansive array of criminal laws with virtual impunity. *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 65–74 (1997) (arguing that the Supreme Court's predominant focus on criminal justice procedures, especially relating to search and seizure, has encouraged an expansiveness in the substantive criminal law). It is futile because police officers are not now and have never been mere ministerial agents of the state; they of necessity possess, and wield, enormous discretion to enforce laws. *See Morales*, 527 U.S. at 62 n.32 (noting "common sense" proposition that "all police officers must use some discretion in deciding when and where to enforce city ordinances"); *id.* at 65 (O'Connor, J., concurring) (citation omitted) ("[S]ome degree of police discretion is necessary to allow the police 'to perform their peacekeeping responsibilities satisfactorily.'"); *see also* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 593 (1997) (observing that "[l]imiting the discretion police exercise . . . by demanding specificity in the laws that they enforce is . . . hopeless").

laws[35] and the weak judicial controls over the "exorbitant codes" that can result.[36] Meanwhile, local politicians have continued to busy themselves with the substantive criminal law, making their influence felt in critically important ways. Their efforts have resulted in the creation of a shadow criminal law that has significantly expanded the range of behaviors that can be targeted by law enforcement, created unique procedural regimes, and diversified the range of sanctions attaching to criminal behavior, including the use of forfeiture.[37]

In short, as much as they have recently asserted themselves in suing gun makers,[38] enacting "moratoriums" on the use of their states' death penalty laws,[39] and even seeking to influence international relations,[40] municipalities are making their presence felt in the realm of criminal law making. And they are doing so with the benefit of not just the innate appeal of localism, discussed above, but also

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[35] Despite the Court's admonition in *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) that "there are constitutional limitations on the conduct that a State may criminalize," in reality the Court has exerted scant constitutional control over substantive criminal law decisions of state (and local) governments, except in cases involving vagueness and overbreadth. The most notable exceptions to this disregard came some forty years ago in *Lambert v. California*, 355 U.S. 225 (1957), which invalidated a local law making it a crime for felons to fail to register with local authorities, and in *Robinson v. California*, 370 U.S. 660 (1962), which invalidated a state law that made it a crime to be "addicted to narcotics."

Today, however, both *Lambert* and *Robinson* are largely ignored, forlorn representatives of a substantive jurisprudence that might have been, to the enduring disappointment of criminal law scholars. *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 411 (1958); Sanford H. Kadish, Essay, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 964–66 (1999); Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490, 497–98 (1971); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 127; William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEG. ISSUES 1, 5–6 (1996).

[36] *See* Whren v. United States, 517 U.S. 806, 818–19 (1996):

> [W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

[37] *See infra* notes 85–169 and accompanying text.

[38] *See generally* Brent W. Landau, *State Bans on City Gun Lawsuits*, 37 HARV. J. ON LEGIS. 623 (2000) (discussing lawsuits filed by thirty cities and legislative efforts by several states to prohibit such suits).

[39] *See* M. Scot Skinner, *Council Likely to Urge Execution Moratorium*, ARIZ. DAILY STAR, Nov. 20, 2000, at A1 (noting more than thirty cities that have passed such resolutions).

[40] *See generally* Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs*, 26 HASTINGS CONST. L.Q. 307 (1999).

with a chorus of advocates who have sought to cleanse newly adopted criminal laws of the criticisms and concerns besetting past laws.

Professors Dan Kahan and Tracey Meares, for instance, have vigorously supported the emergence of a "new generation" of anti-vagrancy and loitering laws, contending that prior discrimination-based concerns are no longer warranted because the laws are the product of newly empowered minority political interests and are being enforced by more racially representative and sensitive police forces.[41] Similarly, Professor Robert Ellickson, in an influential recent article, advocated the "defederalization" of "municipal street law"[42] in deference to the unique social control needs of municipalities.[43] According to Professor Ellickson, "[j]udges should not prevent the residents of America's cities from preserving the vitality of their downtowns."[44] Building upon this same sentiment, Justice Thomas, dissenting from the Court's recent invalidation of Chicago's anti-gang loitering ordinance in *City of Chicago v. Morales*, mordantly stated: "Today, the Court focuses extensively on the 'rights' of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today's opinion do not live in our neighborhoods."[45]

Nor is this orientation likely to abate any time soon, given the ongoing efforts of criminal justice planners to localize law enforcement.[46] Manifestations

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[41] Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1183–84 (1998); Dan M. Kahan & Tracey L. Meares, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 830–31 (1998); Dan M. Kahan & Tracey L. Meares, *When Rights are Wrong*, BOSTON REV., Apr.–May 1999, at 4, 8.

[42] Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165, 1241 (1996) [hereinafter *Chronic Misconduct*].

[43] *Id.* at 1245.

[44] *Id.* at 1248. For similar expressions of this view, see, e.g., GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 41–60 (1996); Debra Livingston, *Gang Loitering, The Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141; Livingston, *supra* note 34, at 561–62.

[45] 527 U.S. 41, 114 (1992) (Thomas, J., dissenting); *see also id.* at 74 (Scalia, J., dissenting) (stating that "[t]he minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets").

[46] Although criminological theory has, for decades, emphasized "place," of late this orientation has assumed newfound popularity, both here and abroad. *See, e.g.*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT. OF JUSTICE, THE ROLE OF LOCAL GOVERNMENT IN COMMUNITY SAFETY (April 2001); ADAM CRAWFORD, THE LOCAL GOVERNANCE OF CRIME: APPEALS TO COMMUNITY AND PARTNERSHIPS (1997); WILLIAM DELEON-GRANADOS, TRAVELS THROUGH CRIME AND PLACE: COMMUNITY BUILDING AS CRIME CONTROL (1999); GOVERNABLE PLACES: READINGS ON GOVERNMENTALITY AND CRIME CONTROL (Russell Smandych ed. 1999); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J.

of this emphasis are seen in such widely adopted strategies as "community"-oriented courts, prosecution, and policing;[47] neighborhood "crime mapping;"[48] urban design changes to achieve "defensible space";[49] and anti-gang civil injunctions, backed by criminal sanctions, implemented within particular neighborhoods regarding specific individuals.[50] As noted earlier, aggressive "zero tolerance" policing strategies—that target the litany of low-level public disorder offenses that are the primary but not exclusive focus of municipal criminal laws—remain a widely touted method of urban social control.[51] Localization is also apparent in the growing body of geographic-specific criminal laws aimed at particular social ills. While for some time the state and federal governments have

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SOCIOLOGY 603 (1999). Professors Clifford Shaw and Henry McKay were among the first, and most influential, scholars to make the connection between geography and rates of criminal victimization. *See generally* CLIFFORD R. SHAW & HENRY D. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS: A STUDY OF RATES OF DELINQUENCY IN RELATION TO DIFFERENTIAL CHARACTERISTICS OF LOCAL COMMUNITIES IN AMERICAN CITIES (2d ed. 1969).

[47] *See generally* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, COMMUNITY COURTS: AN EVOLVING MODEL (2000); CRIME AND PLACE: PLENARY PAPERS OF THE 1997 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION (1998); COMMUNITY JUSTICE: AN EMERGING FIELD (David R. Karp ed., 1998); WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE (1997); Elaine Nugent & Gerard A. Rainville, *The State of Community Prosecution: Results of a National Survey*, THE PROSECUTOR, Mar.–Apr. 2001, at 26.

[48] *See generally* KEITH HARRIES, MAPPING CRIME: PRINCIPLE AND PRACTICE (1999); THOMAS RICH, CRIME MAPPING AND ANALYSIS BY COMMUNITY ORGANIZATIONS IN HARTFORD, CONNECTICUT (2001); ANALYZING CRIME PATTERNS: FRONTIERS OF PRACTICE (Victor Goldsmith et al. eds., 2000).

[49] *See generally* OSCAR NEWMAN, DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN (1972); Marlene A. Pontrelli, *Crime Solutions Through Planning and Zoning*, A.B.A. SECTION ON STATE AND LOCAL GOV'T LAW, 24 STATE & LOCAL NEWS 16 (Winter 2001); Ralph B. Taylor et al., *Block Crime and Fear: Defensible Space, Local Social Ties, and Territorial Functioning*, 21 J. RES. IN CRIME & DELINQ. 303 (1984).

[50] *See, e.g.*, People *ex rel.* Gallo v. Acuna, 929 P.2d 596 (Cal. 1997) (denying constitutional challenge to injunction declaring specified gang members as public nuisances and empowering local police to arrest for instances of contempt). For commentary on this highly popular method, see, e.g., Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L. Q. 717 (2000); Gregory S. Walston, *Taking the Constitution at Its Word: A Defense of the Use of Anti-Gang Injunctions*, 54 U. MIAMI L. REV. 47 (1999); Terence R. Boga, Note, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477 (1994). Prostitution has also been targeted by the injunction strategy. *See, e.g.*, City of New York v. Andrews, 719 N.Y.S.2d 442 (N.Y. Sup. Ct. 2000) (rejecting City's effort to enjoin prostitutes and suspected pimps from frequenting neighborhoods).

[51] *See generally* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order—Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Symposium, *Zero Tolerance Policing Initiatives—Legal and Policy Perspectives*, 35 CRIM. L. BULL. 333 (1999).

enhanced criminal penalties relative to criminal acts in particular areas, such as using, selling, or possessing weapons or drugs near churches, parks, and schools,[52] cities are now weighing in and adding even more specificity tailored to their distinct local needs.[53] Even Fourth Amendment jurisprudence is showing the earmarks of localization, with courts regularly taking into account specific neighborhood characteristics when evaluating probable cause and reasonable suspicion determinations by police.[54]

That crime control should evolve in this self-consciously localized manner should come as no surprise, given that the human consequences[55] and articulated explanations[56] of crime are largely local in nature, as are police enforcement

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[52] *See, e.g.*, United States v. Hodge, 89 F. Supp. 2d 668 (D. V.I. 2000) (addressing federal statute enhancing sentences for possessing drugs near school); People v. Falbe, 727 N.E.2d 200 (Ill. 2000) (addressing Illinois statutory sentence enhancement for drug sales near places of worship); Reed v. State, 720 N.E.2d 431 (Ind. Ct. App. 2000) (addressing Indiana statute prohibiting possession of narcotics near public parks); State v. Crawford, 727 So. 2d 589 (La. Ct. App. 1998) (addressing Louisiana's statutory sentence enhancement for drug sales near schools).

[53] *See, e.g.*, Johnson v. City of Cincinnati, 119 F. Supp. 2d 735 (S.D. Ohio 2000) (addressing Cincinnati law that designated "drug free" zones in particular areas of the City, permitting arrests for criminal trespass after issuance of prior exclusion order from area); Powers v. State, 619 A.2d 538 (Md. 1993) (addressing Baltimore law that proscribed loitering in "drug free" zones); State v. James, 978 P.2d 415 (Or. Ct. App. 1999) (addressing Portland law similar to that of Cincinnati noted *supra*).

Such strategies bear the unmistakable influence of Professor Robert Ellickson, who has urged that "a city's codes of conduct should be allowed to vary spatially from street to street, from park to park, from sidewalk to sidewalk. Just as some system of 'zoning' may be sensible for private lands, so it may be for public lands." Ellickson, *Chronic Misconduct*, *supra* note 42, at 1171–72. According to Professor Ellickson, "[j]udges should generally refrain from construing federal constitutional clauses to deny cities the capacity to spatially differentiate their street policies." *Id.* at 1219; *see also* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

[54] *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119 (2000) (attaching importance in *Terry* "stop and frisk" analysis to fact that the defendant was in a "high-crime area"); United States v. Rucker, 138 F.3d 697 (7th Cir. 1998) (deeming it relevant in probable cause determination that search occurred in a "high drug trafficking area"); United States v. Wadley, 59 F.3d 510 (5th Cir. 1995) (deeming it relevant in probable cause determination that search occurred in "a high crime area"). *See generally* Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 99 (1999) (noting that perceptions of neighborhood character "can come to dominate the reasonable suspicion inquiry").

[55] *See* Lawrence W. Sherman, *Policing for Crime Prevention* 8-3–8-15, *in* LAWRENCE W. SHERMAN ET AL., PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS (1997) (discussing epidemiological studies highlighting distinctly localized nature of criminal victimization and existence of crime "hot spots").

[56] *See* ROBERT J. BURSIK, JR. & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME:

efforts.[57] It thus makes intuitive sense that the substantive definition of crimes should emanate from locals, who at once can give expression to specific social and geographic conditions, and, as the criminal law does more generally, single out particular behaviors for sanction.[58] Furthermore, greater localization holds promise that municipal governments can serve as "laboratories" in a manner analogous to our venerated state-federal relationship, allowing local experimentation in methods of social control.[59]

At the same time, however, the aggressive involvement of municipalities in criminal lawmaking raises an array of potential concerns distinct from the vagueness and overbreadth challenges that have historically been the focus of so much debate.[60] This article highlights the increasing role of local governments,

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THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL (1993) (explaining delinquency rates on the basis of physical, demographic, and institutional aspects of neighborhoods); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, SCIENCE, Aug. 17, 1999, at 918–24 (noting strong statistical differences in crime rates among neighborhoods, depending on variations in "social capital," i.e., the willingness of residents to become engaged in community affairs).

[57] *See* HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 131–32 (1977) (noting that decentralization of law enforcement is a cardinal feature of U.S. policing); John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 693 (1999) (noting that "variations in local needs mean that law enforcement cannot be organized for efficiency along a uniform model, even within a single state").

[58] *See* Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1869 (2000) ("Perhaps more than any other society, ours relies on the criminal law for norm-nurturing.... Our criminal law is, for us, the place we express our shared beliefs of what is truly condemnable."); *see also* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to the New Regionalism*, 88 GEO. L.J. 1985, 2002 (2000) ("Local governments serve as teachers of civic virtue and as essential components of the republican system, helping citizens to fulfill their proper role through daily participation in governmental affairs.").

[59] The reference, of course, dates from Justice Brandeis who in 1932 urged that we "let our minds be bold" in contemplating local experimentation with laws:

> Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). For a discussion of this view with particular regard to the criminal justice system see Kevin R. Wright, *The Desirability of Goal Conflict Within the Criminal Justice System*, 9 CRIM. JUST. 209, 213–14 (1981) (endorsing diversity because it permits inevitable conflicts in community values to be fleshed out and resolved).

[60] Ironically, successful vagueness and overbreadth challenges against purposefully broad vagrancy and loitering laws, in particular, might well serve to foster the proliferation of local criminal laws, encouraging localities to enact additional laws that are more specific in substance

not just in enforcing criminal laws, but also in defining them, and examines many of the associated concerns.

The article begins with an examination of the origins of municipal legislative authority and explores how this expansive power currently manifests in the realm of criminal law. The article then explores several of the most significant potential consequences of municipal criminal lawmaking authority, which include: (1) the negative effects on the daily lives of community residents, and the well-being of communities themselves, as a result of the proliferation of local criminal laws; (2) the threat of oppressive or unduly restrictive laws ("exorbitant codes"), enacted by local legislators; and (3) the balkanization of the criminal law within the states themselves as a consequence of the varied substantive criminal provisions, sanctions, and procedures evidenced in municipalities. The article concludes with an exploration of whether, and to what extent, these potential pitfalls should outweigh the avowed benefits of local autonomy, which for better or worse is here to stay.

II. THE ORIGINS OF MUNICIPAL LEGISLATIVE POWER, ITS EXTENT, AND ITS LIMITS

Despite the fact that municipal governments are "subdivisions" of the state[61] and are accorded no express recognition by the U.S. Constitution,[62] they indisputably possess—and wield—considerable legislative power. The story of how they came to exercise such power is an evolutionary one, in many ways reflecting Americans' preference for local autonomy, as opposed to uniformity, and the respective risks and benefits of each.

From the nation's origin, and well into the nineteenth century, cities were

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and diversified in scope. This response has perhaps been most evident in urban police efforts to combat homelessness. *See* Harry Simon, *Towns Without Pity*, 66 TULANE L. REV. 631, 650 (1992) (noting that "[w]ith the invalidation of vagrancy and loitering laws, officials have turned to arrest campaigns against sleeping in public to punish and control the displaced poor").

[61] City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) (stating that "municipalities have no inherent right of self government which is beyond the legislative control of the state.... [T]he state may withhold, grant or withdraw powers and privileges as it sees fit"); Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) (stating that "[m]unicipal corporations are political subdivisions of the State").

[62] Richard Thompson Ford, *Geography and Sovereignty*, 49 STAN. L. REV. 1365, 1382 (1997) ("The Constitution does not recognize local governments as independent political entities: As far as the Constitution is concerned, local governments... are merely state subdivisions."). For discussions of the legal status of local government in the context of federal constitutional law more generally, see M. David Gelfand, *The Constitutional Position of American Local Government: Retrospect for the Burger Court and Prospect for the Rehnquist Court*, 14 HASTINGS CONST. L.Q. 635 (1987); Carol F. Lee, *The Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 B.U. L. REV. 1 (1982).

largely autonomous units of government. According to Professor William Novak, American municipalities were "self-regulating communities," which were "infinitely more important to regular governance" than the state and federal governments.[63] According to Novak: "No community was deemed free without the power and right of members to govern themselves, *that is*, to determine the rules under which the locality as a whole would be organized and regulated. Such open-ended local regulatory power was simply a necessary attribute of any truly popular sovereignty."[64]

In the mid-to-late nineteenth century, however, a decidedly more hierarchical view of state-local relations came to prevail, prompted in part by concerns that local officials were engaged in improper bond schemes with increasingly powerful railroad interests.[65] Under "Dillon's Rule," the eponymous doctrine made popular by Iowa Supreme Court Justice John Dillon,[66] municipal governments were deemed to possess only such powers (1) "granted in express words"; (2) "those necessarily or fairly implied in or incident to the powers expressly granted"; or (3) "those essential to the accomplishment of the declared objects and purposes of the [local government]—not simply convenient, but indispensable."[67] Consistent with this abstemious view, any doubts over whether authority devolved to locals in a particular instance were to be resolved in the negative in favor of the all-powerful state.[68]

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[63] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 10 (1996).

[64] *Id.*; *see also id.* at 237 ("In contrast to the modern ideal of the state as centralized bureaucracy, the well-regulated society emphasized local control and autonomy."). According to urban historian Stanley Schultz, "municipal law" had a characteristically expansive meaning in America's early years:

> From the sixteenth to the early nineteenth century, "municipal law" in both England and North America referred to the sovereign legal system of an individual state as distinguished from international law. Thus, through the 1830s Americans commonly used the term to refer not only to the law of a city but also to that of the individual state.

STANLEY K. SCHULTZ, CONSTRUCTING URBAN CULTURE: AMERICAN CITIES AND CITY PLANNING 60 (1989).

[65] *See generally* Terrance Sandalow, *The Limits of Municipal Power under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 647–49 (1964).

[66] For more in-depth discussions of Dillon's influence, which competed against that of his contemporary, Justice Thomas Cooley of the Michigan Supreme Court, who advocated greater local autonomy, see David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 509–22 (1999); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 88–90.

[67] 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, at 448–49 (5th ed. 1911).

[68] *See id.* at 449–50 (stating that "[a]ny fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [municipal] corporation, and the power is denied").

This notion of plenary state power receded in the late 1800s, however, when localism reemerged as a result of decisions by numerous states to amend their constitutions to empower local governments by means of "home rule" provisions.[69] The home rule movement was expressly intended to reverse the restrictive, anti-local orientation of Dillon's Rule, and the movement blossomed over the ensuing decades,[70] serving as both an explicit source of local lawmaking power and a bulwark against state legislative interference.[71] Today, some forty-three states are considered home rule jurisdictions[72] as a result of constitutional or legislative intervention, making each municipality a "miniature State within its locality."[73]

In the case of constitutional home rule jurisdictions, local power can be self-executing, emanating directly from the constitutional grant itself. The California Constitution, for instance, provides that a "city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[74] Other constitutional home rule jurisdictions expressly empower localities to frame "charters," which themselves typically enumerate similarly broad grants of power.[75] Legislative home rule jurisdictions,

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[69] *See generally* SANDRA M. STEVENSON, 1 ANTIEAU ON LOCAL GOVERNMENT LAW § 21.01, at 21-3 (2d ed. 2000) [hereinafter ANTIEAU] (noting "[m]odern American home rule dates from the adoption of the first constitutional home rule amendment by Missouri in 1875").

