

Against Criminal Law Localism

Brenner M. Fissell

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AGAINST CRIMINAL LAW LOCALISM

BRENNER M. FISSELL*

Scholars have long called for greater localism in criminal justice as a response to the crises of racialized mass incarceration and over-policing. A downward shift of power to smaller local governments is thought to maximize an array of values, including liberty, equality, and efficient experimentation, and also to allow for criminal justice to better reflect societal viewpoints. In making these claims, localists have at times either explicitly included control over substantive criminal law in their devolutionary project, or have overlooked that more general calls for localism would presumably include this power.

This Article critiques substantive criminal law localism, arguing that it counteracts the values that the localist project aims to achieve. Because of foundational features of local government law, localities have no authority to decriminalize conduct criminalized by a state—their option is only to add more offenses to the existing state code. Increased localism in substantive criminal law, then, functions as a one-way ratchet for more misdemeanor criminalization and all its attendant ills: incarceration, crippling fines and fees, and the authorization of more policing, surveillance, and managerial social control of marginalized groups. Criminal justice localists should therefore excise substantive criminal law from their devolutionary program, and they should do so explicitly.

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INTRODUCTION

For the past two decades, one theme in criminal justice scholarship has remained constant: localism. Nearly every prominent reformist voice agrees that more power should be devolved to smaller jurisdictions when possible, and the smaller the better. First was the intellectual reaction to the Supreme Court’s decision in *City of Chicago v. Morales*¹ in 1999. The Court struck down a Chicago gang-loitering ordinance as void-for-vagueness,² but many academics uncharacteristically recoiled at this pro-defendant result. The rise of a “New Discretion” literature criticized paternalistic judges in far-off marble halls who, in the name of abstract civil rights and liberties, invalidated policy decisions made by local citizens on the ground—especially those made by urban minority citizens who were most affected by crime.³ Fast forward about one decade, and William Stuntz would advance the following thesis: “Make criminal justice more locally democratic, and justice will be both more moderate and more egalitarian.”⁴ Today, this localism remains alive and well in the prominent movement to “democratize” criminal justice,⁵ and also in a newly burgeoning scholarship critiquing the misdemeanor system.⁶

1. 527 U.S. 41 (1999).

2. *Id.* at 51.

3. See, e.g., David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1161–63 (1998).

4. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008).

5. See generally Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017).

6. See, e.g., ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018).

These scholars, writing in response to the contemporary crises of racialized mass incarceration and over-policing, argue that localism can work to enhance a number of values. By more closely mapping jurisdictional boundaries around communities with shared moral viewpoints, localism facilitates greater instantiation of those values into law.⁷ By empowering the community, localism empowers more empathy for fellow citizens, thus resulting in more lenient punishment (and greater individual liberty) as well as more egalitarian outcomes. Finally, localism enables experimentation in policymaking, with the expectation of long-term benefits.

In this Article, I argue that the localist project in criminal justice must make a narrower claim for devolution if the project is to cohere: It must abandon calls for devolution over substantive criminal law. Fundamental principles of local government law—enshrined in state constitutions and their judicial interpretations—deprive localities of the power to decriminalize conduct that is punished under state law. Local governments are creatures of state law, and thus have no authority to repeal state offenses. Moreover, prevailing preemption doctrines enforce this inferior status, reducing the sphere of permissible local regulation to the creation of new offenses that cover more conduct than that covered by state law. Put bluntly, localities can add to criminal law, but they cannot subtract from it. The example of marijuana possession in Sarasota, Florida, is illustrative. The city recently “decriminalized” this conduct with much fanfare, but in reality it was merely repealing its own pre-existing local crime, and the analogous state law offense continues to be enforced even within the city limits.⁸

Localism in substantive criminal law is therefore a “one-way ratchet”—it has a necessarily pro-criminalization valence. While it is conceivable that more speculative theorists could call for a world where localities do have the power to entirely determine the content of the criminal law within their jurisdictional boundaries, the localists engaged with here are pragmatic. Their reforms are expected to be reasonably possible given the current structure of state and federal constitutional law. This is part of the attraction of localism: It is a pre-existing system that can be utilized for an expected benefit. The point I hope to make is that the existing structure will not result in a criminal law localism that will produce the benefits localists expect. More criminal law localism can only mean more local criminalization, which means more misdemeanors and their well-recognized pathologies: more incarceration, fines, and fees, and the authorization of more managerial social control,⁹ policing, and surveillance of marginalized groups. Criminal law

7. See *infra* Part I.

8. See *infra* Section II.C.

9. A “managerial model” of social control, according to sociologist Issa Kohler-Hausmann includes (1) an aim of “marking” defendants by putting arrests and convictions on their records so

localism thus threatens the very values that criminal justice localists hope to maximize.

First, consider the expectation that localism will better permit different concentrations of criminal justice policy viewpoints to make their way into law. Localism could enable moral diversity.¹⁰ Reducing jurisdictional size, when coupled with a concentrated group of likeminded people, is thought to create electoral majorities that would not exist at the state level. This all sounds good when thinking about many different categories of policies (say, zoning), but it turns potentially sinister when applied to criminal punishment. Moral diversity localism, by devolving for the purpose of concentrating viewpoints in criminal law, carries with it the classic threat of minority oppression. Mainstream theories of punishment, such as liberalism or the increasingly popular republicanism, would reject this institutional shift. It would facilitate increased restrictions on autonomy by reducing the barriers to consensus that larger, more heterogeneous communities provide.¹¹

Second, localism in criminalization would counteract another benefit that localism is supposed to provide: the maximization of individual liberty. The liberty payoff in localism, according to some criminal justice localists, comes from the increased empathy that citizens have with respect to those they live alongside.¹² This is supposed to result in more lenient criminal justice outcomes. The claim of expected leniency is psychological, though, and has been criticized.¹³ With respect to substantive criminal law,

that they could be tracked and later controlled; (2) putting up “procedure hassle[s]” to test the “rule-abiding propensities” of the marked individuals (e.g., appearing in court); and (3) “performance” in place of a sentence, meaning “the set of activities the defendant is instructed by the court or prosecutor to undertake” such as drug treatment (also aimed at testing rule-abidingness). ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 20–21 (2018). Even if incarceration is not a sanction actually meted out for many local offenses, although it is very often authorized, see Brenner M. Fissell, *Local Offenses*, 89 *FORDHAM L. REV.* 837, 854–56 (2020), the resultant “marking” and “procedure hassle” of a conviction can have serious implications for the person’s life. Of course, the criminalization of the conduct also licenses police to interfere in citizens’ lives through the triggering of criminal procedure investigative powers. See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 *OHIO ST. L.J.* 1409, 1442 (2001) (explaining that the arrest and search for the trivial local offense can serve “as “an investigative fulcrum to increase criminal liability (sometimes radically)”).

10. See Stephanos Bibas, *Small Crimes, Big Injustices*, 117 *MICH. L. REV.* 1025, 1041 (2019) (“Some communities prize orderly public spaces and are willing to trade away more liberty. Others are more relaxed about social disorder and disruption. The genius of American federalism (and localism) is that the police and prosecutors in each community can calibrate the level of enforcement to their communities.”).

11. And if some localists would be willing to abandon liberalism or republicanism, they would find themselves outside of mainstream criminal law theory. See *infra* Section III.A.

12. Kahan & Meares, *supra* note 3, at 1163.

13. See John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 *U. CHI. L. REV.* 711, 786–91 (2020).

moreover, most people would think that more local power to prohibit and punish more conduct—and for localities the only option is “more”—means less individual liberty to engage in the conduct. Liberty is also inhibited by the policing and surveillance apparatus that is authorized by criminalization. Some criminal justice localists avoid this conclusion by embracing a counterintuitive notion of liberty as freedom from oppressive social norms (that might be erased through new criminal offenses),¹⁴ but we should resist this reframing of a fundamental concept due to a small category of outlier cases: Liberty in the context of criminal justice reform is liberty from the *state*, not from private actors.

Third, criminal justice localists hope that localism can advance equality—especially racial equality, given the American phenomenon of racially disparate mass incarceration.¹⁵ Equality, for the localists, is a benefit that runs in tandem with liberty (or leniency) and moral diversity. Smaller jurisdictions, as empathy enablers, will result in fewer punitive outcomes for historically marginalized groups; these jurisdictions, if given more power, will act to effectuate pro-leniency policy preferences that historically had been subordinated. Again, though, the claim of an expected increase in empathy and leniency is contestable, and in the context of substantive criminal law it is difficult to imagine how power-shifting to localities—given the constraints of local government law—will help to equalize anything. If the only option for localities is to create more misdemeanors, then their only option for equalizing the playing field is to “level up”—to create new offenses that punish conduct engaged in by historically dominant groups. Equality through increased punishment, though, counteracts the decarceral goals of criminal justice localists. It brings equality at the expense of leniency.

Finally, some criminal justice localists deploy a famous argument for devolution: A multitude of smaller jurisdictions will serve as “laboratories of experimentation,” with an expected benefit of more efficient policymaking in the long run.¹⁶ Like with moral diversity localism, this may seem like a valuable effect of devolution when making taxation or zoning policy. When one considers its application to substantive criminal law, though, the result is the unsavory claim that localities should experiment with punishing their citizens. Experimentation localism relies on an expectation of *tentativeness* in enacted laws, and almost no theory of state punishment would accept tentative punishment as legitimate. Citizens are not lab rats, and failed

14. See *infra* Section I.A.

15. See, e.g., Stuntz, *supra* note 4, at 1974; Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 787 (2021).

16. See, e.g., K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 733–34 (2020); NATAPOFF, *supra* note 6, at 226–27.

criminal law policies leave too much destruction in their wake to be contemplated on an experimental basis.

While I argue that criminal *law* localism should be rejected for these reasons, I leave open the possibility of a criminal *procedure* localism—especially with respect to the policing, investigation, and prosecution of crime—that will maximize the central values of the localist project. The full explication of this claim goes beyond the scope of this Article. Here, I briefly flag for future analysis two reasons why one might view procedural devolution differently: (1) the ability of localities to “subtract” in many areas of criminal procedure (because of an absence of state law on the subject),¹⁷ and (2) the target of the rules regarding procedure (officials, and not citizens).¹⁸ These distinctions together make it at least *possible* for the values cherished by localists to be maximized by procedural devolution, and recent reforms demonstrate this potential.¹⁹ However, we must be cautious, realizing that some of the pathologies identified in the analysis of local criminalization may be equally at work in local control over criminal

17. Localities do not usually operate as a one-way ratchet with respect to criminal procedure. Policing and prosecution is almost wholly delegated to local governments, Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 876–77 (2015) (police); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545 (2011) (prosecutors), and state law does not usually regulate these officials with a comprehensive code—at least not anything like one observes in substantive criminal law. This state law vacuum means that localities become ratchets than can work either way. Rules covering law enforcement can be created or abolished, depending on the preferences of the local jurisdiction. This is not true, though, in areas of procedural law where there is a somewhat comprehensive state and federal floor (especially Fourth Amendment law and its state analogues).