[70] *See Localism I*, *supra* note 4, at 15 (noting that "the postwar era has witnessed a steady broadening of the discretionary authority of local governments").

[71] *Id.* at 16 n.53 (stating "[t]he core of home rule is the creation and preservation of governmental structures for independent local decision making and political participation").

[72] *See* ANTIEAU, *supra* note 69, § 21.01, at 21-3–21-6.

[73] Dist. of Columbia v. John R. Thompson Co., 346 U.S. 100, 108 (1953); *see also* Equality Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, 298 n.9 (6th Cir. 1997) (stating "a municipality is a unitary local political subdivision or unit comprised, fundamentally, of the territory and residents within its geographical boundaries").

[74] CAL. CONST. art. XI, § 7; *see also* ILL. CONST. art. 7, § 6(a) ("[A] home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare...."); OHIO CONST. art. XVIII, § 3 ("Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."); WASH. CONST. art. XI, § 11 (extending to cities the power to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws").

[75] *See, e.g.*, ARIZ. CONST. art. XIII, § 2 ("Any city containing, now or hereafter, a population of more than three thousand five hundred may frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the State...."); PA. CONST. art. 9, § 2 ("A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time."). *See generally* ANTIEAU, *supra* note 69, § 21.03, at 21-15–21-18 (providing other examples).

on the other hand, derive their power from state legislation enacted pursuant to constitutional mandate.[76]

Under either scenario, home rule affords municipalities significant power to enact laws concerning public safety and welfare,[77] backed by liberal construction of such grants.[78] While the substance of local laws must of course comport with state and federal constitutional provisions, home rule municipalities are limited in their power to enact public safety-related laws only when the subject matter of the law is (1) expressly or implicitly "preempted" by a state legislative provision, or (2) the substance of the law itself "conflicts" with existing state law.[79] The Michigan Court of Appeals characterized the relationship between the two related, yet distinct, doctrines as follows:

> The preemption doctrine provides that a municipal ordinance may not invade a field completely occupied by state statute. Where the state has preempted the field, the ordinance is void, irrespective of whether the statute and ordinance conflict. The conflict doctrine only invalidates ordinances actually in conflict with the state law where the entire area has not been preempted.[80]

On its face, preemption doctrine would appear to categorically preclude municipalities from legislating against crime. This is because, historically, the task of defining and designating punishments for crimes has fallen to state

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[76] *See, e.g.*, N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney 2000) ("[E]very local government shall have power to adopt and amend local laws . . . relating to its property, affairs or government."); TEX. LOC. GOV'T CODE ANN. § 54.004 (Vernon 2000) (empowering home rule cities to "enforce ordinances necessary to protect health, life, and property and to preserve the good government, order, and security of the municipality and its inhabitants"). *See generally* ANTIEAU, *supra* note 69, § 21.04, at 21-18–21-23 (providing other examples).

[77] *See* MCQUILLIN, *supra* note 23, § 24.32, at 96–97 ("[M]unicipal corporations have police powers to safeguard the health, comfort and general welfare of their inhabitants by such reasonable regulations as are necessary for the purpose. They always have had such power, although they have it only by virtue of its delegation to them by the state.").

[78] *See, e.g.*, ILL. CONST. art. 7, § 6(m) ("[P]owers and functions of home rule units shall be construed liberally."); MICH. CONST. art. 7, § 34 ("The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor."); Francis v. Morial, 455 So. 2d 1168, 1171 (La. 1984) ("[A] home rule charter government possesses, in affairs of local concern, powers which within its jurisdiction are as broad as that of the state, except when limited by the constitution, laws permitted by the constitution, or its own home rule charter."); City of Detroit v. Recorder's Court Traffic & Ordinance Judge, 304 N.W.2d 829, 840–41 (Mich. Ct. App. 1981) ("[T]he home rule act grants general rights and powers subject only to certain enumerated restrictions. Its purpose was to give cities a large measure of home rule. The statute should be construed liberally in the home rule spirit.").

[79] *See generally* George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417, 423–33 (1995) (providing overview of preemption and conflict doctrines).

[80] *City of Detroit*, 304 N.W.2d at 836.

legislatures, especially with respect to the "general criminal laws."[81] However, any inference of state hegemony with respect to criminal law making would be entirely incorrect. Legislative silence on public safety matters is common,[82] stemming as much from states' practical inability to identify the expansive range and unique forms of municipal disorder,[83] as the felt need to permit cities latitude in tailoring criminal law responses to their distinct needs.[84]

As a result of such silence and the judicial proclivity to apply preemption narrowly,[85] municipalities enjoy enormous power to legislate against social

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[81] *See, e.g.*, City of Knoxville v. Dossett, 672 S.W.2d 193, 196 (Tenn. 1984) (observing that home rule entities "are given certain protection from interference by the General Assembly under the Home Rule Amendment with respect to local matters, but not with respect to jurisdiction over violation of the state's general criminal laws").

[82] *See* ANTIEAU, *supra* note 69, § 21.05[2], at 21-32 ("The reality is that state legislatures seldom legislate on all state or general concerns, and a social and political vacuum would exist if a home rule entity desired to impose controls on these matters within its own borders and was not permitted to do so."); *see also, e.g.*, People v. Ortiz, 479 N.Y.S.2d 613, 622 (N.Y. Cty. Crim. Ct. 1984) (observing that "silence by the state on a particular issue should not be interpreted as an expression of intent to preempt. To interpret a statute in this manner would vitiate home rule"); State v. Lopez-Vega, 826 P.2d 48, 50 (Or. Ct. App. 1992) (noting with respect to Oregon home rule provision that "[a]lthough proposals were made that would have forbidden local governments from enacting ordinances that provided for a sentence of imprisonment for acts not designated as crimes by the state, they were rejected").

[83] *See, e.g.*, Horton v. City of Oakland, 98 Cal. Rptr. 2d 371, 375 (Cal. Ct. App. 2000) (citation omitted) ("When state legislation does not address the demands of particular urban areas, 'it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements.'"); City of North Charleston v. Harper, 410 S.E.2d 569, 571 (S.C. 1991) (recognizing that "more stringent regulation often is needed in cities than in the state as a whole").

[84] *See, e.g.*, Town of Van Buren v. Wells, 14 S.W. 38, 39 (Ark. 1890) ("Municipal corporations . . . are founded in part upon the idea that the needs of the localities for which they are organized, by reason of the density of population or other circumstances, are more extensive and urgent than those of the general public in the same particulars. Many acts are often far more injurious, while the temptation to do them are [sic] much greater, in such localities than in the state generally."); *Horton*, 98 Cal. Rptr. 2d at 375 (citation omitted) ("'The general fact that state legislation concentrates on specific areas, and leaves related areas untouched' has been held to demonstrate 'a legislative intent to permit local governments to continue to apply their police power according to the particular needs of their communities in areas not specifically preempted.'").

[85] *See* MCQUILLIN, *supra* note 23, § 21.32, at 318 (stating same and providing examples). As the Minnesota Supreme Court noted over thirty years ago:

> We take judicial notice that our legislature has in this recent decade moved on several fronts to assist, but not to replace, local government in meeting the extraordinary needs of the metropolitan area, such as the elimination of conditions which diminish the quality of urban life. We are averse, in these circumstances, to hold that the legislature contemplates its own regulation to exclude municipal regulation, without most clear manifestation of such intent. It is imperative . . . that the legislature should manifest its preemptive intent in

disorder independent of state jurisdiction. As noted by a leading treatise, "the range of conduct prohibited by ordinances is extremely broad and signifies the importance of municipal control of offenses against the sovereignty of the state, conceiving the municipality to be an arm and agency of that sovereignty."[86] A sample of independent municipal criminal laws includes: pick-pocketing;[87] disturbing the peace;[88] shoplifting;[89] urinating in public;[90] disorderly conduct;[91] disorderly assembly;[92] unlawful restraint;[93] obstruction of public space;[94] harassment over the telephone;[95] resisting arrest;[96] obscenity;[97] nude dancing;[98] lewdness, public indecency, and indecent exposure;[99] prostitution, pimping, or the operation of "bawdy" houses;[100] gambling;[101] graffiti and the materials associated

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the clearest terms.

State v. Dailey, 169 N.W.2d 746, 748 (Minn. 1969); *see also* City of Seattle v. Shin, 748 P.2d 643, 646 (Wash. Ct. App. 1988) (asserting that "[t]he mere fact that a state criminal statute exists in the area is not evidence of the need for a single state-wide standard").

[86] MCQUILLIN, *supra* note 23, § 23.13, at 531.

[87] *See, e.g.*, Kansas City v. Henderson, 468 S.W.2d 48 (Mo. 1971).

[88] *See, e.g.*, Plymouth Township v. Hancock, 600 N.W.2d 380 (Mich. 1999); City of Tiffin v. McEwen, 720 N.E.2d 587 (Ohio 1998).

[89] *See, e.g.*, Eftekhar-Zadeh v. Lusero, 592 P.2d 1347 (Colo. App. 1979).

[90] *See, e.g.*, Commonwealth v. Williams, 568 A.2d 1281 (Pa. Super. Ct. 1990); McConnell v. State, No. 14-99-00887-CR, 2001 WL 8344, at *2 (Tex. App. Jan. 4, 2001).

[91] *See, e.g.*, City of Baton Rouge v. Williams, 661 So. 2d 445 (La. 1995); City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989); Salt Lake City v. Roberts, 7 P.3d 789 (Utah Ct. App. 2000).

[92] *See, e.g.*, State v. Bowers, 498 N.W.2d 202 (S.D. 1993).

[93] *See, e.g.*, City of Broadview Heights v. Baron, 745 N.E.2d 516 (Ohio Ct. App. 2000).

[94] *See, e.g.*, Diaz v. City of Fitchburg, 176 F.3d 560 (1st Cir. 1999).

[95] *See, e.g.*, Salt Lake City v. Alires, 9 P.3d 769 (Utah Ct. App. 2000); City of Bellevue v. Lorang, 963 P.2d 198 (Wash. Ct. App. 1998).

[96] *See, e.g.*, City of Detroit v. Smith, 597 N.W.2d 247 (Mich. Ct. App. 1999); City of Watertown v. Busshardt, 549 N.W.2d 286 (Wis. Ct. App. 1996).

[97] *See, e.g.*, State v. Odom, 554 So. 2d 1281 (La. Ct. App. 1989); City of Portland v. Jacobsky, 496 A.2d 646 (Me. 1985); City of Urbana v. Downing, 539 N.E.2d 140 (Ohio 1989). LA. REV. STAT. ANN. § 14:106E (West 2000). *But see* People v. Llewellyn, 257 N.W.2d 902 (Mich. 1977) (invalidating local obscenity law because legislature implied need for single, state-wide standard); City of Spokane v. Portch, 596 P.2d 1044 (Wash. 1979) (same).

[98] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Lim v. City of Long Beach, 217 F.3d 1050 (9th Cir. 2000); Hang On, Inc. v. City of Arlington, 65 F.3d 1248 (5th Cir. 1995).

[99] *See, e.g.*, South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984); State v. Botsford, 630 N.W.2d 11 (Minn. Ct. App. 2001); Tri-State Metro Naturists v. Township of Lower, 529 A.2d 1047 (N.J. 1987).

[100] *See, e.g.*, State v. Loughran, 693 P.2d 1000 (Ariz. Ct. App. 1985); People v. Johnson, 578 P.2d 226 (Colo. 1978); Allen v. City of Oklahoma City, 965 P.2d 387 (Okla. Crim. App.

with its inscription;[102] littering;[103] aggressive begging and panhandling;[104] vandalism;[105] trespass;[106] automobile "cruising";[107] animal control;[108] nuisances;[109] excessive noise;[110] sale or possession of drug paraphernalia;[111] simple drug possession;[112] possession of weapons other than firearms;[113] possession of basic firearms[114] and assault-style firearms;[115] discharge of firearms;[116] sleeping, lying,

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1998); Flannery v. City of Norfolk, 218 S.E.2d 730 (Va. 1975).

[101] *See, e.g.*, Bugsy's, Inc. v. City of Myrtle Beach, 530 S.E.2d 890 (S.C. 2000).

[102] *See, e.g.*, Nat'l Paint & Coating Ass'n v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995); Sherwin-Williams Co. v. City and County of San Francisco, 857 F. Supp. 1355 (N.D. Cal. 1994).

[103] *See, e.g.*, United States v. Herring, 35 F. Supp. 2d 1253 (D. Or. 1999); People v. Whitted, 718 N.Y.S.2d 162 (N.Y. Cty. Ct. 2000).

[104] *See, e.g.*, Gresham v. Peterson, 225 F.3d 899 (7th Cir. 2000); Smith v. City of Fort Lauderdale, 177 F.3d 954 (11th Cir. 1999); Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993); Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir. 1990); Roulette v. City of Seattle, 850 F. Supp. 1442 (W.D. Wash. 1994).

[105] *See, e.g.*, State v. Lewis, 439 S.W.2d 541 (Mo. Ct. App. 1969).

[106] *See, e.g.*, Batiste v. Superior Court, 5 Cal. Rptr. 2d 694 (Cal. Ct. App. 1992); City of Monroe v. Goldston, 661 So. 2d 428 (La. 1995).

[107] *See, e.g.*, Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990); Brandmiller v. Arreola, 544 N.W.2d 894 (Wis. 1996).

[108] *See, e.g.*, Singer v. City of Cincinnati, 566 N.E.2d 190 (Ohio Ct. App. 1990); City of Richardson v. Responsible Dog Owners of Texas, 794 S.W.2d 17 (Tex. 1990); Rabon v. City of Seattle, 957 P.2d 621 (Wash. 1998).

[109] *See, e.g.*, City of Chicago v. Cecola, 389 N.E.2d 526 (Ill. 1979); Biggs v. Griffith, 231 S.W.2d 875 (Mo. Ct. App. 1950).

[110] *See, e.g.*, City of Marietta v. Grams, 531 N.E.2d 1331 (Ohio Ct. App. 1987); Howard v. City of Tulsa, 712 P.2d 797 (Okla. Crim. App. 1986); City of Beaufort v. Baker, 432 S.E.2d 479 (S.C. 1993).

[111] *See, e.g.*, Cardarella v. City of Overland Park, 620 P.2d 1122 (Kan. 1980).

[112] *See, e.g.*, Edwards v. State, 422 So. 2d 84 (Fla. Dist. Ct. App. 1982); City of Niles v. Howard, 466 N.E.2d 539 (Ohio 1984); Rossberg v. State, 74 A. 581 (Md. 1909).

[113] *See, e.g.*, People v. Gerardo, 220 Cal. Rptr. 368 (Cal. Ct. App. 1985); People v. Ortiz, 479 N.Y.S.2d 613 (N.Y. Crim. Ct. 1984); City of Cleveland v. Barnes, 477 N.E.2d 1237 (Ohio Ct. App. 1984); State v. Rabon, 727 P.2d 995 (Wash. Ct. App. 1986).

[114] *See, e.g.*, United States v. Brown, 217 F.3d 605 (8th Cir. 2000); Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982); Hyde v. City of Birmingham, 392 So. 2d 1226 (Ala. Crim. App. 1980); City of Tucson v. Rineer, 971 P.2d 207 (Ariz. Ct. App. 1999); Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984); Junction City v. Lee, 532 P.2d 1292 (Kan. 1975); City of Cape Girardeau v. Joyce, 884 S.W.2d 33 (Mo. Ct. App. 1994). *But see* PA. STAT. ANN. tit. 18, § 6120(a) (West 2000) ("No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms . . . ."); Ortiz v. Commonwealth, 681 A.2d 152 (Pa. 1996) (invalidating laws enacted by Philadelphia and Pittsburgh that banned assault-style weapons).

[115] *See, e.g.*, Robertson v. City and County of Denver, 874 P.2d 325 (Colo. 1994); Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993).

[116] *See, e.g.*, City of Seattle v. Ballsmider, 856 P.2d 1113 (Wash. Ct. App. 1993).

or camping in public places;[117] driving under the influence of drugs or alcohol;[118] carrying an open container of alcohol;[119] underage drinking;[120] and public drinking and intoxication.[121] Of course, anti-vagrancy and loitering laws remain a common (if controversial) manifestation of municipal power, as they have for decades,[122] and curfews for minors have recently become a staple of local police power.[123] Criminal assault and battery are also the frequent subjects of municipal law making, notwithstanding that the associated physical harms are of "state concern."[124]

Conflict doctrine likewise exercises relatively little control.[125] A municipal

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[117] *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353 (11th Cir. 2000); Roulette v. City of Seattle, 78 F.3d 1425 (9th Cir. 1996); Whiting v. Town of Westerly, 942 F.2d 18 (1st Cir. 1991); Vehicular Residents Assoc. v. Agnos, 272 Cal. Rptr. 216 (Cal. Ct. App. 1990).

[118] *See, e.g.*, State v. Thompson, 536 So. 2d 388 (Fla. Dist. Ct. App. 1989); City of Lake Charles v. Henning, 414 So. 2d 331 (La. 1982); Richfield City v. Walker, 790 P.2d 87 (Utah Ct. App. 1990).

[119] *See, e.g.*, United States v. Lewis, 183 F.3d 791 (8th Cir. 1999); People v. Pantusco, 484 N.Y.S.2d 321 (N.Y. App. Div. 1985).

[120] *See, e.g.*, State v. Weltzin, 630 N.W.2d 406, 408 (Minn. 2001).

[121] *See, e.g.*, State v. Thompson, 536 So. 2d 388 (Fla. Dist. Ct. App. 1989); Goldstein v. City of Atlanta, 234 S.E.2d 344 (Ga. 1977).

[122] *See, e.g.*, Yuen v. Municipal Court, 52 Cal. App. 3d 351 (Cal. Ct. App. 1975); State v. Kemp, 429 So. 2d 822 (Fla. Dist. Ct. App. 1983); City of Milwaukee v. Nelson, 439 N.W.2d 562 (Wis. 1989).

Of late, localities have sought to avoid vagueness and overbreadth challenges by enacting, with some success, more narrowly drawn provisions that target "loitering with unlawful intent" to commit specified offenses. *See, e.g.*, City of Cleveland v. Howard, 532 N.E.2d 1325 (Ohio. 1987) (prostitution); City of Tacoma v. Luvene, 827 P.2d 1374 (Wash. 1992) (drug sales). *See generally* William Trosch, Comment, *The Third Generation of Loitering Laws Goes to Court: Do Laws that Criminalize "Loitering with the Intent to Sell Drugs" Pass Constitutional Muster?*, 71 N.C. L. REV. 513 (1993).

[123] *See, e.g.*, Schleifer v. City of Charlottesville, 159 F.3d 843 (4th Cir. 1998); Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993); State v. T.M., A.N. and D.N., 761 So. 2d 1140 (Fla. Dist. Ct. App. 2000); Village of Deerfield v. Greenberg, 550 N.E.2d 12 (Ill. Ct. App. 1990). *See generally* William Ruefle & Kenneth M. Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQUENCY 347, 353 (1995) (observing that juvenile curfews became the "norm in major American cities" in the 1990s).

States have also been known to enact their own broad curfew laws, while yielding express authority to locals to enact more aggressive curfew provisions. *See, e.g.*, FLA. STAT. ANN. §§ 877.20–.25 (West 2000); 720 ILL. COMP. STAT. 555/2 (West 1993 & Supp. 2001); 65 ILL. COMP. STAT. 5/11-1-5 (West 1992 & Supp. 2001).

[124] *See, e.g.*, City of Chicago v. Roman, 705 N.E.2d 81 (Ill. 1998); City of Westland v. Okopski, 527 N.W.2d 780 (Mich. Ct. App. 1994); City of Cleveland v. Murrad, 616 N.E.2d 1116 (Ohio Ct. App. 1992); City of Spokane v. White, 10 P.3d 1095 (Wash. Ct. App. 2000).

[125] *See, e.g.*, McCormick v. Municipality of Anchorage, 999 P.2d 155, 167 (Alaska Ct. App. 2000) ("[T]he true test is whether the municipal ordinance is irreconcilably at odds with state law . . . that enforcement of the municipal provision defeats the operation of state law.");

law impermissibly conflicts, and is therefore invalid, when "the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."[126] Accordingly, conflict is plainly avoided when a municipality criminalizes, in identical terms, behavior already the subject of state criminal law, creating a form of concurrent criminal jurisdiction.[127] Such concurrent jurisdiction is very common, being at once emblematic of local assertiveness, and the desire of local governments to retain prosecutorial authority and control over any fines that might attach. However, while it on occasion triggers inter-jurisdictional tension involving "race[s] to the court house" by competing state and local prosecutorial offices,[128] in itself it does little to augment the reach of local power in practical terms.[129]

Municipalities most definitely do augment their power, and avoid

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Salt Lake City v. Kusse, 93 P.2d 671, 673 (Utah 1938) ("Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail."); City of Tacoma v. Luvene, 827 P.2d 1374, 1379 (Wash. 1992) ("The conflict must be direct and irreconcilable with the statute.... If the ordinance and the statute can be harmonized, then the statute should not be construed as restricting a municipality's power...."). *See generally* MCQUILLIN, *supra* note 23, § 23.07, at 514 (citing other examples).

[126] Village of Struthers v. Sokol, 140 N.E.2d 519, 520 (Ohio 1923); *see also* State v. Rabon, 727 P.2d 995, 997 (Wash. Ct. App. 1986) ("The basic rule for determining whether an ordinance conflicts with state law is whether the ordinance attempts to authorize what the Legislature has forbidden or does it forbid [sic] what the Legislature has expressly licensed, authorized, or required.").

[127] *See* MCQUILLIN, *supra* note 23, § 23.10, at 524 ("The majority rule is that the same act may be made an offense both against the state and also against a municipal corporation; in other words, an act that violates both a state statute and an ordinance may be treated as a penal offense both under the statute and under the ordinance."); *e.g.*, City of Spokane v. White, 10 P.3d 1095, 1098 (Wash. Ct. App. 2000) ("Under constitutional police powers, cities may enact ordinances prohibiting the same acts state law prohibits as long as the city ordinance does not conflict with the general laws of the state."). Indeed, it is not uncommon for municipalities to enact catch-all laws that make all state misdemeanors occurring within the municipality municipal offenses. *See* MCQUILLIN, *supra* note 23, § 23.06, at 512.

[128] Bush v. Williams, 504 So. 2d 1060, 1063 (La. Ct. App. 1987).

[129] As discussed later, however, concurrent jurisdiction does redound to the benefit of municipalities in several respects to the extent they are empowered to sanction differently than concurrent state law. *See infra* notes 155–161 and accompanying text (discussing how local power to impose lesser punishments in relation to concurrent laws can enhance prosecutorial power and avoid expenditures associated with jury trials and appointed counsel).

Furthermore, it bears mention that, to the extent state and local laws are identical, successive prosecutions are precluded on Fifth Amendment double jeopardy grounds, as state and local governments are not considered "dual sovereigns," unlike the state and federal governments. *See* Waller v. Florida, 397 U.S. 387 (1970). However, as noted below, the propensity of localities to distinguish, if only slightly, local laws from substantively similar state laws largely undercuts this limit.

invalidation of laws as a result of conflict, when they make "refinements" to almost identical state criminal laws.[130] This is achieved, for example, when a municipality, while targeting the same basic behavior as state law, requires a distinct criminal mens rea,[131] adds a particular element not contained in state law,[132] or imposes distinct evidentiary presumptions.[133] Similarly, a municipality can distinguish similar state criminal law by means of altering the focus of a given law in highly specified geographic terms.[134] For instance, because municipalities enjoy the unquestioned right to regulate their parks and recreation spaces, local gun laws that are more restrictive than similar state laws also targeting such sub-areas have been upheld.[135] As noted by the Washington Court of Appeals: "[w]hile an absolute and unqualified local prohibition against possession of a pistol by the holder of a state permit would conflict with state law, an ordinance which is a limited prohibition reasonably related to particular places and necessary to protect the public safety, health, morals and general welfare" of a given locality is permissible.[136] The specification of "exclusion zones" that ban from certain areas of the city individuals previously convicted of drug[137] or

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[130] *See* C. DALLAS SANDS ET AL., LOCAL GOVERNMENT LAW § 14.38, at 14-109 (1997 & Supp. 2000) (noting that "[r]efinements of detail which are reasonably related to differing local conditions and which are consistent with the broad parameters of the state law are, in the better view, sustained").

[131] *See, e.g.*, People v. Ortiz, 479 N.Y.S.2d 613 (N.Y. Crim. Ct. 1984) (upholding local law that banned possession of knives with blade of four or more inches, in contrast to state law that prohibited such weapons on the basis of heightened scienter); City of Portland v. Jackson, 850 P.2d 1093 (Or. 1993) (upholding local law that banned public nudity, without regard to purpose, despite state law that banned nudity only if persons acted with purpose to sexually arouse); City of Spokane v. White, 10 P.3d 1095 (Wash. Ct. App. 2000) (upholding local domestic violence assault law because law required lesser form of intent ("wilful") than similar state law).

[132] *See* SANDS ET AL., *supra* note 130, § 11.25, at 110 (citing examples and noting that courts have "sustained local tinkering with state enactments on the purely verbalistic criteria that the local ordinance provides for an element of the offense which is not present in the statutory definition of conduct constituting a violation.").

[133] *See, e.g.*, People v. Chen Ye, 685 N.Y.S.2d 602 (N.Y. Crim. Ct. 1999) (recognizing local power to legislate relative to presumptions); City of Dickinson v. Gresz, 450 N.W.2d 216 (N.D. 1989) (same).

[134] *See, e.g.*, Batiste v. Superior Court, 5 Cal. Rptr. 2d 694 (Cal. Ct. App. 1992) (upholding local trespass law because it concerned different part of airport than that addressed by state trespass law).

[135] *See, e.g.*, City of Tucson v. Rineer, 971 P.2d 207 (Ariz. Ct. App. 1999) (upholding local law that prohibited use or possession of firearm within municipal parks).

[136] Second Amendment Foundation v. City of Renton, 668 P.2d 596, 599 (Wash. Ct. App. 1983).

[137] *See, e.g.*, State v. Burnett, No. C-981003, 2000 WL 955614 (Ohio Ct. App. Dec. 23, 1999) (rejecting challenge to drug exclusion zone based on rights to peaceable assembly and free travel); State v. Johnson, 988 P.2d 913 (Or. Ct. App. 1999) (rejecting due process (notice)

prostitution-related offenses,[138] making them subject to criminal prosecution if they are discovered in such areas, is also becoming a popular municipal strategy.

Municipalities thus avoid conflict with similar state laws by performing an interstitial function of sorts, in accord with the spirit of home rule,[139] filling substantive gaps in perceived local social control needs.[140] They enjoy this power, as noted by one court, because "[a]n ordinance which merely enlarges upon the provisions of a State statute by requiring more restrictions than the State law . . . [creates no conflict] as long as the State statute is not exclusive."[141] In *State v. Rabon*, for instance, the Washington Court of Appeals upheld a Seattle law that made it a gross misdemeanor to possess "chako" sticks, finding no conflict with the broader Washington state law banning a variety of other weapons because state law did not specifically ban chako sticks.[142] As noted by the *Rabon* court, conflict does not occur merely because a local law broadens, or in some respect is more specific than, the prohibitions contained in a related state statute; conflict occurs only when state law expressly permits the targeted behavior or otherwise denies enlargement power to locals.[143]

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challenge to drug exclusion zone); State v. James, 978 P.2d 415 (Or. Ct. App. 1999) (rejecting double jeopardy challenge to drug exclusion zone). *But see* Johnson v. City of Cincinnati, 119 F. Supp. 2d 735 (S.D. Ohio 2000) (enjoining Cincinnati's drug exclusion zone because it violated the rights to association and movement and constituted double jeopardy).

[138] *See, e.g.*, State v. Lhasawa, 979 P.2d 774 (Or. Ct. App. 1999) (rejecting due process challenge to prostitution free zone).

[139] *See* Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 274 (Ill. 1984):

> Home rule . . . is predicated on the assumption that problems in which local governments have a legitimate and substantial interest should be open to local solution and reasonable experimentation to meet local needs, free from veto by voters and elected representatives of other parts of the State who might disagree with the particular approach advanced by the representatives of the locality involved or fail to appreciate the local perception of the problem.

[140] *See* MCQUILLIN, *supra* note 23, § 23.04, at 505 (observing that "a municipal corporation has implied authority in police control to penalize by ordinance acts which are already punishable by statute where the demands of municipal life seem to require more rigid regulations than are required in the state at large").

[141] Atkins v. City of Tarrant City, 369 So. 2d 322, 326 (Ala. Crim. App. 1979); *see also, e.g.*, Junction City v. Lee, 532 P.2d 1292, 1297–98 (Kan. 1975) ("[W]here both an ordinance and the statute are prohibitory and the only difference is that the ordinance goes further in its prohibition but not counter to the prohibition in the statute, and the city does not attempt to authorize by ordinance that which the legislature has forbidden, or forbid that which the legislature has expressly authorized, there is no conflict."); City of Spokane v. White, 10 P.3d 1095, 1098 (Wash. Ct. App. 2000) ("A local ordinance does not conflict with state law merely because one prohibits a wider scope of activity than the other does.").

[142] 727 P.2d 995, 998–99 (Wash. Ct. App. 1986).

[143] *Id.* at 998; *see also* State v. S.L.S., 777 So. 2d 318 (Ala. Crim. App. 2000) (upholding municipal ordinance prohibiting the giving of false statement to "any department or agency of

Municipal power also extends beyond the basic authority to identify and define crimes; it encompasses, quite naturally, sanctions. Local forfeiture laws provide one such example. Perhaps the best-known local law is New York City's, under which thousands of drug and alcohol-impaired drivers have forfeited their motor vehicles.[144] This same strategy has been used by other localities to target impaired drivers,[145] as well as persons who patronize or solicit prostitutes,[146] purchase illegal drugs,[147] or possess unregistered firearms.[148] In Alaska, statutory law expressly provides that municipalities may adopt vehicle forfeiture laws and

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the city," in contrast to state law that merely prohibited providing a false statement to police); People v. Gerardo, 220 Cal. Rptr. 368 (Cal. Ct. App. 1985) (upholding municipal ordinance prohibiting the carrying of knife in plain view, in contrast to state law that banned possession of concealed knife); City and County of Denver v. Howard, 622 P.2d 568 (Colo. 1981) (upholding municipal ordinance that prohibited interfering with police officer in "any way," in contrast to state law that required use or threatened use of "violence, force, or physical interference"); State v. Thompson, 536 So. 2d 388 (Fla. Dist. Ct. App. 1989) (upholding municipal ordinance that prohibited public consumption of alcohol, in contrast to state law that proscribed disorderly intoxication); City of Portland v. Long, 807 P.2d 815 (Or. Ct. App. 1991) (upholding municipal ordinance that banned carrying loaded firearms, in contrast to state law that merely banned the carrying of concealed firearms); City of Portland v. Marshall, 728 P.2d 903 (Or. Ct. App. 1986) (upholding municipal ordinance that banned discharge of firearms because state law banned only unlawful carrying of firearms); City of Richardson v. Responsible Dog Owners of Texas, 794 S.W.2d 17 (Tex. 1990) (upholding broad local animal control law because state law regulated only "vicious conduct"); City of Seattle v. Eze, 759 P.2d 366 (Wash. 1988) (upholding municipal ordinance that criminalized "disorderly bus conduct" because law was broader in scope than similar state law); City of Seattle v. Shin, 748 P.2d 643 (Wash. Ct. App. 1988) (upholding municipal ordinance that criminalized parental failure to report child abuse because state law relating to child abuse failed to expressly criminalize such behavior).

[144] *See* Grinberg v. Safir, 694 N.Y.S.2d 316 (N.Y. Sup. Ct. 1999); *see also* Alan Feuer, *Long after His Arrest, His Car is His Again*, N.Y. TIMES, Oct. 3, 2000, at B3 (noting that, although Grinberg's case was voluntarily dismissed, it took him nineteen months to regain his car); Jacob H. Fries, *4,000 Cars Seized in Effort to Halt Drunken Driving*, N.Y. TIMES, July 3, 2001, at B2 (noting number of cars seized under law since February 1999).

[145] *See, e.g.*, McCormick v. Municipality of Anchorage, 999 P.2d 155 (Alaska Ct. App. 2000).

[146] *See, e.g.*, Horton v. City of Oakland, 98 Cal. Rptr. 2d 371 (Cal. Ct. App. 2000).

[147] *See, e.g., id.*; Property Clerk, New York City Police Dep't v. Mason, 548 N.Y.S.2d 875 (N.Y. Sup. Ct. 1989). The Oakland forfeiture law at issue in *Horton*, unlike the similar state law, required a mere preponderance of the evidence standard of proof (versus reasonable doubt), did not require a conviction for the underlying drug offense, and contained no "innocent owner" defense or community property exemption for the sole vehicle of the immediate family. *Horton*, 98 Cal. Rptr. 2d at 375–76 n.9 (citing Oakland Cal. Ord. 12093 C.M.S., § 3-23.07). Moreover, unlike under state law, the proceeds were divided evenly among local law enforcement and prosecutors. *Id.* According to the *Horton* court, if the state desired "to preempt local forfeiture ordinances of this kind, it [could have] express[ed] that intention by enacting appropriate legislation." *Id.* at 375.

[148] *See, e.g.*, People v. Jaudon, 718 N.E.2d 647 (Ill. App. Ct. 1999).

that such laws need not be "consistent with [statutory law]";[149] indeed, local laws can be "harsher than their state-law counterparts."[150]

Similarly, municipalities enjoy considerable power to specify the quantum of incarceration upon conviction.[151] With respect to concurrent exercises of criminal authority, despite the general rule that localities cannot punish *less than* or in *excess* of concurrent state criminal laws,[152] in fact very often they are permitted to do so.[153] As a result, when localities are more punitive, they can make criminal

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[149] *McCormick*, 999 P.2d at 167 (quoting ALASKA STAT. § 28.35.038 (Michie 2000)).

[150] *Id.* at 168.

[151] *See* City of Chicago v. Roman, 705 N.E.2d 81, 87 (Ill. 1998) (noting that "[i]nherent in defining a crime is prescribing a penalty.... [A] prescribed penalty is as necessary to constitute a crime as is its definition. A statute that prohibits conduct without a penalty is a nullity"); Commonwealth v. Cabell, 185 A.2d 611, 615–16 (Pa. Super. Ct. 1962) ("Local self-government includes the power to legislate as well as to administer, and if it is to be effective it must include the power to provide penalties for violation of its legislative mandates.").

[152] *See* MCQUILLIN, *supra* note 23, § 17.15, at 444–51 (noting same); *see, e.g.*, Edwards v. State, 422 So. 2d 84 (Fla. Dist. Ct. App. 1982) (invalidating portion of local drug law that imposed harsher punishment than identical state law); Pierce v. Commonwealth, 777 S.W.2d 926 (Ky. 1989) (invalidating local sodomy solicitation law that imposed twice the period of imprisonment and fine than that authorized by identical state law); City of Portland v. Dollarhide, 714 P.2d 220 (Or. 1986) (invalidating penalty provision of local prostitution law that imposed mandatory minimum penalty not contained in identical state law); *see also* City of Seattle v. Hogan, 766 P.2d 1134 (Wash. Ct. App. 1989) (deeming it a violation of equal protection when local law carried a greater penalty than identical state law because it afforded charging authorities "unbridled discretion").

[153] *See* People v. Wade, 757 P.2d 1074, 1076–77 (Colo. 1988) (stating that a "city's choice of a sentencing scheme different from the state's is well within the city's constitutional power as a home rule city.... [T]o find that a home rule city's penal ordinances must share the state's so-called 'philosophy in sentencing' would diminish... the independence and self-determination vested in those cities by the constitution"); Hannan v. City of Minneapolis, 623 N.W.2d 281, 285 (Minn. 2001) (stating "as long as the state has not expressly precluded local regulation, there is no conflict when the state regulates a topic and the local government adds additional regulations that provide consequences greater than those already provided").

For instances of courts upholding local authority to impose penalties greater than identical state laws, see, for example, Brooks v. City of Birmingham, 485 So. 2d 385 (Ala. Crim. App. 1986) (upholding local harassment law); State v. Crisp, 855 P.2d 795 (Ariz. Ct. App. 1993) (upholding prostitution law); State v. T.M., A.N. and D.N., 761 So. 2d 1140 (Fla. Dist. Ct. App. 2000) (upholding local juvenile curfew law); City of Baton Rouge v. Williams, 661 So. 2d 445 (La. 1995) (upholding local disorderly conduct law); Rossberg v. State, 74 A. 581 (Md. 1909) (upholding local cocaine possession law); City of Niles v. Howard, 466 N.E.2d 539 (Ohio 1984) (upholding local simple marijuana possession law); City of Cleveland v. Barnes, 477 N.E.2d 1237 (Ohio Ct. App. 1984) (upholding local concealed weapon law). For instances of courts upholding local authority to impose lesser penalties, see, for example, Ford v. City of Hot Springs, 743 S.W.2d 394 (Ark. 1988) (upholding local animal cruelty statute); City of Aurora v. Martin, 507 P.2d 868 (Colo. 1973) (upholding local assault and battery law); City of Fargo v. Little Brown Jug, 468 N.W.2d 392 (N.D. 1991) (upholding local law barring sale to underage

those behaviors impliedly decriminalized by state government.[154] More subtly, when localities impose less punitive sanctions for concurrent illegalities, they can derive significant institutional benefits. This is perhaps most evident in the well-established authority of municipalities to legislate with respect to "petty crimes,"[155] as to which no federal constitutional right to a jury trial[156] or counsel[157] extends. Accordingly, local governments can be constitutionally abstemious and both save the significant resources associated with the exercise of such rights and afford local prosecutors an expedient charging option[158] with enhanced plea bargain leverage.[159] For individual defendants, this carries the immediate consequences of possibly being deprived of a right to a jury of one's peers, and

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drinkers); Harlow v. Clow, 223 P. 541 (Or. 1924) (upholding local vagrancy law).

[154] In Louisiana and Ohio, for instance, localities are empowered to increase punishments for concurrent laws so long as the degree of violation (misdemeanor) is not exceeded, in effect affording them the power to "recriminalize" low-level offenses. *See* City of Baton Rouge v. Williams, 661 So. 2d 445, 450 (La. 1995); *Howard*, 466 N.E.2d at 541.

[155] *See generally* MCQUILLIN, *supra* note 23, §§ 27.32–.34, at 358–68.

According to the Supreme Court, an offense is "presumptively petty" if the maximum period of incarceration is six months or less. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 543–44 (1989). This benchmark, of course, has encouraged governments to pile on additional sanctions, other than incarceration, when particular laws are violated. According to the *Blanton* Court, the presumption of pettiness can be overcome only if the accused shows that "any additional statutory penalties . . . are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.* at 543. Applying this test, the Court concluded that a DUI provision authorizing a maximum jail term of six months *or* forty-eight hours of community service while wearing clothing signifying that the individual is a DUI offender, *plus* requiring suspension of the offender's driver's licence suspension, the imposition of a fine, and compelled alcohol abuse education, was not "serious." *Id.* at 543–44.

[156] Baldwin v. New York, 399 U.S. 66 (1970) (holding that the Sixth Amendment right to a jury trial does not extend to "petty" offenses).

[157] Scott v. Illinois, 440 U.S. 367 (1979) (holding that indigents must be appointed counsel only when conviction results in "actual imprisonment").

[158] *See, e.g.*, State v. Bowers, 498 N.W.2d 202 (S.D. 1993) (upholding denial of jury trial in relation to prosecution under local law for "disorderly assembly," carrying a maximum penalty of six months imprisonment, despite identical state law carrying a maximum one-year term); City of Casper v. Fletcher, 916 P.2d 473 (Wyo. 1996) (upholding right of local prosecutor to choose between charging under local battery law, as opposed to identical state law, when only state law permitted right to jury trial). *But see* Hardamon v. City of Boulder, 497 P.2d 1000, 1002 (Colo. 1972) (striking down local law that denied right to jury trial, finding it "illogical and without reason to say that a defendant charged in a state or non-home rule municipal court should be permitted a jury trial, whereas if he is similarly charged in a home rule court he should be denied a jury trial").