18. Local innovation in procedure results in restraints on *official* discretion and not on citizens’ freedom. “[C]onstitutional criminal procedure is a species of substantive criminal law for cops.” Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996). When localities create rules that constrain official power, this has the effect of increasing individual (citizen) liberty—in other words, it maximizes freedom and dignity by taking away the ability to exercise official power arbitrarily.

19. Take, for example, the City of Minneapolis’s ban on police chokeholds following the killing of George Floyd—a decision hailed as working to reduce the racially disparate impact of deadly police practices. See Steve Karnowski, *Minneapolis Bans Police Chokeholds in Wake of Floyd’s Death*, AP NEWS (June 5, 2020), <https://apnews.com/article/ce3c4c56b683ae47d26bec1045a35fb7>. Local law built on the state and federal floors that permitted chokeholds, reducing police discretion to use the maneuver. Local prosecutorial declination policies regarding minor offenses have similar potential. See Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization 4* (Feb. 21, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4040302 (“Supporters [of declination policies] . . . assert that a DA’s responsibility is to seek justice through the sound exercise of discretion or to carry out the local electorate’s will and thus that prosecutors should decline to enforce laws that are unjust or at odds with the local community’s needs.”). Finally, consider New York City’s local ban on racial profiling in policing (which is federally permitted under *Whren v. United States*, 517 U.S. 806 (1996)). *Patrolmen’s Benevolent Ass’n of N.Y., Inc. v. City of New York*, 35 N.Y.S.3d 314, 316 (App. Div. 2016). There, the City imposed additional duties beyond what superior jurisdictions had imposed, resulting in enhanced egalitarianism in policing.

procedure. This ambivalence reflects the “dilemma of localism”—the effect of empowering smaller communities will depend on the nature of the community and the decisions it makes.²⁰ But whatever one may say about the potential of criminal procedure localism, I argue that substantive criminal law localism will necessarily have effects that undermine the values of the localist project, and that it should therefore be abandoned.

This Article proceeds as follows. Part I traces the intellectual history of criminal justice localism since the *Morales* decision, beginning with the work of Tracey Meares and Daniel Kahan, and ending with the recent scholarship on misdemeanors by Alexandra Natapoff. Part II introduces a crucial premise about American local government law that functions as an obstacle to expected benefits of devolution in the realm of substantive criminal law: Localities can criminalize, but they cannot decriminalize. Part III applies this premise critically to claims regarding the values of localism, including claims about maximizing liberty, equality, and efficiency (through experimentation), as well as the notion that local law will better reflect concentrated policy preferences.

I. CRIMINAL JUSTICE LOCALISM: A TWENTY-FIRST-CENTURY INTELLECTUAL HISTORY

Criminal justice scholars, following the lead of the Supreme Court,²¹ have long favored localism and devolution of power. This Part will chronicle a twenty-year intellectual history of the most prominent voices in this tradition.²²

20. See generally Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954 (2019).

21. The Supreme Court has been explicitly pro-devolution when deciding criminal justice issues. While the devolution normally lauded by the Court is that from federal to state governments, many federalism arguments also justify localism. The most famous example of this in criminal justice is *Powell v. Texas*, a 1968 case upholding a public intoxication statute against constitutional challenge. 392 U.S. 514 (1968). The defendant argued that the statute violated the rule against status offenses announced in the earlier case *Robinson v. California*, 370 U.S. 660 (1962). *Powell*, 392 U.S. at 532. In rejecting this argument, the Court referenced the complexity of criminal justice matters and the resultant need for the “process of adjustment” in the doctrine to take place amongst the states. *Id.* at 535–36. As an example, the Court pointed to the difficulty in creating a uniform definition of insanity: “[F]ormulating a constitutional rule would reduce, if not eliminate . . . fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold.” *Id.* at 536–37. Pro-devolution themes continue throughout the ensuing decades of opinions, often in service of a pattern of resistance toward the imposition of nationwide constitutional rules in criminal law. For a lengthy treatment, see generally Brenner M. Fissell, *Federalism and Constitutional Criminal Law*, 46 HOFSTRA L. REV. 489, 501 (2017).

22. In a recent piece, Alexandra Natapoff chronicles a similar history. Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 1029–33 (2021) (describing “criminal localism debate” by citing to Stuntz and the democratization symposium, as well as scholarly reactions to *Morales*, including Kahan and Meares).

A. The Backlash to Morales and Judicial Paternalism

We can begin with the work of Dan Kahan and Tracey Meares around the start of the twenty-first century. The context of Kahan and Meares' intervention is the litigation surrounding the City of Chicago's "Gang Congregation Ordinance."²³ In an attempt to reduce the menacing loitering of "criminal street gangs" in the city, Chicago promulgated an ordinance targeting the behavior.²⁴ It was struck down as void-for-vagueness by the U.S. Supreme Court in the famous case of *City of Chicago v. Morales*.²⁵ For Kahan and Meares, the Chicago ordinance issue was emblematic of a larger "coming crisis in criminal procedure."²⁶ The Warren Court's constitutional rules (such as the vagueness doctrine) were created during an era in which Black urban residents were politically powerless and needed protection. By the 1990s, however, Black urban residents were in control of their localities and were attempting to use criminal law to solve problems in their communities.²⁷ Thus, "[a] body of doctrine designed to assure racial equality in law enforcement has now become an impediment to minority communities' own efforts to liberate themselves from rampant crime."²⁸ "Ironically," Kahan and Meares write, "the Warren Court's doctrines are now being used to frustrate minority communities' own efforts to remedy the effects of the one feature of institutionalized racism that the Warren Court itself was powerless to attack—namely, *the discriminatory under-*

23. *City of Chicago v. Morales*, 527 U.S. 41, 57 (1999).

24. *Id.* at 46 (quoting *City of Chicago v. Morales*, 687 N.E.2d 53, 58 (Ill. 1997)).

The ordinance creates a criminal offense punishable by a fine of up to \$500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang membe[r]." Second, the persons must be "loitering," which the ordinance defines as "remain[ing] in any one place with no apparent purpose." Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area." Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance.

Id. at 47 (alteration in original) (quoting *City of Chicago v. Morales*, 687 N.E.2d 53, 58 (Ill. 1997)).

25. *Id.* at 51.

26. Kahan & Meares, *supra* note 3, at 1153–54.

27. *Id.* ("The occasion for the current doctrine's demise, we predict, will be the political revolution that's now remaking urban law enforcement. From Los Angeles to Dallas, from Chicago to New York City, cities throughout the nation are rediscovering curfews, anti-loitering laws, order-maintenance policing, and related law-enforcement strategies. On the surface, these community policing techniques bear a striking resemblance to the ones that communities used to reinforce the exclusion of minorities from the Nation's political life before the 1960's. But there is a critical difference in political context. Far from being the targets of these new law-enforcement strategies, inner-city minority residents are now their primary sponsors. Flexing their newfound political muscle, these citizens are demanding effective law enforcement.").

28. *Id.* at 1154.

*enforcement of criminal law.*²⁹ Minority communities support “new community policing” efforts such as anti-loitering, anti-prostitution, anti-drug dealing, and “other forms of public disorder,”³⁰ Kahan and Meares argue, both because they are effective³¹ and because they “view [them] as the *least destructive*” method of deterring more serious crime.³²

The implications of this claim are obvious: Paternalistic judicial supervision must be replaced by reinvigorated localism that empowers Black urban communities. “Who should we trust to judge whether these [new community policing] policies reasonably balance liberty and order in the inner-city?”³³ For Kahan and Meares, the answer is local communities and residents, not “judges and . . . civil libertarians.”³⁴ First, local citizens have “*concrete, local knowledge*” in that “[their] interests are most directly affected” both by the criminalized conduct and by its enforcement.³⁵ Second,

29. *Id.* at 1167 (emphasis added).

30. *Id.* at 1160–61 (also noting that “other communities, most famously New York City, have turned their attention to aggressive panhandling, public drunkenness, vandalism and other forms of public disorder”); see also Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v Morales*, 1998 U. CHI. LEGAL F. 197, 198–99 (1998) [hereinafter Meares & Kahan, *The Wages of Antiquated Procedural Thinking*].

31. “First, they believe that it will work. Giving the police the authority to control low-level disorder is perceived as essential to deterring more serious crimes. The most sophisticated recent work in criminology confirms this perception.” Kahan & Meares, *supra* note 3, at 1163 (footnote omitted).

32. *Id.* at 1165. Kahan and Meares write:

The attitude of inner-city minorities toward the criminal law is suffused with ambivalence. They obviously resent their exposure to disproportionate criminal victimization, and expect relief. But unlike many whites who also strongly resent crime, they have *not* renounced their concern for the very individuals who are, or who are likely to become, criminal victimizers. Rather, law-abiding residents of the inner-city are likely to feel a strong sense of “linked fate” with inner-city law-breakers, with whom they are intimately bound by social and familial ties.

Id. (footnote omitted); Meares & Kahan, *supra* note 30, at 210 (“In fact, it may be precisely because they care so deeply about these persons that residents of the inner-city prefer relatively mild gang loitering and curfew laws over draconian penalty enhancements for gang crimes, severe mandatory minimum prison sentences for drug distribution, and similarly punitive measures. Inner-city residents may believe these harsher penalties visit an intolerably destructive toll on the whole community. The pervasive sense of linked fate between the majority of inner city residents and the youths affected by curfews and gang loitering ordinances again furnishes a compelling reason *not* to second guess the community’s determination that such measures enhance rather than detract from liberty.”).

33. Kahan & Meares, *supra* note 3, at 1177.

34. *Id.*; Meares & Kahan, *supra* note 30, at 209 (“A 1990s conception of rights should follow two principles: community burden sharing and guided discretion. The first determines when courts should relax their individualist distrust of community judgments, while the second assures that the trust afforded community power is not abused.”) (emphasis omitted).

35. Kahan & Meares, *supra* note 3, at 1177. They explain:

[Local citizens] fac[e] a heightened risk of criminal victimization and . . . live[] with the destructive impact of crime on the economic and social life of those communities; and, at least with respect to the mainstays of the new community policing, [they are] the one[s]

local citizens are more likely than judges to understand “[t]he complex interplay of norms, law, and liberty”—meaning they will know whether creation of a new criminal offense can actually enhance liberty by counteracting “widely resented norms” that push citizens to engage in conduct they otherwise would not.³⁶

B. The Turn Towards Empathy through Devolution

Moving forward almost a decade, one finds that localist thought shifts in tone away from a critique of judicial paternalism and toward a constructive project of political devolution. This is evident in the final works of William Stuntz, culminating in his 2011 book *The Collapse of American Criminal Justice*.³⁷ In Stuntz’s view, one of the primary causes of the contemporary crisis of racially disparate mass incarceration is that power over criminal justice has been diffused away from minority urban communities and into larger county-level jurisdictions dominated by upper middle-class whites.³⁸

who feel[] the pinch of these laws in a meaningful way. Consequently, [they are] in the best position, practically and morally, to decide whether the balance they strike between liberty and order is reasonable.

Id.

36. *Id.* at 1181–82. Additionally, they state:

Many forms of inner-city criminality are fueled by widely resented norms. In a school in which many students are armed, even ones who resent guns will choose to arm themselves. In a neighborhood in which many juveniles hang out on the street corner at night, many will feel compelled to hang out so as not to be excluded from social life. In a community in which gang activity is rampant, many individuals will choose to join gangs, not because they look up to gang members, but because they perceive (incorrectly) that a majority of their peers do and (correctly) that failing to join exposes them to a risk of predation. Laws that interfere with these norms will decrease the liberty of those who intrinsically value carrying guns, hanging out at night, and joining gangs, but *increase* the liberty of those who want the option of *not* engaging in these activities without suffering the adverse consequences of acting contrary to prevailing norms.

Id. (footnotes omitted).

37. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7 (2011).

38. Stuntz states:

No legal rules commanded those results; rather, political equilibrium produced them. In the twentieth century’s second half, that equilibrium unraveled. Suburban populations mushroomed, diluting poor city neighborhoods’ electoral power; big-city police forces grew more professionalized, hence more detached from the streets they patrol. Crime became a live issue in state and national elections, shifting political power from high-crime cities to the safer suburbs and countryside.

Stuntz, *supra* note 4, at 1973; *see also* STUNTZ, *supra* note 37 (“Today, a large fraction—often a large majority—of the population of cities and metropolitan counties live in neighborhoods where crime is an abstraction, not a problem that defines neighborhood life. This gives power over criminal justice to voters who have little stake in how the justice system operates. Second, the suburban population of metropolitan counties mushroomed. This shift in local populations matters enormously, because prosecutors and judges are usually elected at the county level. Today, counties that include major cities have a much higher percentage of suburban voters than in the past. This

“[I]nequality . . . arose, in large measure,” he wrote, “because of the decline of local democratic control over criminal justice outcomes.”³⁹

The solution for Stuntz, then, is the promotion of a revived localism in criminal justice. Underlying the promise of localism is a quasi-psychological claim: Citizens are more moderate in their criminal justice policy positions when their punitive intuitions against offenders are balanced by an empathy that comes from personally knowing offenders who are punished.⁴⁰ Thus, if moderation (and its resultant racial equality) is desirable, more power must be given to those who both experience the anger of criminal victimization and possess the empathy that comes from knowing incarcerated people. If urban citizens of color are more likely to have these features, then shrinking jurisdictional boundaries would concentrate their power and work to moderate and equalize outcomes:

[P]lace more power in the hands of residents of high-crime city neighborhoods—for they feel the effects of rising and falling rates of crime and punishment, just as shareholders feel the effects of rising and falling corporate profits. Make criminal justice more locally democratic, and justice will be both more moderate and more egalitarian.⁴¹

The moderation and egalitarianism of these newly empowered local citizens would primarily be implemented through juries. The trend towards mass plea-bargaining, with its delegation of power to prosecutors, must be reversed.⁴² Moreover, substantive criminal law has a part to play in Stuntz’s vision. Culpability elements should be made more “open-ended” and

means suburban voters, for whom crime is usually a minor issue, exercise more power over urban criminal justice than in the past.”).

39. Stuntz, *supra* note 4, at 1973.

40. Stuntz elaborates, explaining:

The desire for order and the longing for freedom, anger at crime and empathy for the young men whom police officers arrest and prosecutors charge—both forces are powerful, and they push in opposite directions. Anyone who has been the victim of a serious crime knows the desire to see perpetrators punished that seems to be part of our nature. At the same time, all those who have seen neighbors’ sons, or their own, behind bars know the agony incarceration imposes on local communities.

Id. at 1981 (footnote omitted).

41. *Id.* at 1974; *see also* STUNTZ, *supra* note 37, at 311 (“The notion that condemnation and punishment are essential but also dangerous comes most naturally to those whose lives most resemble the lives of the criminal defendants who are subject to the justice system’s justice. This is why the style of local democracy that governed much of America’s criminal justice system for much of the nation’s past worked reasonably well . . .”).

42. STUNTZ, *supra* note 37, at 295 (“Over the course of the past few decades, prosecutors have replaced judges as the system’s key sentencing decisionmakers, exercising their power chiefly through plea bargaining. That prosecutorial power is unchecked by law and, given its invisibility, barely checked by politics.”).

“vague[]”⁴³ so that the jury can explicitly consider punitive desert without “the stigma of nullification.”⁴⁴

Stuntz’s localism, like that of Kahan and Meares, rests on the claim that those most directly impacted by criminal justice—local citizens—should have more control over the system. For Stuntz, it is the “moderat[ion]” and “egalitarian[ism]” of these local citizens that makes them suitable repositories of criminal justice power;⁴⁵ for Kahan and Meares it is these citizens’ superior “local knowledge” regarding liberty and order tradeoffs.⁴⁶ These two views overlap in substantial ways.

C. *The Movement for “Democratization”*

More recently,⁴⁷ criminal justice localism has seen a resurgence in the “Democratization” movement. Typified by the views expressed in a 2017 symposium, an introductory Manifesto by Joshua Kleinfeld lays out the basic claim: The American phenomenon of racially disparate mass incarceration can be blamed on the current system’s “bureaucratic” approach, which prioritizes expertise and efficiency over justice according to community moral views.⁴⁸ The antidote to bureaucratization and its resultant racist mass incarceration, these scholars claim, is democratization—a reorientation towards local lay values.⁴⁹ Consider the following passage from the Manifesto:

43. Stuntz, *supra* note 4, at 2032, 2039.

44. STUNTZ, *supra* note 37, at 303 (“Vaguely defined crimes have one other critical virtue: they are democracy’s friend. Reintroducing a measure of vagueness to American criminal law would trigger more jury trials, and would invite the kinds of jury verdicts Paul Butler encouraged—without the stigma of nullification.”).

45. Stuntz, *supra* note 4, at 1974.

46. Kahan & Meares, *supra* note 3, at 1177 (emphasis omitted); *see supra* notes 34–36 and accompanying text.

47. One localist voice that came between Stuntz and the Democratization movement discussed below is found in a 2014 piece by Lauren Ouziel. After assessing disparities in the punitiveness of federal and state prosecutions of “street crime,” Ouziel posits that the more punitive federal outcomes may be a result of a greater perceived legitimacy. Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2244 (2014). After unpacking why the federal system is perceived as more legitimate, the recipe for increased state legitimacy, according to Ouziel, appears to be “enhancing localism—through greater accountability, participation, and local voice in both criminal lawmaking and law enforcement.” *Id.* at 2243–44 (emphasis omitted). Through the concept of perceptions of legitimacy, Ouziel thus imports a form of the Kahanian and Mearesian argument: “[L]ocalities should consider more robust use of local laws,” because local laws “impart a message . . . that the penal law has not been foisted upon them by a governing body with little understanding of the issues surrounding urban street crime and its enforcement.” *Id.* at 2323–24.

48. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1376 (2017).

49. *Id.*

On one side are those who think the root of the present crisis is the outsized influence of the American public—a violent, vengeful, stupid, uninformed, racist, indifferent, or otherwise wrongheaded American public—and the solution is to place control over criminal justice in the hands of officials and experts. On the other side are those who think the root of the present crisis is a set of bureaucratic attitudes, structures, and incentives divorced from the American public’s concerns and sense of justice, and the solution is to make criminal justice more community focused and responsive to lay influences.⁵⁰

Democratization, therefore, prioritizes devolution to local, non-professional decisionmakers.

The most concrete product of the movement is the *White Paper of Democratic Criminal Justice*.⁵¹ Thirty proposals are laid out.⁵² The proposals and scholarship that appear to call for localism most directly are those dealing with criminal procedure—not substantive criminal law. Consider the proposals regarding community “links” with police and prosecutors:

- *Community-Police Links*.—Civilian review boards to advise police departments and liaise between police departments and local communities should be established. The boards should include individuals of diverse backgrounds, at least some of whom live in the neighborhoods in which the majority of police activity takes place.⁵³
- *Community-Prosecutor Links*.—The jurisdictional boundaries of prosecutorial offices should be redrawn to make prosecutors, whether appointed or elected, responsive to smaller and more cohesive communities. With respect to elected prosecutors, jurisdictional boundaries should be redrawn to ensure that the neighborhoods in which prosecutions regularly take place are also the neighborhoods determining the outcome of the elections.⁵⁴

These proposals demonstrate an affinity for localism in procedural, rather than substantive, criminal law.

Some of the calls for localism in these proposals are recognizably those of Jocelyn Simonson. In her symposium contribution, Simonson argues that the “racial domination and systemic oppression of vulnerable populations

50. *Id.*

51. Kleinfeld et al., *supra* note 5.

52. *Id.* at 1697–1705.

53. *Id.* at 1700.

54. *Id.* at 1702.

endemic to our contemporary criminal justice system”⁵⁵ can be combatted by, among other things, shifting power to contest the system to smaller, more local groups: “Many of these forms of contestation display a faith in local democracy as a tool of responsive criminal justice These forms of resistance and contestation are . . . not revolutionary, but devolutionary.”⁵⁶ There, she referred specifically to “grassroots forms of participation in and disruption of” investigation and adjudication—“copwatching, courtwatching, or community bail funds.”⁵⁷ Simonson hints at the end, though, that her localism may be broader: “Finally, we can imagine state-driven processes that themselves allow for community control of local criminal justice policies and priorities. . . . *Any push to move decisionmaking and resource allocation in criminal justice down to the local level is a potentially useful one.*”⁵⁸

While Simonson says that she potentially supports “[a]ny” devolution in criminal justice, one wonders if she is thinking of the local criminalization contemplated by Kahan and Meares.⁵⁹ Each of the examples of local control she mentions explicitly—juries, police review boards, and judicial control of police—involve investigation and adjudication.⁶⁰

Simonson’s more recent work focuses exclusively on community control of the police, arguing for “shifting power to policed populations,” perhaps even to the neighborhood level.⁶¹ In this claim for devolution in criminal procedure (specifically power over police), one finds the most well-expressed version of Simonson’s justifications for localism. She identifies three: (1) reparations to a population that has historically been marginalized by policing policies; (2) enhancing “antissubordination” of those groups; and

55. Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1611 (2017).