[159] This appeal stems in part from the constitutional latitude enjoyed by prosecutors to aggregate two or more petty offense charges into a single prosecution, which, when combined, threaten more than "petty" punishment, yet do not trigger constitutional jury trial rights. *See* Lewis v. United States, 518 U.S. 322 (1996) (holding that no right to a jury trial attaches in a single prosecution for several petty offenses combined).

being deprived of access to counsel.[160] Moreover, such uncounseled convictions can be used to enhance punishment for any subsequent convictions, potentially resulting in substantial increases in prison time.[161]

The power of localities to specify sanctions as to non-concurrent crimes is even more significant. With respect to this expansive realm of offenses, localities can prescribe punishments under the felony level;[162] they can also impose mandatory minimum sentences,[163] and even require confiscation and destruction of personal property.[164] Of course, when they independently law make, localities enjoy the same institutional savings identified above with respect to "petty crimes."[165]

Finally, home rule authority empowers municipalities to self-regulate in the procedural realm. This power can include the withholding of certain procedural rights otherwise applicable in criminal proceedings[166] and the imposition of limits

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[160] The negative consequences attending lack of counsel, in particular, for low-level offenses have been well-known for some time. As the Court noted in *Argersinger v. Hamlin*: "[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel." 407 U.S. 25, 36 (1972) (quoting AMERICAN CIVIL LIBERTIES UNION, LEGAL COUNSEL FOR MISDEMEANANTS: PRELIMINARY REPORT 1 (1970)).

[161] *See* Nichols v. United States, 511 U.S. 738 (1994) (holding that uncounseled convictions can be used for enhancement purposes, even though only later conviction carries sentence involving "actual imprisonment"); *cf.* Baldasar v. Illinois, 446 U.S. 222, 227–28 (1980) (Marshall, J., concurring) (noting that "[a]n uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense").

[162] *See* MCQUILLIN, *supra* note 23, § 23.06, at 512.

[163] *See, e.g.*, City of Chicago v. Roman, 705 N.E.2d 81 (Ill. 1998) (upholding mandatory minimum for violation of local law prohibiting assault on elderly person, despite more flexible sentencing allowed by state law); City of Detroit v. Recorder's Court Traffic and Ordinance Judge, 304 N.W.2d 829 (Mich. Ct. App. 1981) (upholding mandatory minimum for violation of local prostitution law, despite more flexible state sentencing law); City of Columbus v. Kemper, 610 N.E.2d 1194 (Ohio Ct. App. 1992) (upholding local sentencing scheme resulting in mandatory minimum sentence for drunk driving, when no such minimum would arise under state law because prior convictions counted differently). *But see* City of Portland v. Dollarhide, 714 P.2d 220 (Or. 1986) (invalidating mandatory minimum for violation of local prostitution law when none existed under state law); City of North Charleston v. Harper, 410 S.E.2d 569 (S.C. 1991) (invalidating local law that imposed mandatory minimum jail sentence for simple marijuana possession, unlike state law which afforded discretion to sentencing court).

[164] *See, e.g.*, City of Portland v. Marshall, 728 P.2d 903 (Or. Ct. App. 1986) (upholding local law that permitted the confiscation and destruction of firearm used in violation of city law banning discharge of firearms).

[165] *See, e.g.*, State v. Weltzin, 639 N.W.2d 406 (Minn. 2001) (deeming permissible a prosecution for violation of local underage drinking law, which was closely related to state law, despite fact that local law did not trigger jury trial right).

[166] *See, e.g.*, R.E.N. v. City of Colorado Springs, 823 P.2d 1359 (Colo. 1992) (en banc) (holding that localities are permitted to eschew state procedural safeguards, such as the right to

on the right to appeal.[167] Moreover, local authority typically entails the use of "municipal courts,"[168] the summary and "slap-dash methods" of which have been a source of concern for decades.[169]

As the foregoing should make clear, municipalities today wield considerable power in the battle against crime and disorder, and the trend signals a continued assertiveness. As noted by a leading treatise:

> Without doubt the trend disclosed by the cases, and also the trend of constitutional and statutory enactments, is one of liberality in allowing municipal power to create and punish for offenses upon general municipal police power, regardless of whether the offense is theoretically conceived as one against the state or against the municipality.[170]

Viewed in historical context, this assertiveness should cause neither surprise nor special concern for, as discussed earlier, local governments played a preeminent role in governance during much of the nation's history,[171] including the enactment of criminal laws.[172] As Professor Novak has observed, the "decentralized, loosely

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counsel, in prosecutions of juveniles in municipal courts for violations of local law).

[167] *See* SANDS ET AL., *supra* note 130, § 11.33, at 143–47 (discussing limits on right to appeal).

[168] *See id.* § 11.28, at 124–31 (discussing variety of such courts and summary procedures employed).

[169] *See* Sam B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice during the Past Fifty Years*, 50 HARV. L. REV. 583, 590–91 (1937); *see also* Baldasar v. Illinois, 446 U.S. 222, 228 n.2 (1980) (Marshall, J., concurring) (expressing concern over application of "assembly-line justice" in municipal courts).

In Ohio, this involves the use of "mayor's courts" wherein local chief executives are personally authorized to adjudicate alleged violations of municipal laws and to impose punishments. Tumey v. Ohio, 273 U.S. 510 (1927) (upholding statutory grant of judicial and executive functions and powers to mayoral offices). The *Tumey* Court did, however, invalidate the particular scheme in question because the mayor had a "direct, personal, substantial pecuniary interest" in the proceedings, receiving as a supplement to his regular salary specified fees and costs in the event of a conviction. *Id.* at 523; *see also* DePiero v. City of Macedonia, 180 F.3d 770, 780–82 (6th Cir. 1999) (finding due process violation because of "broad reach of executive authority" enjoyed by particular mayor).

For an in-depth discussion of the "minor judiciary" of Philadelphia in the mid-1800s, characterized by a "fee system" in which aldermen personally benefitted from the adjudication of arrests for acts involving minor public disorder, see ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA 1800–1880, 17, 26–33, 121–30, 173–80 (1989).

[170] *See* MCQUILLIN, *supra* note 23, § 23.02, at 502.

[171] *See supra* note 63 and accompanying text.

[172] *See, e.g.*, Main v. McCarty, 15 Ill. 442 (1854) (city law banning operation of a "tippling house" on the Sabbath); White v. Kent, 11 Ohio St. 550 (1860) (city law authorizing arrest for violation of local law forbidding private auctions in public spaces). *See generally* NORTON T.

structured state coupled with strong traditions of private prosecution and local police regulation allowed for a stunning degree of diversity, experimentation, and discretion" in the municipal power to effectuate social control.[173] Characteristic of the times, as well, was a distinctly communal conception of individual liberties. Such liberties were "routinely subordinated to the local police powers necessary to secure the moral fiber and general welfare of a community."[174] This orientation, and the predominant role of local government in regulating the daily lives of Americans, however, experienced a radical transformation in the wake of the Civil War and the constitutional amendments it spawned, emphasizing individual rights and governmental centralization.[175] After a several-decade-long hiatus, Americans now appear ready to return local government to its major role in regulating and disciplining the affairs of daily life.[176] Not coincidentally, with this return have come strenuous appeals (even—perhaps principally—from

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HORR & ALTON A. BEMIS, A TREATISE ON MUNICIPAL POLICE ORDINANCES *passim* (1887) (citing other examples); Horace L. Wilgus, *Arrests Without a Warrant*, 22 MICH. L. REV. 541, 550–52 (1924) (same).

[173] NOVAK, *supra* note 63, at 155. During that time, "[s]tate legislatures delegated open-ended authority to municipalities to deal with moral hazards." *Id.*; *see also* ERNST FREUND, POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 144–46, 156–59 (1904); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 107–42 (1993) (noting same).

For discussions of criminal law-making by locals in earlier times, see BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA 1606–1660, 9–13, 125–30 (1983); JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT, 1650–1825 *passim* (1975); William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 451–56 (1967).

[174] NOVAK, *supra* note 63, at 169. Novak adds that "[f]rom a twentieth-century perspective, these ideas and practices seem arbitrary and even scary.... But these notions were the essence of nineteenth-century conceptions of local self-government." *Id.* at 169–70.

[175] *Id.* at 170. In the wake of the Civil War, Novak observes, American traditions of local self-governance and *salus populi* gave way to:

> [T]he simultaneous pursuit of two seemingly antagonistic tendencies—the *centralization of power* and the *individualization of subjects*. The two would be ultimately mediated (and, again simultaneously, promoted) by the constitutionalization of law. By the early decades of the twentieth century, a society legally and politically oriented around the relationship of individual subjects to a central nation-state had substantially replaced the well-regulated society's preference for articulating the roles of associative citizens in a confederated republic.

Id. at 240–41. In short, in the mid-to-late nineteenth century there occurred a "decidedly upward shift in decision-making power" with regard to police and regulatory policies. *Id.* at 241.

[176] In addition to the re-imposition of local authority in the realm of substantive law, discussed at length here, recent decentralization efforts such as "community prosecution," suggest a strong link to the past. STEINBERG, *supra* note 169, at 17 (discussing the role played by local aldermen, located in neighborhood offices throughout the city, who adjudicated the majority of criminal cases for much of the nineteenth century in Philadelphia).

academic quarters) that concern for "rights" should not eclipse the commonweal,[177] and that the local, democratic origins of the laws should enjoy deference.[178]

Thus, in many respects, a central strain of the American modus operandi of social control can be said to have come full circle. Municipalities across the country are now exercising their right to criminalize a wide range of behaviors, well beyond the traditional constitutionally contested domains of vagrancy and loitering,[179] consistent with the dynamic quality and responsiveness historically associated with localism.[180] Next, the article examines several of the most important ramifications of this shift.

III. THE MUNICIPAL POWER TO ENACT CRIMINAL LAWS: A POSITIVE GOOD?

When municipal governments enact criminal laws, they avail themselves of just one of several means at their disposal to regulate behavior within their boundaries. To a considerable extent, municipal criminal laws can be said to resemble zoning provisions; a conventional local method of regulating space and maintaining order.[181] The resort by municipalities to criminal laws in particular, however, raises unique concerns that warrant special consideration, as discussed next.

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[177] *See, e.g.*, AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA (1993); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[178] *See supra* notes 4–5, 41–45 and accompanying text.

[179] *See supra* notes 87–167 and accompanying text (citing and discussing large variety of criminal laws enacted by cities); *see also* Ellickson, *Chronic Misconduct*, *supra* note 42, at 1176 (referring to "the crackdown ordinances of the 1990s").

[180] *See* MCQUILLIN, *supra* note 23, § 24.03, at 14:

> [Police power] is not something which is rigid and definitely fixed; on the contrary, in its very nature it must be considerably elastic within limits in order to meet the changing and shifting conditions which from time to time arise through the increase and shift of population and the flux and complexity of commercial and social relations. . . . [I]t copes with the new as it has with the old and justifies measures in the present that it has not justified in the past.

See also id. § 24.08, at 25 ("[T]he power is not confined with respect to the subjects upon which it operates by narrow limits of precedents based on conditions of a past era; rather, it is sufficiently flexible to meet changing conditions that call for revised or new regulations to promote the public health, safety, morals, or welfare.").

[181] It warrants mention, however, that cities employed criminal laws well before the advent of zoning, the latter being a distinctly twentieth century innovation. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1115 (3d ed. 1993) (noting that until the twentieth century, urban land use controls were privatized, "piecemeal[,] and limited").

A. *The Proliferation of Criminal Laws and Their Consequences*

As Thomas Paine once aptly observed, "in America the law is king";[182] this is surely no less true today as evidenced by modern America's penchant for criminal laws in particular.[183] Criminal laws themselves serve both expressive and instrumental functions. In expressive terms, the laws give concrete expression to acceptable standards of decorum and behavior,[184] as determined by a given political body at a given place and time.[185] More significant to the daily lives of most Americans, however, is the instrumental role of criminal laws. In

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[182] THOMAS PAINE, COMMON SENSE AND THE CRISIS 41 (Doubleday Dolphin ed. 1960) (1776). For more modern recognitions of this orientation, see generally LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1985); GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

[183] For extended discussions of contemporary America's particularly acute fixation on criminalization, see David Garland, *Introduction: The Meaning of Mass Imprisonment, Mass Imprisonment in America, in* 3 PUNISHMENT & SOCIETY 5 (2001); David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455 (2001).

[184] Legal expressiveness is now the subject of a burgeoning literature, drawing predominantly from rational choice theory and law and economics, which focuses on the role of social norms in curtailing anti-social behavior. *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805 (1998); Cass R. Sunstein, *On The Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). Under this view, "[i]ndividuals are motivated to obey the law not only by their perception of the costs and benefits of crime, but also by their understanding of what breaking the law will signify about who they are and what they value." Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1860 (1999).

Whatever value expressiveness might have in the abstract, it has little to recommend in the context of the low-level local criminal laws mainly discussed here. While criminal laws targeting such non-serious offenses as open container laws, jaywalking, or loitering might signal a community's displeasure with "disorder," or signal disapproval of gang membership in particular (as in *Morales*), it strains credulity to say that the laws are of such moral magnitude as to condemn transgressors in terms of "who they are and what they value." Indeed, as discussed *infra*, too often such laws constitute little more than a known, pretextual legal basis for police to arrest and search, skewing whatever "expressive" function the laws might have on their own individualized terms. For commentary critical of expressive and social norm theory more generally, see, for example, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537 (2000); Mark Tushnet, *"Everything Old is New Again": Early Reflections on the "New Chicago School,"* 1998 WIS. L. REV. 579.

[185] *See* Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 346 (1984) (observing that governmental decisions in criminal lawmaking generate a "struggle [that] is, in essence, political rather than moral").

instrumental terms, criminal laws provide government agents the means to immediately intervene in citizens' affairs. Upon "reasonable suspicion" that an offense has been or is being committed, police can "stop" a citizen;[186] with "probable cause," police can execute a full "custodial arrest," with or without a warrant, regardless of the minor nature or lack of seriousness of the underlying offense.[187]

Accordingly, with more laws come more opportunities for seizures of citizens by police, making the sheer proliferation of criminal laws a significant social development. The intrusive consequences of this authority are evidenced in New York's ongoing "zero tolerance" and "quality of life" policing strategies,[188] where the state Attorney General determined that the city's police executed roughly 175,000 "stop and frisks" during a recent fifteen-month period,[189] a significant proportion of which were for suspected violations of "quality-of-life" offenses.[190] Although the study did not collect data on "arrests" in New York, [191] other sources underscore the City's frequent resort to arrest for low-level offenses, with such arrests increasing dramatically in number during the first five years of zero tolerance policing.[192] Moreover, with this augmented authority there often

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[186] Terry v. Ohio, 392 U.S. 1, 21 (1968).

[187] Atwater v. City of Lago Vista, 121 S. Ct. 1536, 1557 (2001).

[188] *See generally* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Wayne A. Logan, *Policing in an Intolerant Society*, 35 CRIM. L. BULL. 334 (1999). It is worth noting that aggressive, "zero tolerance" oriented police campaigns did not originate in New York with Mayor Rudolph Giuliani. In the 1850s, for instance, Philadelphia's nativist mayor directed his police to aggressively patrol and arrest for minor offenses, resulting in massive increases in arrest rates. *See* ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA 1800–1880, 172–73 (1989).

[189] *See* ATTY. GEN. OF THE STATE OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES 107–09 (Dec. 1, 1999), http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html (Dec.1, 1999) [hereinafter STOP AND FRISK REPORT] (specifying a total of 174,919 "stops" in New York City during the period of January 1, 1998, through March 31, 1999).

[190] *Id.* at 58 (specifying that the articulated basis in almost 18,000 stops related to such offenses).

[191] *See id* at 57-58.

[192] *See* DIV. OF CRIMINAL JUSTICE SERVICES, CRIMINAL JUSTICE INDICATORS: NEW YORK CITY, 1993–1998, *at* http://www.criminaljustice.state.ny.us/cgi/internet/areastat/areastat.cgi (last modified Aug. 8, 2001) (noting increase from 129,403 misdemeanor arrests in 1993 to 215,155 in 1998); *see also* Kevin Flynn, *Lower Morale, Yes. But Apathy?*, N.Y. TIMES, June 18, 2000, at 25 (noting that such arrests increased by twelve percent in 2000 over 1999); William K. Rashbaum, *Overtime Program Credited for Crime Drop*, N.Y. TIMES, Dec. 29, 2000, at B3 (noting that two-thirds of arrests during the year were for quality-of-life offenses, pursuant to Operation Condor, a hyper-aggressive street patrol initiative); David Rohde,

comes evidence of discriminatory applications of the law, as seen within minority communities in New York[193] and elsewhere,[194] practices that are largely immune to constitutional challenge and redress.[195]

In addition, as has been recognized for decades,[196] criminal laws represent

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Crackdown on Minor Offenses Swamps NYC Courts, N.Y. TIMES, Feb. 2, 1999, at A1 (stating that criminal courts have been "overwhelmed by a flood of cases" for lower-level offenses); David Rohde, *In Teeming Courts, Finding Strength in Family Ties*, N.Y. TIMES, July 7, 2000, at A1 (describing the impact on middle-class families whose members have been ensnared by aggressive "quality-of-life" policing when arrested for petty offenses); David Rohde, *Police Arrest Smokers in Subways, and Lawyers Object*, N.Y. TIMES, June 11, 2000, at A1 (recounting recent arrests for selling tamales on the street without a license and smoking in the subway).

[193] *See* STOP AND FRISK REPORT, *supra* note 189, at 95 (noting that African-Americans were six times, and Hispanics four times more likely than Whites to be stopped and frisked by City police); David Barstow, *View from New York Streets: No Retreat by Police*, N.Y. TIMES, June 25, 2000, at A28 (chronicling marked increases in arrests for minor offenses in poor and minority areas despite decreases in reported crime).

[194] *See* James Walsh & Dan Browning, *Presumed Guilty Until Proved Innocent*, STAR-TRIBUNE (Minneapolis), July 23, 2000, at A1 (noting significantly higher arrest rates in Minneapolis for African-Americans with regard to broad array of minor offenses); *see also* MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 105–06 (1995) (observing that police street detentions are more likely in poor, socially disorganized neighborhoods because illegal activity takes place outside rather than inside); Anthony R. Harris & James A. W. Shaw, *Looking for Patterns: Race, Class, and Crime*, *in* CRIMINOLOGY: A CONTEMPORARY HANDBOOK 129, 135 (Joseph F. Sheley ed., 3d ed. 2000) ("In arrests for less-serious non-Index crimes, there is ample reason to believe the police role may well be more proactive than reactive, resulting in the overarrest of African-Americans compared to whites."); *cf.* David Rudovsky, *Law Enforcement by Stereotype and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001) (discussing recent studies from several jurisdictions reflecting race-based stops and searches of citizens).

[195] The Supreme Court, in *Whren v. United States*, 517 U.S. 806 (1996), held that the Fourth Amendment does not limit discriminatory seizures by police. The Court stated that the Fourteenth Amendment's Equal Protection Clause, however, does. *Id.* at 813 (stating that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment"). It is widely acknowledged that equal protection challenges in such cases, however, are virtually impossible to sustain. *See* Andrew W. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 569–72 (1999) (discussing decisions rejecting such challenges); Jack B. Weinstein & Mae C. Quinn, Terry, *Race, and Judicial Integrity: The Court and Suppression During the War on Drugs*, 72 ST. JOHN'S L. REV. 1323, 1329–34 (1998) (same).