56. *Id.* at 1612 (footnote omitted).

57. *Id.*

58. *Id.* at 1622–23 (emphasis added) (footnotes omitted).

59. *See supra* Section I.A.

60. In a later article with a telling title—*The Place of “The People” in Criminal Procedure*—Simonson argues that “bottom-up resistance to local police actions and prosecutions” should be viewed as “the People” participating just as much as the prosecutor representing “the People.” Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 249 (2019).

61. Simonson, *supra* note 15, at 787. Simonson also states:

In contrast to the instrumentalist approach or the legitimacy approach, the movement focus on governance and policymaking in police reform adds a different idea about what it means to regulate the police effectively. The reform proposals from movement groups surface the specific role that policing plays in denying people in highly policed neighborhoods their democratic standing and collective political impact. They advocate reform efforts to counteract the antidemocratic nature of policing. They focus on power.

Id. at 784. “With respect to policing in particular, movement actors make a deliberate attempt to reclaim the notion of ‘community’ as one of bottom-up power” *Id.* at 817.

(3) the promotion of a “contestatory democracy” in which state-sponsored domination and violence is resisted by “countervailing power.”⁶² The “power-shifting” model claims that these three values are best maximized by devolution of police control to local institutions.⁶³ As Simonson wrote in an article co-authored with Sabeel Rahman:

[P]art of the value of this focus on the city is not just in the substantive policies cities can innovate and experiment with, but also in the processes and strategies for power-shifting they can develop. Cities, on our read, are vital in part as incubators for new democratic practices and strategies.⁶⁴

Simonson’s commitment to localism, though, is qualified by the expectation that local power-shifting will yield certain substantive results. She explicitly disclaims “the valorization of local politics for its own sake,” and warns that “local control can be as oppressive as it can be liberatory.”⁶⁵ “Our normative call, then, is not for localism-qua-localism, but rather for a scholarly focus on concrete mechanisms of power-shifting in governance toward the relatively powerless.”⁶⁶ Localism, then, is only instrumentally valuable insofar as it might maximize equality and regulate violent state actors.⁶⁷

Laura Appleman is another vocal proponent of localism among the democratizers. Like other contributors, she is most interested in localizing criminal procedure—specifically, in reviving the jury.⁶⁸ Her focus is localism in adjudication: “Many of our modern woes in the criminal justice system can be traced to the loss of the community voice and decisionmaking ability in adjudicating crime and punishment.”⁶⁹ Appleman does not discuss local legislatures or substantive criminalization; she is concerned with reviving the role of the jury as an outlet of “democratic localism” that is

62. *Id.* at 787 (emphasis omitted).

63. *Id.* at 809. Simonson also describes how social movement actors have advocated for national legislation, but these efforts focus on the redistribution of federal spending away from law enforcement and towards community programs. *Id.* at 824. There is no call for a federalization of all policing or for uniform national standards of police conduct.

64. Rahman & Simonson, *supra* note 16, at 741.

65. *Id.*

66. *Id.* at 741–42 (footnote omitted); *see also id.* at 741 n.273 (“To the extent that we are entering the debate over the value of localism in the context of federalism, we would also endorse a normative frame that places limits on localism to the extent that it bumps up against values of equality and inclusion.” (citing Davidson, *supra* note 20, at 984–93)).

67. *But see* Simonson, *supra* note 15, at 809 (“The idea of power shifting is not inherently abolitionist, or even left-leaning; community control, for instance, could be an institution that people who want more policing take up in the name of public safety.”).

68. *See* Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413 (2017).

69. *Id.* at 1414 (“[H]istorical vision of criminal process where the lay public was closely involved in adjudicatory justice.”).

constitutionally mandated by the Sixth Amendment.⁷⁰ But the constitutional mandate of a jury is valuable for non-formalistic reasons. In making the case for a robust local jury system, Appleman relies on theories of the functional “values” of devolution from localism and federalism literature.⁷¹ Most prominent is a moral diversity argument (more on this later):⁷² Juries allow for local moral viewpoints to be expressed in criminal justice—presumably through their choice to convict or to nullify. “Indeed,” she writes, “an important aspect of localism in criminal justice is ‘its tendency to make the enforcement of criminal law more responsive to the values, priorities, and felt needs of local communities.’”⁷³ While other familiar localism arguments make appearances in Appleman’s contribution,⁷⁴ this reference to moral diversity is most central.⁷⁵

Next, consider Rick Bierschbach’s symposium contribution. He observes that the criminal justice system’s “fragmentation”—or division of power amongst different institutions, governments, and actors—presents both opportunity and risk.⁷⁶ Fragmentation’s benefits “rest on broadly democratic concepts like representativeness, deliberation, and self-determination,” and “fragmentation “provides multiple nodes of input that allow communities and neighborhoods to tailor on-the-ground criminal justice to their unique needs and reconcile competing values and priorities in

70. *Id.* at 1413, 1415 (“With its enshrinement of the local community, the Sixth Amendment community jury trial right delineates one of the most important rights in our criminal justice system . . .”).

71. *Id.* at 1421.

72. See *infra* Section III.A.

73. Appleman, *supra* note 68, at 1418 (quoting Stephen F. Smith, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105, 110 (2011)).

74. Appleman also discusses the participation argument, adding in pro-legitimacy-perception benefits to participation. *Id.* at 1419 (“Greater local participation in criminal justice has the advantage of helping community members feel connected to both the inner workings of the criminal justice system and the larger civic structure.”). “Local citizens are more likely to think that the criminal justice system is fair if they have had a direct part to play in its workings.” *Id.* at 1424. The liberty-maximization argument also appears as derivative of the moral diversity argument. “The lay citizen’s ability to integrate community values into criminal justice decisionmaking also helps the jury fulfill one of its primary duties under the Constitution: resisting governmental abuse of power against the public and counteracting any judicial bias or corruption.” *Id.* at 1425.

75.

Community participation also assists in inculcating public preference directly into the criminal law Criminal law plays a critical part in helping sustain the moral agreement needed to maintain social norms in our diverse society Restoring community participation to our common criminal procedures likewise restores the community’s role in creating meaningful social norms.

Id. at 1424–25.

76. Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1444–49 (2017).

their own ways.”⁷⁷ However, fragmentation diffuses power and causes actors and institutions to function with “blinder[s]” on, ignoring “broader interests.”⁷⁸ It also diminishes accountability.

In the end, though, Bierschbach is optimistic. Fragmentation enables localism, which generates “democratic benefits . . . in terms of voice and perspective”:⁷⁹

Greater attention to the values (but not the doctrine) of federalism and its close cousin localism could likewise help. Pushing more criminal justice power—legislative, enforcement, adjudicative, and penal—down to directly affected communities and neighborhoods could enhance representativeness and sharpen lines of authority. City councils could be given real power to craft their own substantive criminal codes in response to community concerns—such as stricter gun control laws or more humane punishments for locally focused crimes—even if far-flung state legislators disagree. Prosecutorial districts could be drawn more narrowly to minimize the disconnect between who elects prosecutors (often suburban voters) and whom they prosecute (often residents of inner-city communities); judicial districts could be similarly tailored.⁸⁰

Devolution of power and resources, he thinks, will help to ameliorate the harmful effects of fragmentation and expand its positive effects.

Another symposium contributor, Stephanos Bibas, also demonstrates an unmistakable affinity for criminal justice localism.⁸¹ His monograph, *The Machinery of Criminal Justice*, documents, explains, and critiques the modern evolution of the justice system into a plea bargaining “machine[]” alien to the popular notion of criminal justice as a “morality play” or “form of educational social theater.”⁸² Describing his prescription for reform, Bibas writes:

[T]he problem is too diverse for a single national fix. No one statute or Supreme Court decision, or even a sequential reform program, will fix our broken system from above. Rather, we need

77. *Id.* at 1446.

78. *Id.* at 1448–49.

79. *Id.* at 1450.

80. *Id.* at 1452.

81. Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677 (2017). So as not to present an oversimplified picture, I should note that in a later work co-authored by Bibas & Bierschbach, they express some concern that localism may create negative externalities because it prevents actors and institutions from considering collective costs. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 243 (2017) (“How can we retain our commitment to [localism] while still capturing the benefits of the [rationing to avoid externalities]? We do not have one simple answer.”).

82. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* xv–xvi (2012).

bottom-up populism to pursue a multi-faceted approach. Reform is more likely to happen at the mid-level of counties, cities, and neighborhoods, and the micro-level of individual criminal cases. A variety of outsider pressures, organized and amplified through social-networking technology, can marshal outsiders' voices and their desire to participate at the retail level.⁸³

Localism is intrinsically valuable in that it allows “laymen [to] play more substantial and active roles in criminal justice,” thus humanizing the machine, but it is also a pragmatic reform strategy in that it helps avoid the potentially intractable barriers to reform that a top-down approach would face.⁸⁴

Last to consider is the contribution of Joshua Kleinfeld.⁸⁵ Kleinfeld's positions on localism and devolution of political power stem from his theory of criminal law: reconstructivism. “[R]econstructivism holds that criminal justice's distinctive social function is to protect and repair the social norms on which community solidarity depends in the wake of acts that attack those norms,” and that therefore “the moral culture disclosed by a community's public deliberations or implicit in its social practices and institutions” should be reflected by the content of criminal law and criminal procedure.⁸⁶ Given that moral culture is the lodestar of Kleinfeld's theory, it makes sense that he would generally support localism: Smaller jurisdictional boundaries are more likely to result in majorities with similar ethical lives. “[L]ocalism . . . can be used to reduce the incidences of value disagreement and the need to work out universal values,” he writes, and “[w]ith exceptions for areas of pressing national need and solid national consensus, criminal law should vary with the community whose ethical life it is preserving.”⁸⁷

D. The Critique of the Misdemeanor Justice System

Recent scholarship critically assessing the misdemeanor criminal justice system—especially the work of Alexandra Natapoff—is the last example of localist thought to consider. In her pathbreaking book, *Punishment Without Crime*, Natapoff highlights various problematic features of the sub-felony world: its vast scale and deep impact on the liberty and property of citizens, its lack of concern for factual guilt or innocence, its overreliance on monetary fines and fees (deployed for revenue-generating purposes), and its racial

83. *Id.* at xxvi.

84. *Id.* at xxv.

85. Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455 (2017).

86. *Id.* at 1456. “[R]econstructivism insists on the moral authority of a community's ethical life in the context of criminal law.” *Id.* at 1475.

87. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1562 (2016).

disparities.⁸⁸ Natapoff claims that these features violate basic conditions of legitimacy in criminal law theory, including the rule of law, the commitment to evidence, and the blameworthiness requirement.⁸⁹ The system is also therefore “antidemocratic,” or at least has antidemocratic effects, in that it maintains large-scale social inequality, operates as a form of regressive taxation and wealth redistribution, and tolerates local authoritarianism.⁹⁰ Natapoff’s diagnosis of the misdemeanor system’s ills, like some of the prior thinkers, is procedure-centric.⁹¹ In general, she is concerned with how the misdemeanor adjudicative system combines unnecessary police intrusions (e.g., arrests for quota purposes),⁹² official (even judicial) lawlessness, and overworked public defenders in order to produce mass plea bargaining and the resultant fee-payments—“meet ’em and plead ’em” adjudication, or “McJustice.”⁹³

Natapoff’s vision of reform deploys many of the familiar localism arguments already discussed. In the final chapter of her book, entitled “Change,”⁹⁴ she writes that “many misdemeanor changes will of necessity be bottom-up, driven by local residents, advocates, and public officials.”⁹⁵ This is a cause for hope, though, and not concern: “The beauty of localism, however, is that it offers enormous room for creativity and experimentation; each jurisdiction can implement change in its own ways, given its own population, history, needs, and resources.”⁹⁶ She then directly cites to Justice Brandeis’s *New State Ice Co. v. Liebmann*⁹⁷ dissent, concluding that “[i]n the misdemeanor world, every . . . municipality can launch its own experiment.”⁹⁸

88. See generally NATAPOFF, *supra* note 6.

89. *Id.* at 191.

90. *Id.* at 203–06.

91. This procedural focus is perhaps understandable, since part of the point of the low-level offense literature is to emphasize that, in Malcolm Feeley’s words, “the process . . . is the . . . punishment” for these offenses. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199 (1979). The offense of public urination in most jurisdictions may carry only a very minor sentence, and therefore the true punishment lies in the aggravation of showing up to court and paying the fees (or going to jail if a court date is missed or a fee unpaid).

92. NATAPOFF, *supra* note 6, at 59.

93. *Id.* at 3–4.

94. *Id.* at 211.

95. *Id.* at 226.

96. *Id.* at 226–27.

97. 285 U.S. 262 (1932).

98. NATAPOFF, *supra* note 6, at 227. I am not alone in drawing this conclusion. Consider Judge Bibas’s review of the book. Bibas, *supra* note 10, at 1041 (“Natapoff sees [localities’] bottom-up role as both inevitable and desirable, letting them try out creative experiments.”); *id.* (“Some communities prize orderly public spaces and are willing to trade away more liberty. Others are more relaxed about social disorder and disruption. The genius of American federalism (and

In a recent article, Natapoff is more restrained in her approval of localism.⁹⁹ Speaking specifically about local courts, she writes that the “responsiveness” and “accountability” of local judges allows them to “push back against many of the prime inequities and dysfunctions of the low-level misdemeanor process,” but the judges can also choose to become “complicit in the local promotion of mass incarceration” if they “effectively validate” pro-carceral law enforcement policies.¹⁰⁰ The dilemma of localism, then, predictably manifests itself in these institutions.¹⁰¹ One senses, though, that she remains optimistic. “[Local] courts also reflect the persistent allure of local accountability,” she writes, and “[i]n the criminal context, that allure is not irrational.”¹⁰² Moreover, she points to examples of progressive localism (such as antidiscrimination ordinances) and suggests that “[p]erhaps [local courts] could provide enlightened criminal policy leadership too.”¹⁰³

II. CRIMINAL LAW LOCALISM: THE ONE-WAY RATCHET

The preceding discussion recounts a persistent pro-localist bent among criminal justice scholars. Many make explicit calls for devolution of criminalization decisions, while others focus on policing and adjudication, or make more generalized calls for downward power-shifting. Overlooked by all is a recognition of a critical limitation on localities in the field of substantive criminal law. As I will describe, features of local government law—enshrined in state constitutions and their judicial interpretations—make local power over criminalization more constrained than is immediately apparent. In the context of criminal law, localism functions as a “one-way ratchet” for more criminalization.

A. Localities Cannot Subtract

When one thinks in the abstract about the devolution of power over the content of criminal law, this power would seem to include the power to create or to abolish criminal offenses. This would be the effect of a complete devolution of the states’ “primary authority for defining . . . the criminal

localism) is that the police and prosecutors in each community can calibrate the level of enforcement to their communities. Communities can govern themselves, deliberating on and making their own tradeoffs. There is not a single Platonic ideal, but a range of approaches. And democracy is not static, but adapts these approaches over time to each community’s needs and in light of what it learns from experimenting.”)

99. Natapoff, *supra* note 22.

100. *Id.* at 1030–32.

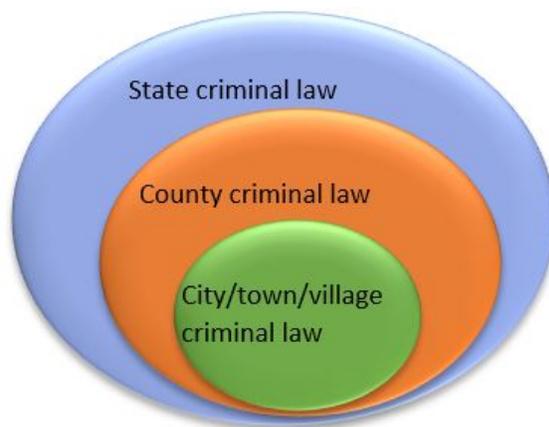
101. *Id.* at 1034 (“[M]unicipal courts are paradigmatic examples of the tense relationship between criminal justice and local democracy.”).

102. *Id.*

103. *Id.*

law.”¹⁰⁴ A devolution of this nature would carry with it ambivalent implications for criminal justice—what would matter would be how the power was used. But features of American local government law (enshrined in state constitutions) make such a total devolution impossible in the United States and make the implications of criminalization devolution more certain.

Most important is the axiom that local governments have no power to repeal state law, a disability¹⁰⁵ that is a feature of their legal status. As a matter of federal constitutional law, “[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”¹⁰⁶ No state’s constitution voluntarily entrusts to a locality the ability to nullify state law within its territory, and the prospects of such a power being granted in the future by constitutional amendment are so unlikely as to be fanciful.¹⁰⁷ The efficacy of state law throughout a state’s borders is thus a bedrock presumption whenever thinking of local lawmaking; it pervades jurisdictional boundaries and is always operative. Think of jurisdictions as concentric circles:



Even when one is living one’s life in the smallest ring, one is still also “inside” both larger rings. Note also how the circles appear to stack on top of each other: The internal circle does not carve out a piece of the greater circle. These are the two salient features of the jurisdictional relationships

104. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

105. “Disability” is used here in the Hohfeldian sense. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, WIS. L. REV. 975, 986 (1982) (“‘Disabilities’ are the absence of power to alter legal entitlements . . .”).

106. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

107. Indeed, such a grant of power may be unconstitutional under the proposition in *Hunter* just noted. *Id.*

between states and localities: State law always applies no matter the local jurisdiction, and local law cannot subtract from it. State law can be said to be *inviolable* and *universal* throughout all local jurisdictions within the state.

This proposition is so axiomatic that it is rarely if ever litigated. A 2008 opinion from the Supreme Court of Ohio, however, helps to illustrate the point.¹⁰⁸ In *Mendenhall v. Akron*,¹⁰⁹ the court analyzed the validity of an ordinance passed by the City of Akron, which created a system that used traffic cameras to enforce speeding in school zones.¹¹⁰ The system was civil in nature, with a sanction of monetary fines imposed on violators (and no police involvement).¹¹¹ Plaintiffs sued, arguing that the ordinance “decriminalize[d] behavior that is criminal under state law.”¹¹² The court rejected this argument, concluding that “[t]he ordinance does not change the speed limits established by state law or change the ability of police officers to cite offenders for traffic violations.”¹¹³ Even though the ordinance covered the “identical conduct” covered by the statute, its noncriminal nature had no effect on the statute: “[T]he city ordinance does not replace traffic law. It merely supplements it.”¹¹⁴

B. Localities Can Add

While localities cannot subtract from criminal law, as *Mendenhall* suggests, what remains of local power is to *add*—to place beneath the preexisting state code an additional subterranean layer of offenses. How much latitude the locality has is determined by the extent of the delegation in either the state constitution or in state statutes. Scholars of local government law mark out three general categories of institutional arrangement: Dillon’s Rule, imperio home rule, and legislative home rule.¹¹⁵ A Dillon’s Rule state has no constitutional grant of power to localities; only ad hoc statutory grants are given for certain localities and for certain types of rulemaking.¹¹⁶ An imperio home rule state preserves a nineteenth-century form of home rule in which the state constitution insulates local law from state preemption so long

108. *Mendenhall v. Akron*, 881 N.E.2d 255 (Ohio 2008).

109. 881 N.E.2d 255 (Ohio 2008).

110. *Id.* at 258.

111. *Id.*

112. *Id.* at 264.

113. *Id.*

114. *Id.*

115. See, e.g., Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338–39 nn.10–12 (2009).

116. *Id.* at nn.10–12. Another way of putting this is that these states do not recognize home rule.

as the local law affects only “local” and not state concerns.¹¹⁷ A legislative home rule state grants a presumption that localities have general lawmaking powers—both in matters of state and local concern—but eliminates immunity from preemption if the state legislature acts on the same topic.¹¹⁸ Again, note that under all of these regimes, the local legislation will result in a net addition of criminal law in the given jurisdiction. None of these power-granting institutional structures permits the locality to exempt its citizens from statewide criminal offenses.¹¹⁹

Moreover, the institutional arrangements just noted are protected by an array of preemption doctrines that provide the framework within which local legislation is assessed for compliance.¹²⁰ These doctrines can be thought of as setting the boundaries around localities’ criminalization power. In the words of the leading local government law treatise: “It is fundamental that municipal ordinances are inferior in status and subordinate to the laws of the state. The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government.”¹²¹ Preemption doctrines usually stand as no impediment to local criminalization that adds to the range of conduct covered by state law, and in some cases, they encourage it.

Preemption can be express or implied.¹²² An example of express preemption is a state law with a provision stating that “no local authority

117. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124–25 (2007) (“[M]any early home-rule regimes established essentially separate—and exclusive—sovereigns whose areas of authority did not overlap . . .”).

118. As Richard Briffault writes, “The rise of the *legislative* home rule model . . . trades away all immunity in order to assure greater scope to local initiative . . .” Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 28 (2006).

119. An imperio home rule regime might immunize against preemption a local ordinance “permitting” certain conduct, but this would not result in a correspondent invalidation of the state law. There would be no inverse preemption, in other words.

120. *See generally* Diller, *supra* note 117. In some states the state legislature’s ability to preempt local law is limited by state constitutional law, but this is true only in about one quarter of the states, and even in these jurisdictions the limitations are quite weak. *See* Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1374 (2020) (“In sum, though enormous variation exists across jurisdictions, local government authority is often significantly circumscribed.”).