[196] *See* WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 437–82 (Frank J. Remington ed., 1965) (surveying widespread use of arrest for minor offenses to uncover evidence and suppress incipient social disorder). Reflecting on the landmark studies of the American Bar Foundation of the 1950s and 1960s, of which Professor LaFave's seminal work was a part, Professor Herman Goldstein more recently observed: "The substantial police involvement in an activity like traffic control, through the arrests made and the searches conducted, was used in various ways to control serious crime." HERMAN GOLDSTEIN,

more than ends in themselves. Alleged violations of serious and non-serious criminal laws alike afford police the tools to detain citizens and make further invasive investigations.[197] Upon "stopping" a citizen, and with the reasonable belief that the citizen is armed, police can conduct a "frisk" for weapons.[198] Upon "arresting" a citizen, police are automatically permitted to conduct a full bodily search, again, regardless of the nature or seriousness of the underlying offense.[199] Any evidence or contraband discovered, whether or not related to the initial basis for arrest, can then be used by the government to prosecute, with the arrest in effect serving as an investigative fulcrum to increase criminal liability (sometimes radically).[200] Even short of arrest, alleged violations provide police a basis to conduct investigative "fishing expeditions,"[201] the obvious appeal of which is greatly enhanced by the reality that police can exercise their discretion not to

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Confronting the Complexity of the Policing Function, *in* DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY 32 (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

[197] For discussions of the well-known use of traffic laws as tools to serve broader investigative ends, often with discriminatory motives, see David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 559–60 (1998); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 344–54 (1998). For discussions of racially discriminatory application of low-level laws more generally, see Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. LAW & CRIMINOLOGY 775 (1999).

[198] Terry v. Ohio, 392 U.S. 1, 20 (1968).

[199] United States v. Robinson, 414 U.S. 218, 235 (1973). *See generally* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381 (2001).

[200] *See, e.g.*, United States v. McFadden, 238 F.3d 198 (2d Cir. 2001) (upholding conviction for illegal firearm possession based on arrest for riding bicycle on sidewalk, resulting in fifteen-year prison term); State v. S.L.S., 777 So. 2d 318 (Ala. Crim. App. 2000) (upholding drug possession conviction based on arrest for violation of law criminalizing the provision of false statement to government officer); State v. Thompson, 536 So. 2d 388 (Fla. Dist. Ct. App. 1989) (upholding drug possession conviction based on evidence derived from arrest for drinking a can of beer in public); People v. Pantusco, 484 N.Y.S.2d 321 (N.Y. App. Div. 1985) (upholding burglary conviction based on evidence derived from arrest for violation of open container law); People v. Whitted, 718 N.Y.S.2d 162 (N.Y. Crim Ct. 2000) (upholding drug possession conviction based on evidence seized as result of arrest for littering); Commonwealth v. Williams, 568 A.2d 1281 (Pa. Super. Ct. 1990) (upholding drug possession conviction based on evidence derived from arrest for urinating in public); McConnell v. State, No. 14-99-00887-CR, 2001 WL 8344 (Tex. App. Jan. 4, 2001) (upholding drug possession conviction resulting in forty-year prison term based on arrest for public urination); State v. Greene, 983 P.2d 1190 (Wash. Ct. App. 1999) (upholding drug possession conviction based on evidence seized pursuant to arrest for violation of "pedestrian interference" ordinance).

[201] *See* STOP AND FRISK REPORT, *supra* note 189, at 116 (noting that New York police as a whole stopped eight citizens for every arrest made, while the aggressive "Street Crimes Unit" worked at a fifteen-to-one stop-to-arrest ratio).

arrest, thus avoiding the institutional costs associated with formal arrest and prosecution (e.g., police time and salaries, jail costs).[202] With news of decreasing crime rates, yet concomitant increasing pressure on police leaders to "show results,"[203] the concern assumes ever-greater salience. This is especially so given the Supreme Court's recent decision in *Atwater v. City of Lago Vista*, where the Court expressly condoned warrantless arrests for "very minor" (even non-jailable) offenses.[204] As a result of the Court's decision, as long as probable cause exists that a violation occurred, the sole limit on police arrest authority is that the act of physical arrest not be conducted in an "'extraordinary manner, unusually harmful to [the citizen's] privacy or . . . physical interests.'"[205]

In sum, municipal criminal codes have greater instrumental significance than initially meets the eye: they at once furnish an immediate basis for police to terminate particular behaviors, and they serve as tools to achieve broader investigatory and enforcement ends. Municipal laws thus significantly augment the government's capacity to stop and frisk, and to arrest and search citizens, thereby increasing the already prodigious menu of state criminal laws at the disposal of police.[206] The laws play a direct role in increasing the incidence of

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[202] Evidence in New York City, however, suggests that police are not shy about executing full-blown custodial arrests for minor offenses, as permitted by state law. The result has been huge increases in the declination rates by local prosecutors. *See* Ford Fessenden & David Rohde, *Dismissed Before Reaching Court, Flawed Arrests Rise in New York*, N.Y. TIMES, Aug. 23, 1999, at A1. This practice is itself troubling, suggesting an abuse of the government's Fourth Amendment authority. *See* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1 (2000) (discussing national prevalence of arrests for non-serious crimes without prosecution and arguing that the practice violates the reasonableness requirement of the Fourth Amendment).

[203] Logan, *supra* note 188, at 345 (arguing that "police administrators now have an institutional, volume incentive to make 'bigger' cases on the basis of custodial arrests and searches premised on petty crimes"); *see also* Barry Loveday, *Managing Crime: Police Use of Crime Data as an Indicator of Effectiveness*, 28 INT'L J. SOC. L. 215, 216 (2000) (noting that "[p]olice forces . . . are now judged on performance criteria, which embraces [sic] their success in reducing crime"); Howie Carr, *Arresting Memo Puts State Cops in a Pinch*, BOSTON HERALD, Oct. 21, 1998, at 1 (discussing state police internal memorandum demanding "corrective action . . . [to] increase the level of activity" because arrests are a "valid indicator" of performance); Larry Celona & Linda Massarella, *"Collar" Shortage Puts Queens Cops in Doghouse*, NEW YORK POST, June 11, 1998, at 12 (addressing memorandum from a police supervisor threatening that officers who fail to make ample arrests will not receive vacation days).

[204] 121 S. Ct. 1536, 1557 (2001).

[205] *See id.* (quoting Whren v. United States, 517 U.S. 806, 818 (1996)).

[206] This growth of arrest authority, it should be noted, is typically facilitated by state statutory law that expressly empowers local police to execute warrantless arrests for low-level offenses. *See, e.g.*, N.Y. CRIM. PROC. LAW § 140.10(2)(a) (McKinney 1992 & Supp. 2001) (authorizing warrantless arrest of any person suspected of committing a "petty offense"); TEX. CRIM. PROC. CODE ANN. § 14.01(b) (Vernon 1977 & Supp. 2001) (authorizing warrantless

acknowledged personal indignities[207] and negative practical consequences[208] experienced by citizens, not to mention providing grist for the nation's skyrocketing imprisonment rates,[209] which lead the world.[210] The laws are always

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arrest for "any offense").

[207] *See* Wyoming v. Houghton, 526 U.S. 295, 303 (1999) (quoting Terry v. Ohio, 392 U.S.1, 24–25 (1968)) (noting that "[e]ven a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience"); Bell v. Wolfish, 441 U.S. 520, 558 (1979) (observing that bodily searches "instinctively give[ ] us the most pause"); United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (deeming an arrest "a serious personal intrusion regardless of whether the person seized is guilty or innocent"); *Terry*, 392 U.S. at 16–17 (deeming it "simply fantastic to urge that such a [stop and frisk] procedure performed in public by a policeman while the citizen stands helpless . . . is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.").

[208] *See, e.g.*, Michael Cooper, *You're Under Arrest*, N.Y. TIMES, Dec. 1, 1996, at A1 (noting that transport to the precinct house can take in excess of four hours, and that individuals in New York have been "held in cells for more than sixty hours waiting to see a judge for crimes like fare-beating, sleeping on park benches and drinking beer in public"). Officials in New York City, until recently, strip-searched persons arrested for minor offenses. The practice was discontinued as a result of a successful class action civil rights suit. *See* Benjamin Weiser, *New York Will Pay $50 Million in 50,000 Illegal Strip-Searches*, N.Y. TIMES, Jan. 10, 2001, at A1.

[209] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2000 1 (2001) (noting that from 1990 to 2000 the nation's population in prisons and jails grew by 783,157 inmates, a 5.6% annual rate of increase). Over this same period, the national per capita incarceration rate rose from 458 inmates per 100,000 residents to 702 inmates per 100,000 residents. *Id.* at 3. At mid-year 2000, the total number of persons incarcerated in state, federal, and local facilities reached almost two million. *Id.* at 2. The number of persons in the nation's jails, alone, rose thirty-two percent during the period 1993–1999. *See* U.S. DEP'T OF JUSTICE, CENSUS OF JAILS 1999 1 (2001). Since 1983, the jail population has more than doubled. *Id.*

The exorbitant rise has been driven in significant part by arrests of young African-American males, the disproportionate target of urban policing efforts directed at low-level crimes. *See* Bernard Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC. REV. 179, 201–02 (2000) (observing that "a law enforcement strategy that emphasizes misdemeanor arrests has a disproportionate effect on minorities. . . . The brute fact is that the *decision to arrest* for misdemeanors results in the arrest of many minorities"). *See generally* MARC MAUER, RACE TO INCARCERATE (1999); MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996).

[210] *See* THE SENTENCING PROJECT, U.S. SURPASSES RUSSIA AS WORLD LEADER IN RATE OF INCARCERATION 1 (2000), *at* http://www.sentencing project.org/brief/USVRSUS.pdf (last visited Aug. 24, 2001).

growing in number, only rarely being repealed or invalidated,[211] adversely affecting individuals[212] and entire communities.[213] Moreover, minor offense convictions can result in deportation for resident aliens[214] and serve as the basis for sentencing enhancements for any subsequent conviction under state and federal sentencing guidelines.[215]

Beyond the tangible human consequences, the proliferation of criminal laws at the local level potentially fosters negative sociological effects that are at once more subtle and pervasive. By definition, those who violate the criminal law are "outsiders," permitting self-identification of law-abiding citizens as community "insiders."[216] British criminologist Adam Crawford recently characterized the

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[211] As Professor Stuntz observes, "[c]riminal law is not static; like other areas of law, it is constantly changing. *Unlike* other areas of law, it tends to change in one direction only: legislatures regularly add new crimes but rarely repeal old ones." William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 854 (2001); *see also* Robert Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 745–46 (1996) (discussing the experience in Arizona where legislators, revising the state criminal code, refused to repeal existing statutory sex crimes because they were reluctant to appear lenient on sex crimes, even when the laws had become outmoded or superfluous). *But see* Pam Belluck, *Chicago Looks at Past to Purge Its Stale Statutes*, N.Y. TIMES, Sept. 11, 2001, at A1 (discussing unusual effort by Chicago to review "foot-thick city code books" prompted by constitutional challenge to aged "anti-mask" law).

[212] For individuals these consequences include, *inter alia*, the loss of physical freedom often for long periods of time, disruption of and damage to family relations and work opportunities. *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999); Kathryn Casa, *Prisons: The New Growth Industry*, NAT'L CATHOLIC REP., July 2, 1999, at 15. The experience of arrest for juveniles, in particular, appears to have particularly adverse personal consequences, accounting for marked increases in the risk of recidivism. *See* Malcolm Klein, *Labeling Theory and Delinquency Policy: An Empirical Test*, 13 CRIM. J. & BEHAV. 47 (1986).

[213] For discussions of the deleterious socio-economic effects on communities, see John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, *in* CRIME AND JUSTICE: A REVIEW OF RESEARCH—PRISONS 121 (Michael Tonry & Joan Petersilia eds., 1999); Todd R. Clear et al., *Incarceration and the Community: The Problem of Removing and Returning Offenders*, 47 CRIME & DELINQ. 335 (2001); Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, 65 FED. PROBATION 3 (June 2001); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441 (1998).

[214] *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1941–46 (2000) (noting same and citing instances).

[215] *See e.g.*, United States v. Staples, 202 F.3d 992 (7th Cir. 2000) (enhancing federal penalty for possessing crack cocaine with intent to distribute based on prior local conviction for discharging an air rifle).

[216] *See* EMILE DURKHEIM, ON THE DIVISION OF LABOR IN SOCIETY 102 (George Simpson trans., MacMillan 1933) (1893) (observing that "[c]rime brings together upright consciences

process as one whereby "[c]ommunity members recognize themselves as a collective, as 'us' in contradistinction to 'them'.... The offender is viewed primarily as an 'outsider' against whom the 'community' needs to defend itself.... There is no sense of offenders being internal to, and members of, communities."[217] Crawford asserts that:

> [I]n seeking to construct communities around crime we may be creating parochial and exclusive communities with intolerant values. Crime as an issue inherently bifurcates people, behaviours, and actions into the "acceptable" and the "unacceptable": the normal and the pathological.... The meaning of "community" may then become saturated with that which "we" are not, as much as that which "we" are or share in common. It is not hard to see how such a sense of "us and them [sic]," particularly if constructed at a local geographical level, paves the way for those who have the resources to retreat behind "gated communities."[218]

In short, to borrow a phrase coined by Gerald Frug, the process of "community building" by means of criminal laws can result in the "building of walls."[219] Or, as William Dixon has put it even more metaphorically, building "community" on the basis of crime concerns "is Janus-faced: it excludes as it includes."[220]

In more concrete terms, reflexive resort to the criminal law can undercut the salutary goal of creating strong, sustainable, and inter-reliant communities. Rather than cultivating mutual understanding and identification, criminal laws can breed distrust and antagonism among residents[221] and serve to discourage pursuit of

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and concentrates them"); KAI T. ERIKSON, THE WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE (1966) (observing generally that labeling others as criminal or deviant serves to educate others and foster mutual identification).

[217] ADAM CRAWFORD, THE LOCAL GOVERNANCE OF CRIME: APPEALS TO COMMUNITY AND PARTNERSHIPS 159–60 (1997); *see also id.* at 163 (noting that under such a regime "offenders are conceptualized as strangers who inhabit public spaces").

[218] *Id.* at 292–93; *see also id.* at 289 (asserting that the use of crime as a method of community building hastens a "localism achieved, largely, through the power to exclude").

[219] *See* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999).

[220] DAVID DIXON, LAW IN POLICING: LEGAL REGULATION AND POLICE PRACTICES 315 (1997). Dixon adds: "The exclusion of those not defined as being of 'the community' is particularly problematic in its re-articulation of distinctions drawn by police cultures between the respectable and the unrespectable; between those who count and those who do not." *Id.*

[221] *See* CRAWFORD, *supra* note 217, at 169 (stating that with increasing criminalization, "communities are less likely to be open, tolerant, and inclusive of values and differences, and more likely to be exclusive, parochial, and prejudiced"); Rose & Clear, *supra* note 213, at 467 (asserting that "overreliance on formal controls may increase disorganization by impeding other forms of control"). On the toxic effects of "governing through crime" more generally, see Jonathan Simon, *Governing Through Crime*, *in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 171 (Lawrence Friedman & George Fisher eds., 1997).

more benign efforts that might hold promise for long-term organic improvement of communities.[222] This is especially so if the laws are perceived as unfair.[223] The criminal law, whatever else it promises, typically fails to deliver anything but a one-shot, fleeting remedy, as countless ineffectual "police sweeps" over the course of history attest,[224] and empirical findings highlight.[225] Finally, consistent

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[222] *See* WILLIAM DELEON-GRANADOS, TRAVELS THROUGH CRIME AND PLACE: COMMUNITY BUILDING AS CRIME CONTROL 141 (1999) (observing that the human potential of communities is "co-opted" by a reflexive criminal justice approach; with such an approach "the powerful informal solutions residing in the abilities found only in those communities . . . dissipate or never receive the proper validation and resources to make them successful").

Law enforcement in general requires less empathy and creativity; it is also typically not wanting for funds, as evidenced by the federal government's recent infusion of millions of dollars in grant money for expansion of local police ranks. *See* JEFFREY A. ROTH & JOSEPH F. RYAN, NAT'L INST. OF JUSTICE, THE COPS PROGRAM AFTER 4 YEARS—NATIONAL EVALUATION (2000) (describing the origin and evolution of the Office of Community Oriented Policing Services and the provision of massive federal funds for increases in local police ranks).

[223] *See infra* notes 268–277 and accompanying text (discussing empirical work of Professor Tom Tyler and others suggesting that when citizens believe the government is acting fairly and with benevolent motives, they are more likely to comply voluntarily with the law and legal authority).

[224] *See, e.g.*, ROBERT M. FOGELSON, BIG-CITY POLICE 187–88 (1977) (recounting ineffective "saturation" efforts by police in 1950s San Francisco); *see also* Egon Bittner, *The Police and Skid-Row: A Study of Peace-Keeping*, 32 AM. SOC. REV. 699, 710–11 (1967) (discussing survey results indicating that veteran police viewed "minor offense arrests" as "poor craftsmanship").

The approach is also very often at cross purposes with the progressive goals (if not always the methods) of "community policing." *See* ROBERT R. FRIEDMAN, COMMUNITY POLICING 92 (1992) (noting that community policing seeks to forge a trust-based relationship between officers and citizens characterized by a sense of shared responsibility). *See generally* WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE *passim* (1997) (discussing role of community policing officers as being "coproducers" of safety). Despite its ostensibly benign and inclusive orientation, community policing of late has been criticized for succumbing to many of the same pitfalls associated with traditional policing methods, including a disregard for "community" values and involvement, and reflexive resort to criminal laws. *See generally* WILLIAM LYONS, THE POLITICS OF COMMUNITY POLICING: REARRANGING THE POWER TO PUNISH (1999).

[225] Based on their work in troubled inner-city Chicago neighborhoods, for instance, Professors Sampson and Raudenbush recently concluded that while manifestations of public disorder might encourage individuals to move from particular areas, they have no direct effect on crime. *See* ROBERT J. SAMPSON & STEPHEN W. RAUDENBUSH, NAT'L INST. OF JUSTICE, DISORDER IN URBAN NEIGHBORHOODS—DOES IT LEAD TO CRIME? 5 (2001). Even more important, the authors' findings "strongly suggest that policies intended to reduce crime by eradicating disorder solely through tough law enforcement tactics are misdirected. . . . The active ingredients of crime seem to be structural disadvantages and low levels of collective efficacy more than disorder." *Id.* Rather than "police-led crackdowns on disorder," the authors assert, local leaders should focus on efforts that instill "collective efficacy by creating and

with the long-standing concern regarding "over criminalization" more generally,[226] criminalizing behaviors that otherwise might be deemed innocuous, or worthy of less forceful (read: civil) condemnation, threatens trivialization of the "stigma" associated with the criminal law and its sanctions.[227]

B. *The Specter of Local Oppressiveness*

Beyond the untoward effects associated with the application of municipal criminal laws, in their sheer volume, the substance of the laws in their particulars

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strengthening social ties and increasing awareness of the residents' commitment to their neighborhood." *Id.* at 5–6.

[226] For one of the first, and most trenchant, examinations of this phenomenon, see Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17 (1968). As Professor George Fletcher recently observed, "[t]he tendency at the close of the twentieth century is to focus not on the necessity that the guilty atone but on the pragmatic utility of using criminal sanctions to influence social behavior." GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 203 (1998).

[227] *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 365 (1968) (noting that the "criminal sanction is the best available device we have for dealing with gross and immediate harms and threats of harm. It becomes less useful as the harms become less gross and immediate"); Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (observing that "crime is . . . conduct, which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community"); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 481 n.64 (1997) (observing that many regulatory offenses have been made criminal in order to trigger the "moral stigmatization that criminal liability brings but civil liability does not").

Today's impulse to criminalize, it should be noted, is distinctly at odds with broader criminal law reform efforts of the recent past, in particular that of the American Law Institute in the 1950s and 1960s in creating the Model Penal Code. As the Code's Chief Reporter, Herbert Wechsler, stated:

> [T]he penal law should not be used merely to express the pious sentiment of the community. . . . Unless conduct "unjustifiably and inexcusably inflicts or threatens harm to individual or public interests," it is not deemed to be a proper subject of a penal prohibition—a declaration designed to be given weight in the interpretation of the Code.