121. 5 MCQUILLIN MUNICIPAL CORP. § 15:18 (3d ed. 2021) (footnote omitted); *see also* *Patterson v. Tehama Cty.*, 229 Cal. Rptr. 696, 702–03 (Ct. App. 1986) (“Since a county cannot enact an ordinance in conflict with state law, a fortiori a county cannot by ordinance repeal, abrogate, or nullify a state law.”), *depublished by* 235 Cal. Rptr. 867 (Ct. App. 1987).

122. Most states mirror the preemption categories created by the U.S. Supreme Court in the federal-state context. *See* Diller, *supra* note 117, at 1140 (“Despite some superficial distinctions, most states’ preemption analyses are similar in form to the federal model.”); *see also* *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203–04 (1983) (describing traditional preemption categories, including express preemption, field preemption, and conflict preemption).

shall enact or enforce any ordinance on a matter covered by this chapter unless expressly authorized.”¹²³ Preemption can be implied even absent such an express provision, though, when the local ordinance creates a “conflict” with the statute.¹²⁴ The most widely used form of conflict preemption in state law is the so-called “prohibit/permit” test.¹²⁵ This test finds preemption when a local ordinance prohibits what the state statute permits, or permits what a state statute prohibits.¹²⁶ Many states interpret this to mean that local ordinances can only survive preemption if they are “more stringent” than a state statute on point—meaning that they cover more conduct.¹²⁷ Finally, an ordinance can be impliedly preempted if a court holds that an entire “field” of regulation has been “occupied” exclusively by the state; field preemption shuts out local legislation where comprehensiveness and uniformity are sought.¹²⁸

Local criminalization is not usually impeded by preemption doctrine—at least not if localities follow the guideposts. First, courts rarely hold that a state criminal code, or a part of it, has occupied the field of criminal regulation entirely.¹²⁹ Widespread deployment of field preemption would shut down local criminalization, but this has not happened.¹³⁰ Express

123. *Masone v. City of Aventura*, 147 So. 3d 492, 496 (Fla. 2014) (emphasis omitted) (quoting FLA. STAT. § 316.007 (2008)); see also *id.* at 498 (holding that local red light camera ordinance expressly preempted by Florida Uniform Traffic Control Law). In an even more extreme category, a small number of states impose civil or even criminal liability for an official to attempt to undermine state law by passing preempted legislation (this is now called “super” or “hyper” preemption). See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1995 (2018) (describing phenomenon); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1494 (2018) (same).

124. Diller, *supra* note 117, at 1141–42. Some states use a variant of what federal law calls obstacle preemption and ask whether the ordinance creates a “substantial interference” with the statute, but this is only true of three states. *Id.* at 1168 n.274.

125. *Id.* at 1142 n.132.

126. *Id.* at 1142. Diller is highly critical of the test, calling it “a fundamentally flawed approach that creates tremendous confusion for courts and litigants. ‘Prohibit/permit,’ in its most extreme form, is an argument almost shocking in its sophistic simplicity; nonetheless, litigants challenging local ordinances frequently rely upon it.” *Id.*

127. *Id.* at 1146.

128. *Id.* at 1150.

129. Only one jurisdiction appears to hold that all criminal law is preempted: South Carolina. See, e.g., *Beachfront Ent., Inc. v. Town of Sullivan’s Island*, 666 S.E.2d 912, 914 (S.C. 2008) (finding that the local criminal offense of allowing smoking in the workplace was preempted because “it conflicts with State criminal law by imposing a criminal penalty for conduct that is not illegal under State law”). This is effectively field preemption via the prohibit/permit test.

130. For examples of the rare cases finding certain categories of conduct are field-preempted from local criminalization, see *State v. Crawley*, 447 A.2d 565, 571 (N.J. 1982) (field of loitering-type conduct occupied by state law); *Lambert v. City of Atlanta*, 250 S.E.2d 456, 457–58 (Ga. 1978) (field of solicitation and loitering offenses occupied by state law); *Pierce v. Commonwealth*, 777 S.W.2d 926, 928 (Ky. 1989) (field of sexual solicitation offenses occupied by state law).

preemption of local crimes is similarly rare.¹³¹ The form of preemption that is most often implicated—conflict preemption—does little to prevent local criminal offenses from proliferating. The “prohibit/permit” test might be read to mean that any conduct not criminalized by the state is therefore “permitted” and off limits for local criminalization, but only one state has taken this path.¹³² Usually affirmative evidence of permissive intent is required,¹³³ but in a liberal society, government does not normally speak of “permissions” outside of, say, licensure regimes, and therefore few things are off limits from local “prohibition.” The “more stringent” test, far from reigning in local criminalization, incentivizes it.¹³⁴ This test encourages localities to write offenses more broadly, and to seek out areas for criminalization not yet regulated by the state. For example, two state high court cases applying the test have upheld an ordinance because the ordinance, unlike the state law analogue, eliminated mens rea.¹³⁵

C. Case Study: Sarasota, Florida

The limits on localities’ powers over the criminalization and decriminalization of conduct is illustrated by a brief case study. Consider the City of Sarasota, Florida.

Sarasota has dabbled in “decriminalization,”¹³⁶ but this effort’s impact is necessarily limited. In September of 2019, the City Commission “voted unanimously to decriminalize the possession of less than 20 grams of cannabis,” replacing a prior criminal offense punishable with up to one year

131. This usually occurs only when a national political issue mirrors itself in a state-local conflict, such as that over gun rights. *See Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996) (preempting Philadelphia & Pittsburgh ordinances purporting to ban assault weapons after legislature passed statute in response to ordinances expressly preempting local regulation of this conduct).

132. *See Beachfront Ent.*, 666 S.E.2d at 913–14.

133. *See, e.g., City of Portland v. Jackson*, 850 P.2d 1093, 1096 (Or. 1993); *Crawley*, 447 A.2d at 567; *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993).

134. Field preemption doctrines similarly encourage localities to seek new areas of criminal regulation in order to avoid preemption by state law.

135. *See Junction City v. Lee*, 532 P.2d 1292, 1297–98 (Kan. 1975) (“The ordinance eliminates the[] [state law] [culpability] elements and is thus more restrictive, more stringent,” the court observed, and when “the ordinance goes further in its prohibition but not counter to the prohibition in the statute . . . there is no conflict”); *Kansas City v. LaRose*, 524 S.W.2d 112, 117 (Mo. 1975) (“While, as stated, the statute requires that the act be knowingly and willfully done and the ordinance does not contain those words, we have concluded that no conflict exists which would invalidate the ordinance. It is clear that any violation of the statute would also be a violation of the ordinance. In that regard they are entirely consistent. The ordinance has simply gone further and prohibited interference in cases where willfulness is not shown.”).

136. Decriminalization can mean many things, including total legalization or a conversion of the criminal offense to a civil violation. *See Alexandra Natapoff, Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1066 (2015) (noting distinction between “decriminalization” and “legalization”).

in jail with a “civil citation” sanctioned with a \$100 fine.¹³⁷ Florida state law, however, remains on the books and punishes possession of less than twenty grams as a first-degree misdemeanor punishable with a year in jail.¹³⁸ In the year following the city’s decriminalization, a docket search of the state statute in the Sarasota County Court indicated eighty-five cases in which the statute was enforced—many of which presumably involved possession while within the city limits.¹³⁹ Repeal of the local offenses had no effect on state penal law, which still applied in all localities throughout the state.

One case illustrates the hollow promise of local decriminalization. Weliton Dos Santos, a 22-year-old from Brazil, was riding his motorcycle in Sarasota on December 5, 2020, when a Florida State Highway Patrol Officer observed him traveling in a right-turn-only lane in order to pass and cut off traffic in the through-lane.¹⁴⁰ After initiating a traffic stop, the officer

137. Billy Cox, *Sarasota Votes to Decriminalize Small Amount of Marijuana*, HERALD TRIB. (Sept. 3, 2019), <https://www.heraldtribune.com/news/20190903/sarasota-votes-to-decriminalize-small-amount-of-marijuana>; SARASOTA, FLA. CODE OF ORDINANCES § 21-10(b)-(c)(1) (2022) (possession of less than twenty grams punished with “civil citation” and \$100 fine or community service).

138. FLA. STAT. ANN. § 893.13(6)(b) (West 2019).

139. Docket search on file with author. For other examples of such jurisdictional tensions, see Jordan Laird, *Yellow Springs Decriminalizes Marijuana in the Village*, DAYTON DAILY NEWS (Sept. 10, 2020), <https://www.daytondailynews.com/news/yellow-springs-decriminalizes-marijuana-in-the-village/5KBWEHSGYBGWLKQ4U6FTRUL2H4/> (“Ohio State Highway Patrol troopers and Greene County Sheriff’s deputies are not obligated to charge people applying village ordinances and may still charge individuals possessing marijuana in the village with misdemeanors under state law. Breanne Parcels, the village solicitor, said the village can’t prevent those departments from applying state law but will attempt to educate them about the local ordinance and ask them to charge accordingly.”); John Luciew, *‘It’s Lunacy’: Pa. Cops Still Busting Plenty of People for Pot Despite De-Criminalization, Report Says*, PENNLIVE (Feb. 10, 2020, 8:55 AM), <https://www.pennlive.com/crime/2020/02/its-lunacy-pa-cops-still-busting-plenty-of-people-for-pot-despite-de-criminalization-report-says.html> (“City councils in Philadelphia, Pittsburgh, Erie, Allentown, Harrisburg, York, Lancaster, and most recently Norristown have all officially decriminalized possession of a small amount[] of marijuana. However, those city ordinances can’t repeal state or federal law. So even if a municipality passes a decriminalization ordinance, state law still says possession is illegal and a person can be arrested. As a result, the pot busts go on almost unabated, the stats show.”); Nicole Radzевич, *District Judge Questions How Bethlehem Treats Minor Marijuana Offenses*, MORNING CALL (Dec. 16, 2019, 8:08 PM), <https://www.mcall.com/news/local/bethlehem/mc-nws-bethlehem-district-judge-marijuana-possession-20191217-wd4hzfkmg5dpfminl7rmmj3c33u-story.html> (“Bethlehem is split between two counties headed by district attorneys who differ on the issue. . . . Morganelli has said they would leave it up to individual municipalities to decide on whether to decriminalize amounts of less than 30 grams, but Lehigh County District Attorney Jim Martin called for the state law, which makes the violation a criminal misdemeanor, to be enforced.”); John Romano, *Romano: St. Pete Should Mellow Out When it Comes to Marijuana Law*, TAMPA BAY TIMES (May 4, 2016), <https://www.tampabay.com/news/localgovernment/romano-st-pete-should-mellow-out-when-it-comes-to-marijuana-law/2275988/> (“Otherwise, if the city passes one plan and the county passes another, St. Petersburg police officers would potentially have three options at their discretion. They could follow state law (make an arrest), city law (issue a fine) or county law (enroll in diversion).”).