Herbert Wechsler, *The Model Penal Code and the Codification of American Law*, *in* CRIME, CRIMINOLOGY AND PUBLIC POLICY: ESSAYS IN HONOUR OF SIR LEON RADZINOWICZ 430 (Roger Hood ed., 1974); *see also* Robert Force, *Decriminalization of Breach of the Peace Statutes: A Non-Penal Approach to Order Maintenance*, 46 TULANE L. REV. 367 (1972) (arguing that public order should be maintained by means other than reflexive resort to the criminal law). On the threat of trivialization and the concerns thereby raised more generally, see John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Richard A. Epstein, Symposium, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1 (1996).

can be significant. Despite the "ancient faith"[228] that localism represents a check against mass despotism exercised by a distant sovereign,[229] history and experience provide reason to be suspicious of local legislative authority. To be sure, localities over the course of history have served as "islands" of tolerance, as suggested by recently enacted civil laws protective of the gay, lesbian, and transgender communities,[230] as well as recurrent efforts by localities to de-criminalize prostitution[231] and the use or possession of small amounts of marijuana.[232] Localities, however, can also indulge in a marked tendency toward oppressive use of the criminal sanction, as harsh laws targeting non-heterosexuals over the course of history,[233] and myriad other instances evidenced in the state[234] and

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[228] Powell v. Texas, 392 U.S. 514, 547–48 (1968) (Black, J., concurring) (noting the "ancient faith . . . that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow"); *see also* People v. Hanrahan, 42 N.W. 1124, 1127 (Mich. 1889):

> Common experience, and the necessities of our civilization, have shown that the grant to and exercise by cities and villages of such power to enact ordinances, and to punish for their violation, have been both wise and just, and have not operated oppressively upon the citizen. . . . [I]f it should be attempted and results in wrong or oppression to the people, the remedy is in their hands. The legislators are chosen by them, and it is in their power to effect any needed reform.

[229] This faith in the benign role of local actors was colorfully noted by the Georgia Supreme Court in 1877, describing municipal government as standing "between the family and the state. It is an aid to both, and partakes of the nature of both. Police ordinances are at once family rules on a large scale, and state laws on a small scale." McRea v. The Mayor and City Council of Americus, 59 Ga. 168, 170 (1877).

[230] *See* William N. Eskridge, *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship 1961–1981*, 25 HOFSTRA L. REV. 817, 925–28, 970 (1997) (citing protective local laws).

[231] For an interesting discussion of local suspension of state anti-prostitution laws in New Orleans, St. Louis, and Houston, see Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1208–14 (1996). Professor Neuman characterizes such local initiatives as being "doubly local": "they were subregions of a city, configured by city policy as a result of local self-government within a state." *Id.* at 1213. Neuman compares the areas to churches in medieval England where fleeing offenders were legally immune from arrest, "an immunity defined by location." *Id.* at 1206. Eventually, however, the refuges were stamped out because their "subversive potential proved unacceptable to the larger society." *Id.* at 1226; *see also* JOEL BEST, CONTROLLING VICE: REGULATING BROTHEL PROSTITUTION IN ST. PAUL, 1865–1883 (1998) (examining St. Paul, Minnesota's "regulation" of prostitution, despite state law banning it).

[232] *See California County OKs Growing Pot*, THE FLORIDA TIMES-UNION, Nov. 11, 2000, at A10 (discussing laws enacted in Ann Arbor and Berkeley). *But see* City of Portland v. Jackson, 87 P.2d 1093, 1094 (Or. 1993) (stating that localities are barred from "creating a 'safe haven' for outlaws by legalizing, within boundaries of the city, that which the legislature has made criminal statewide").

[233] *See* William N. Eskridge, Jr., *Law and the Construction of the Closet: American*

federal[235] reporters, attest. Recent municipal efforts to regulate the streets by means of "loitering with intent" laws, which target "preparatory" conduct rather than actual harmful conduct, provide additional evidence of their continued aggressive ingenuity in this regard.[236] So do vehicle forfeiture laws, discussed above.[237] This propensity for aggressive use of the criminal law, of course, is not unique to local government—the states manifest such a propensity as well;[238]

Regulation of Same-Sex Intimacy, 1880–1946, 82 IOWA L. REV. 1007, 1038–45, app. 6 at 1134–36 (1997) (citing and discussing municipal laws criminalizing "cross-dressing" and other crimes of "degeneracy"). This local intolerance also sought to suppress expressions of "gender-bending" in theater, movies, and the arts more generally. *See id.* at 1075–80 (discussing same).

[234] *See, e.g.*, Abbott v. City of Los Angeles, 349 P.2d 974 (Cal. 1960) (addressing local "criminal registration" law, noting that ten California communities had similar laws); Thomas v. State, 614 So. 2d 468 (Fla. 1993) (discussing local law making it an arrestable offense to ride a bicycle without a bell); Pierce v. Commonwealth, 777 S.W.2d 926 (Ky. 1989) (addressing local anti-sodomy law that was far more restrictive than state law); State v. Ulesky, 252 A.2d 720 (N.J. 1969) (addressing local "criminal registration" law); People v. Buckley, 536 N.Y.S.2d 948 (N.Y. Dist. Ct. 1989) (discussing local law criminalizing use of beach chairs not provided by concessionaire); People v. Stover, 191 N.E.2d 272 (N.Y. 1963) (addressing local law that criminalized having clotheslines in front yards); State v. Tyler, 7 P.3d 624 (Or. Ct. App. 1999) (addressing local law making jaywalking punishable by imprisonment); Williams v. State, 726 S.W.2d 99 (Tex. Crim. App. 1986) (discussing a local law making illegal parking a misdemeanor); Hicks v. Commonwealth, 548 S.E.2d 249 (Va. Ct. App. 2001) (discussing local law that "privatized" streets and sidewalks surrounding public housing project, permitting prosecution under trespass laws); *see also* Mark Eddington, *La Verkin Revises U.N. Law*, SALT LAKE TRIBUNE, July 26, 2001, at B1 (discussing municipal ordinance in a remote Utah town creating a "U[nited] N[ations]-free" zone).

[235] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (addressing local law that criminalized animal sacrifice, engaged in by local religious groups); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (addressing local law that targeted "[r]ogues and vagabonds, or dissolute persons who go about begging . . . common drunkards, common night walkers, thieves, pilferers or pickpockets . . . ."); Lambert v. California, 355 U.S. 225 (1957) (addressing local law making it a crime for ex-convicts to fail to register with police); Johnson v. Carson, 569 F. Supp. 974 (M.D. Fla. 1983) (addressing local law that criminalized being a prostitute, as opposed to engaging in prostitution); Farber v. Rochford, 407 F. Supp. 529 (N.D. Ill. 1975) (addressing local law that criminalized status of being a prostitute, drug addict, habitual drunkard, or pimp); *cf.* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (addressing local law that required "special use permits" for operation of group homes for mentally retarded persons).

[236] *See supra* note 122 (citing examples).

[237] *See supra* notes 144–50 and accompanying text.

[238] *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962) (addressing state law that made it a misdemeanor to "be addicted to the use of narcotics"); Skinner v. Oklahoma, 316 U.S. 535 (1942) (addressing state law that permitted sterilization of "habitual felons"); Grosvenor v. Duffy, 80 N.W. 19 (Mich. 1899) (addressing state law making the sale of oleomargarine a crime); *see also Cussing Canoeist Convicted in Michigan Court*, L.A. TIMES, June 12, 1999, at A4 (discussing state law that criminalized the use of indecent, immoral, obscene, vulgar or

rather, local aggressiveness is significant for its augmentation of the already expansive array of state and federal criminal laws at the disposal of government.[239]

It is difficult to account in any precise way for this punitive impulse. Perhaps the tendency stems from local legislators' very proximity to disorder, which, instead of mitigating punitiveness, might make them prone to react punitively,[240] and to indulge their own idiosyncratic standards of decorum.[241] Public choice

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insulting language in the presence or hearing range of children). For an interesting discussion of the role of states in enacting religion-based "Sunday criminal laws" (i.e., "blue laws"), see Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675 (2000).

[239] Beyond the numerous contemporary examples discussed throughout the article, history provides an illuminating illustration of the corollary force of local criminal law making. In the nineteenth century, southern state legislatures commonly enacted race-based laws making blacks alone criminally liable for particular behaviors, or specifying harsher punishment for blacks convicted of criminal laws also applicable to whites. *See generally* EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN 19TH-CENTURY AMERICAN SOUTH (1984); DANIEL J. FLANIGAN, THE CRIMINAL LAW OF SLAVERY AND FREEDOM, 1800–1863 (1987). Such laws, in turn, were mirrored in many localities. *See, e.g.*, Commissioners of Washington v. Frank, 46 N.C. 436 (N.C. 1854) (upholding local law for disorderly conduct, which carried fines for white violators and "thirty-nine lashes" for blacks). In upholding the local law, the North Carolina Supreme Court in *Frank* emphasized that:

> Different regulations are required in different localities.... [T]he commissioners of every incorporated town have a right to establish any and every regulation which, in their judgment, is needful to the comfort and interests of the citizens.... Slaves compose so large a portion of the population of our towns and villages that, in passing rules and regulations for their government, much must be left to the judgment and discretion of those who are to enforce them, in their application to particular cases.

Id. at 440–41.

Localities in the nineteenth century American West also made generous use of the criminal law to differentially target persons of Chinese ancestry. *See* WILLIAM J. COURTNEY, SAN FRANCISCO'S ANTI-CHINESE ORDINANCES, 1850–1990 *passim* (1956) (discussing laws enacted by City including those making it a crime to "carry a basket or baskets, bag or bags, suspended from or attached to poles upon the shoulder"; to discharge fireworks in Chinatown; and to ring a gong during a theatrical performance); *see also* CHARLES MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1994) (discussing similar laws enacted by states); *cf.* CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 132–33 (1993) (noting that in Portland, Oregon between 1871–1885, sixty-eight percent of all gambling arrests involved Chinese suspects; in 1883, Chinese were twenty-nine times more likely to be arrested for gambling than non-Chinese).

[240] *Cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 522–23 (1989) (Scalia, J., concurring) (noting "social reality... [that] racial discrimination against any group finds a more ready expression at the state and local level than at the federal level").

[241] As Carl Bridenbaugh has noted, this impulse was especially evident in the governance of America's earliest cities, where "village fathers" unabashedly sought to put their personal

theory would suggest that local political leaders are as prone to "rent-seeking" behavior in the anti-crime context as they are in local legislative decisions pertaining to regulatory and economic matters.[242] Indeed, the recognized political appeal of appearing tough on crime and disorder[243] might suggest an even greater influence in the local political arena,[244] the small scale of which might create a particularly conducive environment for oppressive decisions.[245]

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imprint on social control efforts:

> In addition to legal restriction and penalties for their violation [of laws] similar to those that govern the life of a citizen today, colonial townsfolk found themselves limited on all sides by regulations of a moral and ethical character. Village fathers . . . regarded themselves as rightfully their brothers' keepers, and exercised a continuous and strict supervision over the daily lives of all inhabitants.

CARL BRIDENBAUGH, CITIES IN THE WILDERNESS: THE FIRST CENTURY OF URBAN LIFE IN AMERICA, 1625–1742, 75 (1938). These efforts, Bridenbaugh notes, varied among jurisdictions in accord with the inclinations of local leaders. *Id.* at 76–78. The same impulse was evidenced in waves of local laws concerning sanitation, health, and vice from the mid-nineteenth to early twentieth centuries designed to combat social disorder by means of "moral environmentalism." STANLEY K. SCHULTZ, CONSTRUCTING URBAN CULTURE: AMERICAN CITIES AND CITY PLANNING 111–49 (1989) (surveying such laws and the political forces giving rise to them).

[242] *See generally* DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

[243] *See* Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67, 67 (1997) (observing that "[s]ince crime cannot be significantly reduced through legislation, politicians must rely on symbolic policies to convey the message that they are doing something to solve the problem"). For extended discussion of this potent political influence, see DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA (1995); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY POLITICS (1997); Henry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527 (1996).

[244] Professor Gillette suggests that local governments are especially vulnerable to capture and influence, in significant part because the smaller size of local governments facilitates interest group influence:

> [L]ocal issues have characteristics that tend to exacerbate both formation of privileged groups and free riding by latent groups. The possibility that interest groups are particularly likely to form at the local level stems from that body of collective action theory that suggests the possibility of collective action is directly related to the size of the affected group.

Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 981 (1996).

[245] Since at least the time of James Madison, it has been accepted learning that the dynamic of small group relations raises the specter of political minorities exercising influence disproportionate to their numbers. According to Madison:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a

Local punitiveness might also be explained in more pragmatic terms. Urbanites historically have suffered a comparative paucity in available means of social control, lacking much of the taxing and zoning prowess of affluent suburbanites, for instance.[246] The criminal sanction, for cities especially,[247] has always represented an easily adopted and expedient (if crude) method for the control of "dangerous classes" thought to disproportionately inhabit cities,[248] with their distinct "criminal pathology."[249] Evidence of this anxiety dates back to the

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> majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

THE FEDERALIST NO. 10, at 82–83, 114 (James Madison) (Clinton Rossiter ed., 1961).

[246] *See* Sheryll D. Cashin, *Building Community in the Twenty-First Century: A Post-Integrationist Vision for the American Metropolis*, 98 MICH. L. REV. 1704, 1705 (2000) (noting that "central cities and older suburbs, saddled with increasing populations of poor people and attendant demands on their tax base, are incapable of using local powers in ways that wall out 'undesirables'") (citation omitted).

Of course, this is not to say that cities over time have not also engaged in their share of exclusionary zoning practices. One need only consider the ongoing efforts of the City of San Francisco in the late nineteenth and early twentieth centuries to use facially neutral zoning or regulatory laws to target laundries operated by immigrant Chinese. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating, on equal protection grounds, San Francisco law limiting operation of laundries because it was enforced in a discriminatory manner); Yee Gee v. City and County of San Francisco, 235 F. 757 (N.D. Cal. 1916) (invalidating, on equal protection grounds, San Francisco law making it a misdemeanor for laundries to operate between 6 P.M. and 7 A.M. and on Sundays).

[247] Cities—with their heterogenous populations, diverse interests, and complex social organization—represent classic realms in which social controls are potentially at their most lax, increasing the practical need for explicit legal controls. *See* DONALD BLACK, THE BEHAVIOR OF LAW 107 (1976) (noting that "[l]aw is stronger where other social control is weaker. *Law varies inversely with other social control*").

[248] The phrase, but not the concept, traces to social reformer Charles Brace, who in 1872 characterized such persons as "hidden beneath the surface of society," a congregate of the "great masses of the destitute, miserable, and criminal persons." CHARLES LORING BRACE, THE DANGEROUS CLASSES OF NEW YORK, AND TWENTY YEARS' WORK AMONG THEM 28–29 (1872); *see* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 83–106 (1993) (discussing historic use of criminal law to target particular "outsider" groups and maintain societal status quo); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76–135 (1997) (same, with particular focus on targeting of African-Americans).

[249] *See* Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 RUTGERS L. REV. 1289, 1290 (1999) (observing that "community policing" is "designed especially to deal with the criminal pathology of inner city neighborhoods").

late-seventeenth century[250] and has flared, often with unmistakable ethnic and class-inspired vehemence, to this day. In 1889, the Supreme Court of Michigan emphasized the unique utility of the criminal law to cities in particular, stating that:

> [I]t must happen that very many of the lesser crimes and misdemeanors which are punished under general law must come under the police regulations of such municipalities, because they are more liable to be perpetrated by the vicious classes who congregate in cities than elsewhere; and the peace and good order of the municipality requires that they should be more promptly and summarily dealt with than they could under state law.[251]

While deployment of the criminal sanction by "elites" has met with criticism for decades,[252] of late the discourse has assumed considerably greater nuance. Led principally by Professors Dan Kahan and Tracey Meares, commentators have defended the new wave of municipal criminal laws, offering several innovative arguments. First, they assert that the local laws deserve greater deference than past efforts to combat urban crime and disorder because the laws are the democratic product of more racially representative political bodies.[253] Second,

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[250] *See* BRIDENBAUGH, *supra* note 241, at 68–78, 220–31, 382–84 (tracing historic shift from "rural neighborliness" and lack of concern over social disorder to nascent anxieties over "growing disorder" in the late 1600s and early 1700s).

[251] People v. Hanrahan, 42 N.W. 1124, 1126 (Mich. 1889). Twelve years earlier, the Supreme Court of Georgia identified the unique criminal needs of urban areas as follows:

> [M]any transactions that are made penal by the general law of the state may, at the same time, afford material for a proper police ordinance. The state may deal only with the central element of a transaction which is fringed all round with adjuncts that ought to be prohibited by ordinance as highly mischievous to the quiet of municipal society. In the country, such adjuncts might not need repression, for there they might be comparatively harmless.

McRae v. The Mayor and City Council of Americus, 59 Ga. 168, 169 (1877). For an expansive discussion of the "urban threat" and the perceived rampant immorality of nineteenth-century urbanites more generally, see PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920 (1978).

[252] On the relation between invocation of police powers and the historic ascendance and development of capitalism, for instance, see DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY 52–114 (1993); Eric H. Monkkonen, *A Disorderly People? Urban Order in the Nineteenth and Twentieth Centuries*, 68 J. AM. HIST. 539 (1981).

[253] *See* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 88 GEO. L.J. 1153, 1161–63 (1998) [hereinafter Kahan & Meares, *The Coming Crisis*]; Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 210–11[hereinafter Meares & Kahan, *Antiquated Procedural Thinking*]; *cf.* William O. Douglas, *Vagrancy and Arrest on Suspicion,*

they argue that today's urban residents, in contrast to those in the past, actually welcome more aggressive criminal laws and enforcement, at the possible cost of civil liberties, because they are disproportionately the victims of crime.[254] Finally, they note that the racial composition of urban police departments today better reflects the citizens they serve, which lessens the need for suspicion that the laws are being enforced in a discriminatory manner.[255]

While this "new discretion scholarship" is primarily geared toward neutralizing constitutional concern over discretionary enforcement,[256] it also enjoys persuasive force with regard to the content of the laws themselves.[257] Other commentators, however, have vigorously contested the assertions that deference to local democratic decisions, and the expectation that a given criminal law will be fairly applied to the community at-large ("burden sharing"), should displace constitutional inquiry.[258] They also cast doubt on the belief that police forces are

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70 YALE L.J. 1, 13 (1960) (condemning anti-loitering laws because those arrested were typically minorities lacking in political clout "to protect themselves" and the "prestige to prevent an easy laying-on of hands by the police").

[254] *See* KENNEDY, *supra* note 248, at 76–167; Kahan & Meares, *The Coming Crisis*, *supra* note 253 at 1163, 1166, 1182; Livingston, *supra* note 34, at 571; Meares & Kahan, *Antiquated Procedural Thinking*, *supra* note 253 at 197; Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong*, BOSTON REV., Apr.–May 1999, at 4.

This same sentiment was evidenced in the recent efforts by the Chicago Housing Authority to conduct wholesale, warrantless searches of the apartments of persons residing in the city's most crime-infested public housing projects. Advocates of "Operation Clean Sweep" claimed the strategy was justified in part because a portion of the residents in the projects welcomed the searches. *See* Corey Roush, Note, *Warrantless Public Housing Searches: Individual Violations or Community Solutions*, 34 AM. CRIM. L. REV. 261 (1996).

[255] *See* Kahan & Meares, *The Coming Crisis*, *supra* note 253, at 1162.

[256] *See* David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1063-70 (1999) (noting same and discussing the various arguments in support).

[257] As suggested throughout, the existence of police discretion to enforce, or not enforce, local law is intimately tied to the breadth of local legislative authority: the greater the number of criminal laws, the greater the degree of available police discretion. As noted by Professor Alfred Hill, "[t]he issue of police discretion is of special importance now because of the advent of community policing, with its focus on quality-of-life offenses, and its over-arching purpose of forestalling major criminality by discouraging petty affronts to public order." Hill, *supra* note 249, at 1307.

[258] Professor Toni Massaro has characterized the analysis as one asking solely "Who voted for this law," rather than "Who voted for this law and what does this law do?" TONI MASSARO, THE GANG'S NOT HERE, 2 GREEN BAG 25, 29 (1998); *see also* Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 240 ("Our Constitution does not permit a majority to limit individual rights simply by offering to share the burden."); Dorothy E. Roberts, *Forward: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 827 (1999) ("[P]olitical process theory does not support relaxing

sufficiently integrated to warrant the mooting of discriminatory enforcement concerns,[259] and question whether the new laws, the Chicago anti-gang loitering ordinance at issue in *Morales* in particular, actually enjoyed broad-based political support,[260] presuming that a popular vote by elected officials can ever give voice to the entire "community."[261] There will always be those whose sentiments are out-voted or not heard in the first instance: "the losers will generally be those without effective political power," as Professor David Cole has observed.[262]

Consistent with this analysis, empirical work suggests that, among urban

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constitutional scrutiny of the gang-loitering ordinance or other order-maintenance policing strategies."); *id.* at 834 ("The Constitution places limits on the government's ability to conduct social experiments that sacrifice minority freedoms to enhance the welfare of the majority.").