140. See Dos Santos Docket, R. at 3 (on file with author).

requested Dos Santos's driver's license, and Dos Santos produced what was "clearly" a false New Jersey identification.¹⁴¹ The officer arrested Dos Santos for providing a false name, and after conducting a search incident to arrest he discovered a "small amount of marijuana."¹⁴² Dos Santos was arrested for the state possession offense as well, and was taken to jail.¹⁴³ Thus, in the jurisdictional boundaries in which a locality had "decriminalized" possession of marijuana, this same conduct was part of the justification for Dos Santos's arrest and (one expects) eventual punishment.

While Sarasota's decriminalization efforts are necessarily limited in impact, this is not true of criminalization. Sarasota's code of offenses is a burgeoning one. The city incorporates by reference all state offenses that are misdemeanors and infractions, and applies a general penalty of a \$500 fine or sixty days imprisonment.¹⁴⁴ In addition, the city has created over fifty new offenses in its "offenses" chapter¹⁴⁵ alone, including innovations such as a prohibition on rushing the field during an athletic event.¹⁴⁶

Of course, the local offenses that will most often be enforced and most often impact peoples' lives are classic "public order" offenses. An appellate case from 2012 illustrates how Sarasota's ordinances have actually been applied.¹⁴⁷ The defendant, a Black man named Lawshea, was asking passers-by for money when a shopkeeper called the police to complain:

The people Lawshea approached were an older, married couple who were headed to a movie. The husband testified that Lawshea walked up to them and asked for money. The encounter made him nervous, he said, because "where I come from, we don't have much of this." He gave Lawshea a few dollars and then saw him hurry away just as a police officer arrived.¹⁴⁸

Lawshea fled the officer and ignored his commands, and after the officer caught up to him Lawshea physically resisted arrest.¹⁴⁹ The Florida court vacated Lawshea's panhandling conviction under the Sarasota ordinance because the prosecutors failed to charge or prove that he made his solicitations in a prohibited area or in a prohibited manner.¹⁵⁰ The ordinance only prohibited "aggressive" panhandling, or panhandling in certain areas, and the officer therefore initiated the arrest while under the "mistaken view

141. *Id.*

142. *Id.*

143. *Id.*

144. SARASOTA, FLA., CODE OF ORDINANCES § 1-11, § 21-2 (2022).

145. *Id.* ch. 21.

146. *Id.* § 21-5 (setting general penalty).

147. *Lawshea v. State*, 99 So. 3d 603 (Fla. Dist. Ct. App. 2012).

148. *Id.* at 605.

149. *Id.*

150. *Id.* at 605–06.

of the law—that it was illegal to panhandle anywhere in the city.”¹⁵¹ However, Lawshea’s conviction for resisting arrest with violence was affirmed, and he was sentenced to five years imprisonment as a habitual offender.¹⁵² The existence of the local Sarasota offense, which was not itself violated, set in motion a chain of events with felony-level implications. No panhandling offense exists in Florida state criminal law.

III. LOCAL CRIMINALIZATION & THE VALUES OF LOCALISM

Because devolution over the power to create substantive criminal law is a one-way ratchet for increased criminalization, I will argue that criminal law localism undermines the values it is expected to promote.¹⁵³ Adding a subterranean layer of misdemeanor offenses to the existing body of criminal law results in more punishment—more incarceration and exploitative fines—and more authorization of policing and surveillance of marginalized populations. As we will see, this is not the way to maximize the values of liberty, equality, or efficient experimentation, and carries with it the risk of oppressive enforcement of parochial norms.¹⁵⁴

151. *Id.* at 605, 607.

152. *Id.* at 607.

153. Much of the theoretical apparatus relating to the values of localism comes from theories of federalism. This is no accident. Claims about the benefits of devolving political power in America are most often discussed when thinking about the federal-state relationship. The justifications for the devolution, though, usually apply equally to power-shifting from a state to a locality. As Richard Briffault wrote, “[m]any of the arguments offered on behalf of federalism are not distinctively associated with the states, but, rather, could be advanced by the empowerment of other subnational units,” and that therefore “much of the ‘intellectual case for federalism’ often converges with the case for decentralization, or localism.” Richard Briffault, “*What About the ‘Ism’?*” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1304 (1994) (footnote omitted) (quoting Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1491 (1987)). Briffault claims that this convergence should not ignore that there are “features that distinguish the states from local governments and that give the states their unique place in the American constitutional order.” *Id.* at 1305. These features include: fixed borders not changeable without a state’s own consent; no overlapping of borders; a role in national lawmaking; and inherent, autonomous legislative power. *Id.* at 1305–06.

154. Some of my arguments build on those made decades ago by Wayne Logan. Logan, *supra* note 9, at 1421. Logan should be credited with first drawing attention to local criminal law, and Logan, unlike the criminal justice localists, expresses concerns about the power of localities to criminalize conduct: They contribute to the existing problem of overcriminalization, create “balkanization” of law across the state, and “indulge in a marked tendency toward oppressive use of the criminal sanction . . .” *Id.* at 1421, 1449. The first and the third argument dovetail, respectively, with two sections below. Regarding the problems of overcriminalization as they burden individual liberty and dignity, this relates with the below discussion of “liberty-maximizing localism.” See *infra* Section III.B. Regarding the oppressive use of criminalization by majorities against minorities, this relates with the below discussion of “moral diversity localism.” See *infra* Section III.A. Since Logan was writing before the rise of criminal justice localism as a major scholarly movement, he did not have occasion to consider many of the arguments that this Article responds to. Thus, my critique adds considerations of local criminal law’s effects on equality, and on the validity of local experimentation in criminal punishment.

A. Moral Diversity Localism

The most significant argument used by those proposing devolution of power to localities is that smaller jurisdictions permit different groups to live under different laws according to their own preferences. In the words of the Supreme Court, smaller, more local jurisdictions will be “more sensitive to the diverse needs of a heterogeneous society.”¹⁵⁵ Deborah Merritt describes this as the ability to “create the type of social and political climate [citizens] prefer,”¹⁵⁶ while Barry Friedman calls this “cultural . . . diversity.”¹⁵⁷ Devolution has the effect of allowing people to create policies that align with their value preferences, and also avoids an impasse that might be created by a larger jurisdiction with more heterogeneous groups.¹⁵⁸ Moral diversity localism contains an embedded descriptive premise as well as a normative one. First, this theory assumes that moral viewpoints (or values) will be geographically concentrated. While this seems intuitively true, it is debatable.¹⁵⁹ Normatively, the theory presumes that moral viewpoints should be maximally reflected in law.

Among the criminal justice localists, moral diversity arguments are most prominent in the work of Kahan and Meares. Recall that the “concrete, local knowledge” of urban communities of color serves as their first justification for devolution over “new community policing.”¹⁶⁰ While this may appear to be a claim about epistemic superiority regarding particular local conditions, on further inspection “local knowledge” is revealed to be knowledge about moral viewpoints. Put bluntly, the local knowledge Kahan and Meares aim to prioritize is knowledge about what a community wants regarding its criminal justice policies and laws. It is the local citizen “whose

155. *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

156. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8 (1988).

157. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 401–02 (1997).

158. See Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 FORDHAM L. REV. 769, 770 (2006) (describing federalism as means of devolving contentious moral decisions to local level so as to “defus[e] deep disagreements”). See generally THE FEDERALIST NO. 10 (James Madison) (“Extend the sphere [of territory], 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.”).

159. Compare Guido Calabresi & Eric S. Fish, *Federalism and Moral Disagreement*, 101 MINN. L. REV. 1, 18 (2016) (“Who can doubt the deep geographic divide, in America, of moral attitudes with respect to guns, abortion, capital punishment, gay marriage, religious fundamentalism, assisted suicide, and more?”), with JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 69 (2005) (noting lack of distinctive identities due to “the ease and frequency of mobility[] [and] the dominance of mass media and mass marketing of national scope”).

160. See Kahan & Meares, *supra* note 3, at 1177 (emphasis omitted).

interests are most directly affected” by laws (or their absence), and therefore “she is in the best position, practically and morally, to decide” the order and liberty tradeoff reflected in a criminal law.¹⁶¹ Local citizens should be “free to decide for themselves” what policies will be enacted; their “judgments on these matters is entitled to profound respect.”¹⁶²

Moral diversity arguments are also prevalent in the writings of other criminal justice localists.¹⁶³ The proposal of Appleman (echoing Stuntz)¹⁶⁴ to empower juries with the effective equivalent of prosecutorial discretion is rooted in the belief that “an important aspect of localism in criminal justice is ‘its tendency to make the enforcement of criminal law more responsive to the values, priorities, and felt needs of local communities.’”¹⁶⁵ Similarly, Bierschbach calls for “tailor[ing] on-the-ground criminal justice” to “community concerns” and “neighborhood preferences,”¹⁶⁶ and Judge Stephanos Bibas, when reviewing Natapoff’s work, writes that localism allows for “room for variation” between different communities that may have different views about criminal justice and “social disorder.”¹⁶⁷ Lastly, Kleinfeld’s reconstructivism is explicit in its demand that “criminal law should vary with the community whose ethical life it is preserving.”¹⁶⁸

When championing the devolution of decision-making power over substantive criminal law, how should one view the moral diversity argument? While one should recognize that the claim regarding institutional design is conceptually coherent, criminal justice scholars should be wary about its implications and about the theory of criminal law on which it rests. It seems correct to think that if viewpoints about criminalization are geographically concentrated and diverse across geographic boundaries, a jurisdictional boundary that most tightly maps onto the concentration will best permit those viewpoints to become instantiated in law. But is this desirable? In my view, the answer is “no.” Moral viewpoints about state punishment are surely relevant to criminalization, but they should not be *maximally* represented in law.

161. *Id.*

162. *Id.* at 1179, 1180.

163. *See supra* Part I.

164. *See* STUNTZ, *supra* note 37, at 302.

165. Appleman, *supra* note 68, at 1418 (quoting Stephen F. Smith, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105, 110 (2011)) (discussing localism in the capital punishment context). Smith also cites to Briffault for the proposition that “‘the representation of diverse interests’ [is a] core value[] of localism.” Smith, *supra* (quoting Briffault, *supra* note 153, at 1305)).

166. Bierschbach, *supra* note 76, at 1446, 1448, 1452.

167. *See* Bibas, *supra* note 10, at 1041.