[259] Citing Department of Justice data, Professor Cole notes that African-Americans comprise somewhere in the range of half the rank and file of police departments in major urban areas and adds that "the problem of discretion and discrimination does not disappear when black officials exercise police power." Cole, *supra* note 256, at 1081; *see also* C.J. Chivers, *For Black Officers, Diversity Has Its Limits*, N.Y. TIMES, April 2, 2001, at A1 (noting paucity of blacks in supervisory positions in the New York City Police Department and that a mere 9.2% of the force is African-American).

[260] *See* Alschuler & Schulhofer, *supra* note 258, at 216–20; Cole, *supra* note 256, at 1066–67, 1080; Alan M. Dershowitz, *Rights and Interests*, BOSTON REV., Apr.–May 1999, at 10; Roberts, *supra* note 258, at 822–25, 827–28.

[261] *See* Alschuler & Schulhofer, *supra* note 258, at 241:

> Which community counts—the minority community or the residents of the highest crime wards? And what procedures should be used to sort through the conflicting preferences held by members of the either one of these groups? . . . Should one speak of the "minority community" without dividing it, or should one speak of Chicago's Latino community or, more narrowly, of the Mexican-American community?

See also Mary I. Coombs, *The Constricted Meaning of "Community" in Community Policing*, 72 ST. JOHN'S L. REV. 1367, 1373 (1998) ("The 'community' whose interests are to be considered in a community policing model is often ill-defined or defined in a way disproportionately likely to exclude those whose interests are in less aggressive policing. What are the boundaries of the community?"); Roberts, *supra* note 258, at 823 ("Any claim of Black community consensus begs the questions, what defines the community?, who represents the community?, and how are residents' voices counted?"); *cf.* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1817 (1992) (rejecting the notion that a "black community" per se exists, but rather a population of varied economic, social, and cultural interests).

[262] Cole, *supra* note 256, at 1082. Professor Cole adds that:

> In the best of all possible worlds, inner-city residents might well prefer increased investments in job training, public schools, economic development, and afterschool programs to an expansion of police discretion and aggressive quality-of-life policing. But if the larger community is unwilling to provide the former investments, and is only willing to provide increased resources if they take the form of policing, residents will have a less than free hand in striking the appropriate balance.

Id. at 1088.

African-Americans at least, there exists considerable distaste for aggressive resort by police to the criminal law for non-serious forms of social disorder. According to one recent study, for instance, there is a strong negative attitudinal correlation between arrest rates for low-level offenses and a positive one between arrest rates for violent crimes, i.e., such citizens disfavor widespread police resort to arrest for low-level offenses, yet favor arrest for serious crimes.[263] This finding is in keeping with persistent survey results suggesting that large numbers of African-Americans believe that police treat them unfairly,[264] a perception exacerbated by the acknowledged disproportionate use by police of stops without arrest in minority communities.[265] One clear implication of such findings is that we should be suspicious of the "ancient faith" that municipal governance is immune to despotic tendencies;[266] indeed, the very propinquity of local legislators to social

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[263] *See* Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1225–26 (2000).

[264] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 111 tbl.2.32 (Kathleen Maquire & Ann L. Pastore eds., 1999) (stating that over forty percent of African-Americans surveyed felt that police single them out for differential treatment); STEVEN SMITH, U.S. BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION AND PERCEPTIONS OF COMMUNITY SAFETY IN 12 CITIES 25 (1998) (stating that African-Americans in twelve cities surveyed are more than twice as likely to be dissatisfied with police treatment than whites); Dan Barry & Marjorie Connelly, *Poll in New York Finds Many Think Police Are Biased*, N.Y. TIMES, Mar. 16, 1999, at A1 (reporting that ninety percent of African-Americans surveyed in New York City believe the police single them out for aggressive, differential enforcement).

For an overview of the persistent, strong statistical relationship between race and negative sentiments toward police behaviors more generally, see Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129 (2000); *see also* Tracey Maclin, *Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 264 (1991) (stating that "[f]or many blacks, police officers are the most immediate representatives of the justice system. When police harass black men, the history of discrimination . . . suddenly becomes very alive and current. [Police abuses] have no doubt contributed to the mistrust that many blacks feel toward law enforcement").

[265] *See* STOP AND FRISK REPORT, *supra* note 189; Leslie Casimir et. al., *Minority Men: We Are Frisk Targets*, N.Y. DAILY NEWS, March 26, 1999, at 34 (discussing results from an informal survey of one hundred African-American and Hispanic males in New York City; eighty-one reported being stopped by police at least once, yet none of the stops resulted in an arrest).

In New York's minority communities for instance, police stops have become a "fact of life," prompting African-American and Latino parents to instruct their children on how to behave when detained by police, and to encourage them to carry identification at all times. Felicia R. Lee, *Young and in Fear of Police; Parents Teach Children How to Deal With Officers' Bias*, N.Y. TIMES, Oct. 23, 1997, at B1.

[266] For a provocative discussion of how ostensibly neutral local laws, such as those concerning auto cruising, street vending or youth curfews, have "racialized" effects, see Regina

disorder, however defined, and felt need to "do something" about it, might make their governance in the crime area less, rather than more advisable.[267]

Finally, if perceived as arbitrary or unfair, local laws can have broader, socially destabilizing effects. Most fundamentally, they can foster a sense of illegitimacy, which serves to undermine necessary confidence in and respect for the criminal law. As social psychologist Tom Tyler has observed, "the key to the effectiveness of legal authorities lies in creating and maintaining the public view that authorities are functioning fairly."[268] Local laws that are perceived as unfair can breed disrespect for law and government, providing a perverse incentive for lawbreaking,[269] and engender resistance to formal legal authority.[270] Moreover,

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Austin, *"Not Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667 (1998).

[267] *Cf.* David H. Bayley, *Community Policing: A Report from the Devil's Advocate*, *in* COMMUNITY POLICING: RHETORIC OR REALITY 225, 231–32 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (observing with respect to community policing that "local accountability does not substitute for professional, independent oversight. Quite the contrary, it makes it more necessary. Americans especially have been naive about this, believing that rectitude was assured by local control. Responsiveness may be achieved in this way, but not propriety under law").

[268] Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 989 (2000) [hereinafter *Willingness*]; *see also* Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361 (2001) [hereinafter *Law Abidingness*]; Tom R. Tyler, *What is Procedural Justice?: Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1998).

[269] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 6 (1990) [hereinafter WHY PEOPLE OBEY] (observing a "two-stage process . . . with people's judgments about the justice or injustice of their experience affecting their views about the legitimacy of the authorities, and these views in turn shaping compliance with the law"); *id.* at 108 (noting that "[i]f people feel unfairly treated when they deal with legal authorities, they then view the authorities as less legitimate and as a consequence disobey the law frequently in their everyday lives."); *see also* TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 176 (1997) (noting that "people who experience procedural justice when they deal with authorities are more likley to view those authorities as legitimate, to accept their decisions, and to obey social rules"); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 719 (2000) (stating that "[t]o sustain its moral authority, the law must be experienced as consistent with people's sense of morality. . . . Typically, people are less willing to follow legal rules when those legal rules are not supported by their moral values"); *cf.* Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 176–82 (1997) (discussing correlation between police behaviors and citizen perceptions of police legitimacy); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection after* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1087 (1997) (observing that "cynicism fostered by the appearance of unfairness may encourage disregard for and disobedience of the law"); Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J.

perceptions of illegitimacy, Tyler's work shows, can foster alienation and social estrangement on a more personal level. This is because individuals "use their treatment by authorities as information about their status in society" since "fair and respectful treatment acknowledges people's importance and status, while unfair and disrespectful treatment communicates marginality."[271] This alienating influence, social disorganization theory would suggest, further heightens prospects for law breaking.[272]

The likelihood of such disrespect is high enough with respect to the enforcement of state criminal laws, which, whether justified or not, can benefit from appearing the result of superior democratic consensus. Municipal criminal laws, with their interstitial quality and frequent focus on *malum prohibitum* behaviors, are logically at special risk for being viewed as illegitimate,[273] thus

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RES. CRIME & DELINQ. 445, 463 (1993) (noting that in a Milwaukee domestic violence study, abusers who felt they were unfairly treated by police were thirty-six percent more likely to abuse within six months);

For an insightful discussion of the ways in which the Fourth Amendment is itself based on "reciprocal trust" between citizens and their government, see generally Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751 (1994).

[270] On the basis of recent surveys conducted in Oakland and Los Angeles, Tyler discovered a very strong positive association between citizens' perceptions of whether legal authorities are acting in good faith and their willingness to comply with the law. His conclusion: the effectiveness of legal authorities such as police "lies in their ability to gain acceptance for their decisions among the members of the public with whom they personally deal." *Law Abidingness*, *supra* note 268, at 363. To Tyler,

> [the] findings suggest that trust is important not only because it shapes acceptance within the immediate situation, but also because dealing with an authority that is viewed as trustworthy also shapes people's general orientation toward the law and legal authorities. These findings suggest a further importance of personal experiences. They are one type of information that people use to make general judgments about authorities.

Id. at 389. Tyler thus infers that voluntary compliance can be better fostered by developing trust in the "benevolence of [legal authorities'] motives," which "encourag[es] cooperation" as a "proactive model of social regulation," compared to commonly embraced coercive and deterrence-based approaches. *Id.* at 406.

Tyler's survey of "motive based trust" involved over 1,500 subjects, with whites, African-Americans, and Hispanics about equally represented in the sample. *Id.* at 373. The primary basis for interaction with police among those surveyed involved a request for police help (54%), followed by being detained by police (32%). *Id.*

[271] *Willingness*, *supra* note 268, at 1001.

[272] *See* Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 AM. J. SOC. 774 (1989).

[273] As Professor Tyler has written, individuals view the law as "legitimate," as having "moral credibility," when they see the law as reifying broadly held moral beliefs. TYLER, WHY PEOPLE OBEY, *supra* note 269, at 32–37, 64–68, 161–63.

reducing likely voluntary compliance with the law.[274] As Paul Robinson recently observed, "the criminal law's influence . . . as a moral authority has effect primarily at the borderline of criminal activity," as opposed to more serious criminal law prohibitions (e.g., murder, rape, or robbery) which enjoy proscriptive benefit from "common sense."[275] However, it is at the "borderline . . . where there may be some ambiguity as to whether the conduct is really wrong."[276] If this is so, municipal criminal laws, which most often operate at this very "borderline," should warrant particular concern.[277]

C. *Balkanization of the Criminal Law*

A final concern stems from the diversity of municipal criminal laws themselves, a concrete outgrowth of the revered responsiveness of municipal governance.[278] This very dynamic quality, however, can threaten a balkanization of the criminal law, which the judicial tools of preemption and conflict doctrine have done little to protect against. Together, preemption and conflict seek to head off "uncertainty and confusion" that would otherwise result from inconsistent laws within a given state.[279] As discussed, however, true to the deference afforded home rule, courts typically go out of their way to avoid finding preemption and conflict.[280] As a result, localities use their broad authority to criminalize behaviors

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[274] *Id.* at 31 (noting that persons "who view authority as legitimate are more likely to comply with legal authority, whether the legitimacy is expressed as obligation or as support"); *see also* HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY 89 (1989) (stating that "[o]nce a demand is categorized as legitimate, the person to whom it is addressed enters a situation where his personal preferences become more or less irrelevant").

[275] Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1865 n.84 (2000); *see also id.* at 1869 ("A criminal law that earns a reputation for moral credibility can influence the shaping of norms and, through them, conduct. But to become a moral authority, the criminal law cannot deviate too far from what the community thinks is just, that is, too far from lay intuitions of justice.").

[276] *Id.; see also* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

[277] *Cf.* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 50 (Little, Brown & Co., 1948) (1881) ("[A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.").

[278] *See supra* notes 4, 83–84 and accompanying text (noting that one of the prime attractions of local governance is that it permits greater familiarity and responsiveness to local needs).

[279] *See* Junction City v. Lee, 532 P.2d 1292, 1300 (Kan. 1975) (Schroeder, J., dissenting) (observing that the doctrines are rules "of necessity, based upon the need to prevent dual regulations which could result in uncertainty and confusion").

[280] *See supra* notes 81–143 and accompanying text.

not expressly addressed by state criminal law, supplement extant state law by criminalizing closely related (but distinct) behaviors, and impose varied procedural regimes and sanctions.[281]

This diversity has at least two significant potential consequences. The first relates to notice. While it remains axiomatic that ignorance of the law is no defense to criminal liability,[282] due process compels that behaviors potentially subject to penal prohibitions be reasonably knowable in advance.[283] The proliferation of local criminal laws, however, imposes a correspondingly lessened likelihood that the substantive reach and content of such laws can be known, and therefore observed. This is especially of concern to itinerant citizens passing through a given locality, a common occurrence in today's highly mobile society. Just such a concern was addressed by the Supreme Court in *Lambert v. California*,[284] where the Court invalidated a Los Angeles ordinance making it a crime for one previously convicted of a felony to fail to register with local authorities[285] because the law did not require proof of "actual knowledge of the duty to register or the proof of the probability of such knowledge."[286] *Lambert*, however, today endures as little more than as a pedagogic chestnut found in criminal law casebooks, supporting Justice Frankfurter's prediction in dissent that the holding would amount to "an isolated deviation . . . a derelict on the waters of the law."[287] The Court has never revisited the principle enunciated in *Lambert*, while local governments have proceeded to enact a myriad of criminal laws, rendering residents and non-residents alike susceptible to prosecution without

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[281] *See supra* notes 144–169 and accompanying text.

[282] *See* Cheek v. United States, 498 U.S. 192, 199 (1991) (noting that "[t]he general rule that ignorance of the law or a mistake of law is no defense to a criminal prosecution is deeply rooted in the American legal system"). The pragmatic basis for this view was eloquently captured by Justice Holmes:

> It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit [ignorance or mistake] as an excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

HOLMES, *supra* note 276, at 48. *See generally* Dan M. Kahan, *Ignorance of the Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997) (discussing moral underpinnings of "mistake of law" doctrine).

[283] *See* United States v. Harris, 347 U.S. 612 (1954); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[284] 355 U.S. 225 (1957).

[285] *Id.* at 229–30.

[286] *Id.* at 228–29.

[287] *Id.* at 232 (Frankfurter, J., dissenting); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 69 (1997) (noting that "*Lambert*'s notice principle turns out not to matter").

leave for ignorance.[288]

This state of affairs should be a source of concern, given what we know about citizens' scant familiarity with criminal legal expectations. For years empirical work has made clear the existence of significant knowledge deficits among citizens with respect to the "general" criminal law and changes made to it.[289] Greater concern should logically arise, therefore, when municipalities unexpectedly criminalize behaviors, especially those of a *malum prohibitum* nature.[290] This knowledge deficit, moreover, assumes major practical importance given the expansive authority possessed by modern police to execute warrantless arrests for "very minor offenses," endorsed by the Supreme Court's recent decision in *Atwater v. City of Lago Vista*.[291] Thus, the legislative decision by

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[288] *See* MCQUILLIN, *supra* note 23, § 27.57, at 448 (stating that "[a]ll persons upon whom valid ordinances are binding are charged with constructive notice of those ordinances, and a defendant cannot show that he or she did not know of the existence of the ordinance. So, for like reason, it is no defense that one is a nonresident, where an ordinance is intended to apply to all within the corporate limits").

[289] *See, e.g.*, JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 35–52 (1997) (discussing research findings from studies highlighting low levels of public familiarity with criminal laws and punishments). As Professor William Stuntz recently observed, "[o]rdinary people do not have the time or training to learn the contents of criminal codes.... Criminal codes therefore do not and cannot speak to ordinary citizens directly." William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000).

[290] On the historic distinction between *malum in se* and *malum prohibitum* crimes more generally, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 32 (2d ed. 1986).

[291] 121 S. Ct. 1536, 1557 (2001). In so deciding, by a 5-4 vote, the Court placed its imprimatur on the ongoing, decades-long legislative empowerment of police to execute warrantless arrests for non-breach of the peace offenses, in contrast to traditional common law limits. As Professor Barbara Salken had noted:

> Prior to the mid 1800s... the summons was the rule.... Legislatures then adopted statutes granting sweeping arrest powers. Without considering whether the taking of immediate custody was necessary, legislatures began to authorize custodial arrests for minor crimes. This change appears to have been aimed at making it easier to arrest without a warrant, but the effect was to authorize custodial arrests for many offenses, "such as ordinances and regulatory violations, that had previously not been subject to arrest at all."

Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 258–59 (1989) (citations omitted); *see also* Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 363 (1936) (noting that "[recent statutes] have brought within the area of legal arrest a vast number of misdemeanors which were not breaches of the peace at common law, and hence not subject to arrest without warrant even though committed in the presence of an officer"); Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 550 (1924) (observing that "states may, by statute, enlarge the common law right to arrest without a warrant, and have quite generally done so or authorized municipalities to do so, as for example, an officer may be authorized by statute or ordinance to arrest without a warrant for various misdemeanors and violations of ordinances, other than

some (but not, perhaps problematically, all) municipalities to criminalize and enforce low-level disorder offenses raises a troubling specter: arrests (and hence searches) of citizens are free to occur merely on the basis of intra-state geography.[292] Addressing this concern in 1927, Harvard Law Professors Francis Bohlen and Harry Shulman characterized the availability of arrest for violations of municipal law as being "doubly" problematic and "appaling," given the variability of the laws in what to them was an increasingly mobile society:

> People no longer live their whole lives in the village in which they were born. They pass freely from place to place, and in transit go through innumerable towns and villages. The risk of being arrested on sight, because one's conduct contravenes some regulation, which the wisdom of the local Solons deems necessary, is appalling to any thinking person. It would be impossible to know at what moment one might become amenable to arrest. Even that outworn and discredited fiction that every man knows the law has never been pushed to such an extreme as to justify imposing such consequences upon an ignorance of the local ordinances of the myriads of small communities through which modern men constantly pass.[293]

Notice concerns, however, can also arise with respect to more serious offenses, the criminality of which citizens are presumably aware, when localities

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breaches of the peace, if committed in his presence"). For commentary critical of police resort to arrest for minor crimes, see, for example, Thomas R. Folk, *The Case for Constitutional Constraints upon the Power to Make Full Custody Arrests*, 48 CINN. L. REV. 321 (1979); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771 (1993). By the Supreme Court's count, all fifty states and the District of Columbia today afford police some degree of authority to execute warrantless arrests for non-breach of the peace misdemeanors and violations. *See Atwater*, 121 S. Ct. at 1552 & app.

[292] Texas statutory law contains a notably curious instance of this disuniformity. Since 1856, Texas law has expressly afforded "towns and cities" the right to enact laws "authorizing the arrest, without warrant, of persons found in suspicious places," on the belief that a crime has been or might be committed. *See* Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 TEXAS TECH. L. REV. 931 (2000) (discussing TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1) (Vernon 2000) and predecessor versions). Professor Reamey expresses understandable concern over "why such rule making would be delegated to the lowest level of government. It is especially important that this kind of arrest procedure rule be consistent throughout the state, and there is no special virtue in consulting varying community standards in the legislative consideration of such rules." *Id.* at 945.

[293] Francis H. Bohlen & Harry Shulman, *Arrest With and Without a Warrant*, 75 U. PA. L. REV. 485, 491–92 (1927). The authors also noted with great prescience that "[t]he privilege to arrest without a warrant will undoubtedly lead to officers taking into custody persons for offenses which, though actually committed in the presence of the officer, are subsequently deemed too insignificant to warrant prosecution." *Id.* at 490. Today's widespread resort to arrest without prosecution would appear to amply substantiate the authors' fears. *See supra* note 202.

experiment with sanctions. For example, in *City of Niles v. Howard*,[294] a locality elevated the state's punishment for simple marijuana possession (under state law a minor misdemeanor involving a maximum $100 fine with no jail time, and which did not form the basis for a "criminal record"), to a "first degree" misdemeanor, subjecting the defendant to a six month jail term and a $500 fine. A majority of the Ohio Supreme Court upheld the provision,[295] prompting a dissenting justice to retort that "[t]he citizens of the state will be wise if they begin to research the laws of each city that they intend to pass through prior to traveling along our highways."[296] The judge continued:

> The case before us today is not a "marijuana case." The issues presented directly involve the constitutional balance between the authority of the General Assembly and the authority of the municipal government. . . .
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> . . . .
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> Municipalities are now granted authority to convert any minor misdemeanor into a misdemeanor in the first degree; and, as a result, uniformity in the application of the criminal laws and penalties in Ohio will be diminished. Individuals traveling on our highways under the belief that their conduct is not punishable by imprisonment will suddenly find themselves inside the boundaries of a municipality . . . where their conduct is punishable by six months in jail. Having no notice of the "recriminalization" of their activities upon entering the city limits, certain of these individuals undoubtedly will be arrested and convicted under these municipal ordinances. These individuals will face imprisonment, be burdened with a criminal record, and potentially suffer from a loss of employment or even a destroyed career, while their counterparts outside the city limits merely will receive a citation and no more than a $100 fine.[297]

Local forfeiture laws provide another reason for concern.[298] Aside from the obvious worry that such laws provide local law enforcement with undue monetary incentives to be overzealous, also evident with state and federal forfeiture laws,[299] the geographically varied use of such laws within a given state raises basic fairness concerns. The Minnesota Court of Appeals, writing in 1992, invalidated an aggressive automobile forfeiture provision enacted by the City of St. Paul, and voiced just such a worry:

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[294] 466 N.E.2d 539 (Ohio 1984).

[295] *Id.* at 541.

[296] *Id.* at 544 (Sweeney, J., dissenting).

[297] *Id.* at 543 (Sweeney, J., dissenting).

[298] *See supra* notes 144–50 and accompanying text (discussing same).

[299] *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 76–83 (1998) (discussing negative influences of forfeiture laws on law enforcement practices).

> [F]orfeitures of motor vehicles, for misdemeanor offenses varying from jurisdiction to jurisdiction, [would] impose[ ] uncertainty and confusion. . . . [T]he number of misdemeanor offenses, which could involve a motor vehicle, is too great to allow a proliferation of local forfeiture ordinances. Under a municipal forfeiture system, motor vehicle owners could risk their vehicles for a different offense in each municipality. . . . [T]he adverse effect of a local ordinance upon transient citizens outweighs the benefit to the City of St. Paul.[300]

Notwithstanding this concern, as discussed above, forfeiture is enjoying increased use among localities.[301] For instance, in upholding the City of Oakland's aggressive forfeiture law, the California Court of Appeals recently emphasized that "the adverse effect of the ordinance on transient citizens of the state" does not "outweigh the benefit to the municipality"; the law "is directed at the protection of public safety, and targets . . . transient and resident alike."[302] The court added that "[w]hen state legislation does not address the demands of particular urban areas, 'it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements.'"[303]

Finally, intra-state variability raises possible concern that citizens will be denied equal protection of the laws. When a locality criminalizes behavior not targeted by the state and even other local governments, makes prosecution easier as a result of reducing the required mens rea, or sanctions more harshly,[304] such lack of uniformity threatens unequal treatment.[305] So too does the use of differential procedural regimes, which, as discussed above, can have constitutional overtones.[306]

However, no equal protection claim would likely be available. This is because residence in a political subdivision of a state in itself does not constitute a "suspect" or even "quasi-suspect" classification for Fourteenth Amendment purposes, consequently triggering ordinary rational basis scrutiny for any such claim.[307] As the Supreme Court observed almost forty years ago in upholding a

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[300] State v. Gonzales, 483 N.W.2d 736, 738 (Minn. Ct. App. 1992).

[301] *See supra* notes 144–50 and accompanying text.

[302] Horton v. City of Oakland, 98 Cal. Rptr. 2d 371, 375 (Cal. Ct. App. 2000).

[303] *Id.* (citation omitted).

[304] *See supra* notes 87–165 and accompanying text.

[305] As then Justice Rehnquist noted over twenty years ago, "[t]he imaginary line defining a city's corporate limits cannot corral the influence of municipal actions. A city's decisions inescapably affect individuals living immediately outside its borders." Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 69 (1978).

[306] *See supra* notes 155–67 and accompanying text.

[307] In denying an equal protection challenge against a local disorderly conduct law that imposed a greater penalty than that of an identical state law, the Louisiana Supreme Court stated:

Virginia county's decision to shut down its schools in order to avoid racial desegregation: "[T]here is no rule that [localities] . . . must be treated alike; the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas.'"[308] This orientation was evidenced some eighty years earlier when the Court, addressing an equal protection claim based on Missouri's power to impose a different method of judicial appeal in the City of St. Louis, remarked that the Equal Protection Clause ensured that "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."[309] Given that laws can vary among the states, the Court discerned "no solid reason" why intrastate variation should not also be condoned by the Constitution.[310]

Nor, it seems, would an equal protection claim lie on the theory that a fundamental right is differentially impinged by local law. Conceivably, the right to travel could serve as a basis for such a claim.[311] The right has at times been extended by lower courts to the right to intrastate, not just interstate, travel.[312] The Supreme Court, however, has also been at pains to emphasize that travel is unconstitutionally impinged only when it denies a "necessity of life,"[313] and while particular local laws might affect such rights, e.g., targeting the homeless with laws criminalizing sleeping or eating in public,[314] in principle local criminal laws

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> Because situations are different from city to city, the Constitution and the legislature have given municipalities some leeway in exacting the penalties they deem appropriate. Because it is conceivable that the state and municipalities can have different and equally legitimate policy objectives, there is a rational basis for allowing a city to set different penalties from those contained in identical state law.

City of Baton Rouge v. Williams, 661 So. 2d 445, 451 (La. 1995); *see also* MCQUILLIN, *supra* note 24, § 23.01, at 501 (observing that "the fact that an ordinance has provisions for people within a municipal corporation that are different from statutory provisions outside the municipal corporation does not in itself result in unconstitutional discrimination, where the classification is based upon a reasonable distinction").

[308] Griffin v. County School Bd., 377 U.S. 218, 230 (1964) (quoting Salsburg v. Maryland, 346 U.S. 545, 551 (1954)).

[309] Missouri v. Lewis, 101 U.S. 22, 31 (1880).

[310] *Id.*

[311] *See* Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 902 n.2 (1986) (asserting that the right to travel receives "its most forceful expression in the context of an equal protection analysis"); United States v. Guest, 383 U.S. 745, 757 (1966) (noting that travel is a fundamental right that has been "firmly established and repeatedly recognized").

[312] *See, e.g.*, Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971); Stoner v. Miller, 377 F. Supp. 177 (E.D.N.Y. 1974).

[313] *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 259 (1974).

[314] *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1580–83 (S.D. Fla. 1992)

do not, thus undercutting a rights-based claim.[315] Equally unavailing, it would appear, would be a discrimination-based claim sounding in the "Privileges and Immunities" Clause of article IV or the "Privileges or Immunities" Clause of the Fourteenth Amendment, as each protects against discriminatory treatment on the basis of state (not local) residence and citizenship.[316]

In ultimate terms, while local laws might not raise constitutional concern as a technical matter, this does not speak to the troubling practical consequences[317] and policy concerns[318] potentially raised by intra-state criminal law variations. Although the state-federal relationship obviously differs in important ways from the state-local relationship,[319] the concerns raised over the increasing

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(granting injunction against Miami's use of criminal laws to arrest homeless persons for such "inoffensive conduct").

[315] *See generally* Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 295–308 (1987) (discussing the failure of courts to police municipal variations in treatment of fundamental rights).

[316] *See generally* Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241 (1998); Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553 (2000).

[317] *See, e.g.*, Neuman, *supra* note 315, at 306–07 (noting that "[i]ndividuals can choose membership in another subdivision only by change of residence, a[n] action with extraordinary costs, and one whose practical availability to different individuals varies with their circumstances"). Another commentator has adopted a decidedly more dogmatic view with regard to local laws that are perceived as unfair:

> Because withdrawal from the local community is easier than from the state or national community, it is less distasteful for a local government to subject its members to community decisions. People who disagree with the choices of a particular community can seek a community more compatible with their values or they can choose to live in no community at all.

Kevin J. Worthen, *Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes*, 44 VAND. L. REV. 1273, 1285 (1991).

[318] *See* City of Niles v. Howard, 466 N.E.2d 539, 543 (Ohio 1984) (Sweeney, J., dissenting) (stating that state-local disuniformity "technically may not 'qualify' as a deprivation of either due process or equal protection, but it clearly is highly inequitable"); Commonwealth v. Cabell, 185 A.2d 611, 615 (Pa. Super. Ct. 1962) (stating that lack of geographical "uniformity in criminal legislation" and the "difficulties which would arise from the fact that the state and a city might both make the same act criminal and subject to different or cumulative penalties . . . raise no question of constitutionality, whatever may be said of them as a matter of policy").

[319] Municipalities, of course, are thought to owe their very existence to their coordinate state governments, in contrast to the states, which enjoy an organic sovereignty and independence from the federal government. *See supra* notes 10, 61–62 and accompanying text. It bears mention, however, that, as an historical matter, localities actually very often preceded creation of the state governments that would come to have dominion over them. *See generally* Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 394–431 (1985).

"federalization" of crime in many respects track those raised by increasing localization. The Court's decision in *United States v. Lopez*[320] notwithstanding, the reality is that the federal government continues to commandeer criminal law territory from the states,[321] the traditional purveyors and keepers of the general criminal law.[322] The result has been a substantive overlap[323] comparable to that created in state-local relations explored at length here.[324] As a result of this overlap, fairness concerns have arisen in the state-federal arena, especially with regard to drug[325] and weapons-related offenses,[326] where state penalties remain

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[320] 514 U.S. 549, 561 n.3 (1995) (citiation omitted) (invalidating federal "Gun-Free Schools Zone Act" on Commerce Clause grounds, observing that "when Congress criminalizes conduct already denounced as criminal by the states, it effects 'a change in the sensitive relation between federal and state criminal jurisdiction'").

[321] For a discussion of the limited effects of *Lopez* and the continued aggressive extension of federal criminal law authority, see Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 921–24 (2000).

According to one recent study, "[m]ore than 40% of the Federal criminal provisions enacted since the Civil War have been enacted since 1970." TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION 7 (1998). The Task Force observes that the one-time estimate of 3,000 federal crimes on the books "is now surely outdated." *Id.* at 9 n.11. Indeed, taking account of the superabundance of "regulatory" crimes, it appears that the number of federal crimes exceeds 300,000. *See* Susan L. Pilcher, *Ignorance, Discretion, and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 32 (1995).

[322] *See* Patterson v. New York, 432 U.S. 197, 201 (1977) (observing that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government").

[323] *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1162 (1995) (noting that "[m]any federal criminal statutes overlap with or merely duplicate state law prohibitions unrelated to any substantial federal interest"); Peter J. Henning, *Foreword: Statutory Interpretation and the Federalization of Criminal Law*, 86 J. CRIM. L. & CRIMINOLOGY 1167, 1167 (1996) (noting that federal criminal laws "in large measure duplicate crimes that the states can prosecute").

[324] Indeed, in this sense the "new federalism" embraced by the *Lopez* Court lies with the grain of increasing localization; both see diversity as a virtue. *See* Frank S. Alexander, *Inherent Tensions Between Home Rule and Regional Planning*, 35 WAKE FOREST L. REV. 539, 541–42 (2000) (recognizing same).

[325] *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996) (denying motion for discovery relating to selective prosecution challenge, based, *inter alia*, on allegedly discriminatory choice to prosecute African-American crack cocaine defendants in federal, not state, court); United States v. Williams, 963 F.2d 1337 (10th Cir. 1992) (denying due process challenge when defendant received four times as great a prison sentence pursuant to federal drug law, compared to that authorized by state drug law).

[326] *See, e.g.*, United States v. Hayes, 236 F.3d 891 (7th Cir. 2001) (denying selective prosecution claim against "Operation Triggerlock," under which federal prosecutors screen local police arrests for potential federal violations); *see also* United States v. Nathan, 202 F.3d

modest compared to the draconian terms mandated by federal law.[327] Different procedural and evidentiary rules, and constitutional safeguards, likewise, can make federal prosecution more appealing (i.e., easier) than state prosecutions.[328] Plainly, analogous differences exist in the state-local realm, raising the prospect that a citizen will be treated quite differently merely on the basis of where within the state a particular offense is alleged to have occurred. Ultimately, if left to fester, such variability might inspire internecine antagonisms among municipalities themselves, when citizens are treated differently from one

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230 (4th Cir. 2000) (denying Tenth Amendment challenge against "Project Exile," a joint state-federal effort that prosecutes firearm-related offenses in federal court pursuant to more punitive federal law, despite the fact that suspects are arrested by local police).

[327] *See* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 668–69 (1997) (asserting that "disparity between state and federal state prosecution is a hallmark of federalization" and that "defendants typically fare considerably worse when prosecuted in federal court"); *see also* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1134 (1997) (stating that "[t]he routine enforcement of so many duplicative federal crimes harms state autonomy because federal prosecutions establish an alternate authority"). *See generally* Jamie Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967 (1995) (discussing the critical importance of forum decisions in prosecutorial decisions).

These forum-shopping considerations, in turn, have been encouraged by the courts, whether intentionally or not. *See, e.g.*, United States v. Batchelder, 442 U.S. 114 (1979) (holding that federal prosecutors, presented with two federal statutes covering same conduct, are empowered to select criminal statute with harsher penalty); United States v. Jacobs, 4 F.3d 603 (8th Cir. 1993) (holding that defendant can be prosecuted pursuant to federal law, with harsher punishment, despite existence of state law carrying lesser penalty for identical conduct).

[328] On this point more generally, see Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997); John C. Jeffries & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095 (1995); Greg Hollon, Note, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499 (1996).

This increase in federal criminal jurisdiction has prompted a novel rethinking, if not reconfiguration, of the traditional party lines in debates about state-federal relations. As Professor Rory Little has noted:

> For example, many "liberals" today oppose the federalization of crime largely because of the severity of federal criminal Sentencing Guidelines enacted in 1986. Yet these opponents may be loath to make states-rights federalism arguments . . . that were successfully battled decades ago. At the same time, the customary advocates of a federalist states-rights theory tend today to be conservative law-and-order proponents of federalizing criminal statues. They have little interest in raising federalism concerns . . . at least in the political realms where the federalization debate is being played out.

Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1065–66 (1995).

jurisdiction to another,[329] to the nation's detriment.

IV. CONCLUSION

For better or worse, "our localism" shows no sign of abating,[330] as laws enacted by municipalities, in ever greater numbers,[331] enjoy enormous deference from the courts and policy makers.[332] The laws, in their myriad form and content, give expression to what Professors Michael Dorf and Charles Sabel have recently referred to as "an emergent experimentalist government,"[333] which above all "gives locales substantial latitude in defining problems for themselves."[334] This article has focused on one outgrowth of this phenomenon in particular, addressing developments in the domain of the criminal law, a critically important realm of local legislative authority heretofore largely taken for granted by courts and commentators.

This article has explored the ways in which municipalities are now asserting themselves in creating—not just enforcing—criminal laws, and identified several central concerns. The discussion has sought to draw attention to these concerns,

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[329] Intra-state tension is already manifest in instances of concurrent jurisdiction, with prosecutors from coordinate governments "racing to the courthouse," motivated at least in part by the financial benefits associated with securing convictions. *See, e.g.*, Bush v. Williams, 504 So. 2d 1060, 1063 (La. Ct. App. 1987). Tensions are also evident in the realm of state-federal-local relations, as local police are now turning seized assets over to federal and not state authorities because federal "equitable sharing" provisions reward local police forces directly. *See* Blumenson and Nilson, *supra* note 299, at 106–08.

For an interesting discussion of how Congress and the Court have, on repeated occasion, conferred federal powers (and, importantly, resources) on willing local governments, even when contrary to the desire of state legislatures, see Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999). Hills notes that with such end-runs, "the city—a creature of the state—[invokes] federal law to defeat the will of the state government, its creator." *Id.* at 1202.

[330] *Localism I*, *supra* note 4, at 112–13 (stating that "[l]ocal autonomy has taken on an air of permanence. State legislatures and state and federal courts have proven unwilling to limit local power or alter the structure of state-local relations, even after the effects of local autonomy in promoting interlocal inequality and local parochialism have been demonstrated").

[331] Compelling evidence of this proliferation is found in the evolution of New Haven, Connecticut: during the nineteenth century, the city's municipal code grew by a mere 170 pages; during the twentieth century, the code grew by almost 1,100 pages, despite a comparatively modest increase in population. *See* Robert C. Ellickson, *Taming the Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 105–06 (2000).

[332] *See supra* notes 11–12 and accompanying text.

[333] *See* Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

[334] Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 322 (1998).

and to suggest that the prevailing uncritical embrace of local authority be tempered with some reserve, not to argue against local authority in principle. Indeed, there are apparent benefits to localism and the diversity it can bring; most particularly, in theory at least, it affords a heightened legislative nimbleness and responsiveness to particularized local needs.[335] In addition, because the financial costs associated with police and jails are, in the end, to be paid mainly by municipal governments, it would appear sensible and just to provide them (and not the distant, financially insulated state) ample prerogative to specify criminal behaviors. Taken together, these virtues might encourage looking upon local criminal laws as "trumps"; autonomous products of decentralized government as to which Professor Clayton Gillette has recently urged deference.[336] In so doing, we might eventually embrace a deferential "checkerboard" approach to inter-governmental relations similar to how tribal governments are viewed[337] or a

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[335] *See* Neuman, *supra* note 315, at 305 (stating that "local governments are designed to pursue contrasting policies, each within its own sphere. These variations are not irrational, or enforced for their own sakes, but are the necessary result of maximizing local-determination in a democratic society").

[336] *See* Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347 (1997). Professor Gillette invokes the concept to describe instances where local governments have been afforded an "explicit veto" or "exclusive jurisdiction over a subject that the central government desires to regulate." *Id.* at 1347. Of course, such carve-outs in the criminal law arena are rare. In practical reality, however, the weakness of preemption and conflict analysis suggests a "trump" effect at work in the state-local dynamic, making the analogy a useful one.

[337] *See* Washington v. Yakima Indian Nation, 439 U.S. 463, 499–502 (1979) (rejecting equal protection challenge to statute conferring "checkerboard" jurisdiction over Indian territory). Like local governments, which are invested with authority by their coordinate states, the tribes, for the most part, derive power and recognition from the federal government. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (stating that "Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess"). Like municipalities, tribal governments also have their own courts, which lack jurisdiction over "major" crimes. *See* Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 988 (2000). One key difference, however, lies in the criminal jurisdiction enjoyed by the respective governments: tribes lack jurisdiction to prosecute non-Indians for misdemeanors committed on reservation lands, unlike municipalities which are free to prosecute non-residents. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). In so deciding, the *Oliphant* Court was at pains to emphasize its concern that non-Indians not be subject to losses of liberty at the hands of "alien" justice systems. *Id.* at 210–11.

For more on the idea that municipalities might be regarded in a fashion similar to the way tribes are regarded by the state and federal governments, see Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053 (1998); Kevin J. Worthen, *Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes*, 44 VAND.

super-autonomous *imperium in imperio* (sovereignty with a sovereignty) form of governance contemplated early in the Republic,[338] characterized by intrastate, not just interstate, variation in criminal laws—perhaps to the nation's ultimate good. As discussed here, however, whether the benefits of localism, such as advanced in support of municipal control over zoning, education, and other traditionally "local" concerns, extend to the realm of the criminal law (with its distinct personal and social consequences) remains a crucial question that will continue to loom in the years to come.

L. REV. 1273 (1991).

[338] *See generally* Daniel J. Hulsebosch, *Imperia in Imperio: The Multiple Constitutions of Empire in New York*, 1750–1777, 16 LAW & HIST. REV. 319 (1998). Such a model of governance was a source of great controversy in the Framing Era, so much so that Samuel Adams characterized it as a "Solecism in Politics." H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1526 (1987) (quoting *Letter from Samuel Adams to H.A. Cushing* (Dec. 3, 1787), *reprinted* in 4 WRITINGS OF SAMUEL ADAMS 324 (H. Cushing ed., 1908)).