168. Kleinfeld, *supra* note 87, at 1562.

While moral diversity localism relies on a plausible premise of geographic concentration, a competing observation must be accounted for—that even in areas of heavy concentrated agreement about criminal law, there will always be minorities. One will never find a community with completely homogenous viewpoints on criminal law. Thus, outside of an abstract ideal, theories of criminalization devolution will always have “losers” as well as “winners.” It is because of this “fact of reasonable pluralism”¹⁶⁹—coupled with a recognition of the fundamental value of individual autonomy—that very many theorists, as well as the Supreme Court, rightly accept a liberal account of state punishment.¹⁷⁰ Liberal claims for criminalization should be justified in terms that are neutral with respect to claims about the good life, and this results in a minimalistic criminal law.¹⁷¹

Devolution for the purpose of concentrating majority viewpoints and facilitating their enactment as law thus presents a threat to liberalism. Because liberalism seeks a minimal criminal law, diffusion and increased heterogeneity is more, and not less, desirable. One might say that liberalism seeks the “lowest common denominator” of *punitive restrictions on autonomy*, and that larger jurisdictions promote this. As more viewpoints are included, the sphere of consensus shrinks. Moral diversity localism in criminal law, on the other hand, seeks the lowest common denominator of *jurisdictional boundaries*, and in so doing, seeks the maximal representation of viewpoints in criminal law, and therefore a maximal restriction on autonomy.

169. JOHN RAWLS, *POLITICAL LIBERALISM* 441 (expanded ed., 2005).

170. See, e.g., NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 143 (Taylor & Francis e-Library ed. 2002) (“What is striking about the traditional theories of punishment . . . is that they can all be located, at least in their modern forms, at some point within the liberal tradition in political theory.”); Bernard E. Harcourt, *Foreword: “You Are Entering a Gay and Lesbian Free Zone”: On the Radical Dissents of Justice Scalia and Other (Post-) Queers. [Raising Questions About Lawrence, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503, 503–04 (2004). Harcourt states:

For the first time in the history of American criminal law, the United States Supreme Court has declared that a supermajoritarian moral belief does not necessarily provide a rational basis for criminalizing conventionally deviant conduct. The Court’s ruling is the *coup de grâce* to legal moralism administered after a prolonged, brutish, tedious, and debilitating struggle against liberal legalism in its various criminal law representations. Henceforth—or at least until further notice—majoritarian morality no longer automatically trumps liberal argument (whether consequentialist or deontological) in defining the reasonable and permissible contours of the penal code.

Harcourt, *supra* (footnotes omitted).

171. See LACEY, *supra* note 170, at 146–47. The core of a liberal criminal law is thought to consist of conduct that is harmful. Jean Hampton, *Retribution and the Liberal State*, 5 J. CONTEMP. LEGAL ISSUES 117, 129 (1994). Even offenses that were once justified on the basis of the protection of morality or virtue are now recast in terms of their “harmful” effects. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 110 (1999).

While moral diversity criminal law localism presents a threat to liberalism, it may also present a threat to republicans. Republican punishment theorists, building on the work of Philip Pettit, claim that criminal law prevents “dominium”—the domination of private citizens over another.¹⁷² However, they also aim to prevent “imperium”—the arbitrary use of state power.¹⁷³ Thus, republicans are not usually moralists, and aim at a cultivation not of personal virtue, but of “civic virtue.”¹⁷⁴ A republican criminal law, then, ends up looking very much like a liberal criminal law, and would view with suspicion pro-devolution claims rooted in moral diversity. Localism for the purpose of maximizing viewpoints about state punishment results in the threat of increased imperium.

But perhaps these criticisms would be shrugged off by many criminal justice localists; if their localism is not grounded in liberalism or republicanism, then the labels “illiberal” or “anti-republican” have little bite to them. However, if this is their response, let us pause for a moment to emphasize its implications. If criminal justice localists are willing to jettison liberalism and republicanism when making pro-devolution claims, then they are accepting a criminalization regime rooted in majoritarian popular sovereignty that comes with all the well-known dangers of minority oppression and moralism. Moral diversity localism, after all, seems moralistic. And just as reduction in jurisdictional size gives greater power to concentrated majority viewpoints, it hurts all the worse for the dissenters who happen to live there. As I said before, there will always be “losers” in this devolutionary scheme. We can be sure that the localizers discussed earlier are all aware of these dangers, and also hope to guard against them. But the burden is on them to explain what safeguards can be used to replace the traditional safeguard of liberal neutrality.

Of all the democratizers, Kleinfeld is most keenly aware of the potentially nefarious implications of a popular sovereignty theory of criminalization. While arguing that a community should “see its norms reflected in its [criminal] laws,” he responds to the objection of majoritarian norm oppression by limiting his claims to certain types of communities and by superimposing on those communities a tight boundary around the acceptable realm of criminalization.¹⁷⁵ Regarding the communities who can

172. Richard Dagger, *Republicanism and the Foundations of the Criminal Law*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 44, 47 (RA Duff & Stuart P. Green ed., 2011) (emphasis omitted).

173. *Id.* (emphasis omitted).

174. *Id.* at 66 (emphasis omitted) (“Republicans do want to make people better, in other words, but they want to make them better citizens; and this means, among other things, that they want people to be better observers of ‘the rules of toleration’ and the other liberal ‘ground rules’ that Murphy takes to be necessary to the preservation of ‘individual moral autonomy.’”).

175. Kleinfeld, *supra* note 85, at 1456.

reconstructively criminalize, it is only “decent” communities whose “ethical life” also has “democratic authority”—meaning that its “values” were “formed in reasonably non-oppressive conditions.”¹⁷⁶ Thus, he stipulates that his claims apply only to political communities that have managed to prevent from occurring what both liberal and republican theory aim to prevent.¹⁷⁷ Kleinfeld concludes that this may potentially “exclude from consideration all communities with unjust cultures.”¹⁷⁸ While he was not thinking of devolution in the context in which he made these specific claims, one worries that devolution and concentration of moral viewpoints may give jurisdictional status to pockets of people that form non-“decent” communities.¹⁷⁹ Furthermore, Kleinfeld avoids the majoritarian norm oppression problem by positing a minimalism in criminalization that the majority may or may not agree to. His “moral culture principle of criminalization” limits punishable conduct to the core of the traditional criminal law: very serious “acts that violate and attack the values on which social life is based,” and therefore are “fairly basic and widely acknowledged” to be legitimate targets of state punishment.¹⁸⁰ How can popular sovereignty, once concentrated and liberated from substantive constraints, be expected to limit itself in such a way? Again, the superimposition of a substantive constraint on the majority will does the work that liberalism and republicanism aimed to do.

The threat of oppressive local norms becoming ratified by law is not a farfetched antiquarian concern more appropriate for the Victorian era—it is always real, but manifests itself in different forms at different times. Reducing jurisdictional size facilitates this ratification.

Consider the series of criminal “anti-sag[ging]” ordinances punishing wearing one’s pants too low around one’s waist (in some cases with jail time).¹⁸¹ These were enacted in the late 2000s—well after the end of

176. *Id.* at 1466 (emphasis omitted).

177. Kleinfeld states:

For a community’s ethical life to have *democratic* authority, that ethical life must be consistent with the premise that the people who comprise society should command its law. That premise necessarily excludes forms of ethical life based on one portion of society oppressing, manipulating, denying equal citizenship to, or otherwise dominating another portion of society. Democratic ethical life is thus necessarily limited to moral cultures formed in reasonably free and equal conditions.

Id.

178. *Id.*

179. *Id.*

180. *Id.* at 1456, 1458.

181. See Angelica M. Sinopole, Comment, “No Saggy Pants”: A Review of the First Amendment Issues Presented by the State’s Regulation of Fashion in Public Streets, 113 PENN ST. L. REV. 329, 331 (2008) (citing DELCAMBRE, LA., ORDINANCE 2007-04 (2007); MANSFIELD, LA., ORDINANCE

Victorian moralism—and they were enacted by localities, not states.¹⁸² Indeed, in Louisiana a statewide offense was proposed in 2004 but failed to become law.¹⁸³ As reported by the Washington Post, “after that failed, cities in Louisiana and beyond simply took up the cause themselves.”¹⁸⁴ For a proponent of such an ordinance in Atlanta (which did not pass), a Black city councilman named CT Martin, “saggy pants represent[ed] the ‘prison mentality’ and signif[ied] the poor social conditions and problems associated with young black persons,” and he therefore “proposed the law in an effort to resolve these social problems and improve ‘community standards.’”¹⁸⁵ In smaller jurisdictions like Shreveport, where such oppressive norms were able to garner a majority of votes on the local legislature, these norms became enforced by criminal law.¹⁸⁶

Another moralistic local offense that seems teleported from a prior era is a 2009 ordinance punishing the sale of “[a]ny device designed or marketed as useful primarily for the stimulation of human genital organs.”¹⁸⁷ Created by the City of Sandy Springs, Georgia, this offense was challenged in 2014 as unconstitutional by a disabled plaintiff who sought to use the devices to facilitate sexual intimacy with her husband.¹⁸⁸ The plaintiff lost at trial and on appeal, but the case became moot once the city decided to repeal the ordinance—a decision made only after the city learned that the case was being reviewed by the en banc court.¹⁸⁹ Examples like these teach us that the threat of localistic moralism in criminal law remains a contemporary concern.

B. Liberty Maximizing Localism

A second major value of criminal justice localism is said to be the enhancement of individual liberty.¹⁹⁰ When jurisdictions are smaller, citizens

10 (2007); Atlanta, Ga., Proposed Ordinance 07-O-1800, § 106-13, Wearing of Pants Below the Waist in Public, Unlawful (2007)).

182. *See id.*

183. Meagan Flynn, *A ‘Saggy Pants’ Violation Led to a Fatal Police Chase. A Louisiana Lawmaker Wants to Repeal the Law.*, WASH. POST (May 30, 2019), <https://www.washingtonpost.com/nation/2019/05/30/saggy-pants-violation-led-fatal-police-chase-louisiana-lawmaker-wants-repeal-law/>.

184. *Id.*

185. Sinopole, *supra* note 181, at 368–69 (citation omitted).

186. *Id.* at 369.

187. SANDY SPRINGS, GA., CODE OF ORDINANCES § 38-120(c) (2009).

188. *Flanigan’s Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248, 1253 (11th Cir. 2017).

189. *Id.* at 1254.

190. This is similarly a value claimed of federalism, but the liberty-enhancing mechanism for federalism is distinct. Federalism’s benefit is the checking power of two sovereigns, but localities do not have sovereign status. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907). *See also* Briffault, *supra* note 153, at 1322 (“Perhaps the strongest argument for federalism is that it is, in Madison’s phrase, part of the ‘double security’—along with the separation of powers within the national government—for liberty. Thus, federalism is said to provide ‘protection against abusive

are expected to use the law against each other in less oppressive ways. The lynchpin of the expected non-oppression is what may be called a psychological claim: People feel empathy for people that are like them or that they know, and they will act on this empathy when making political decisions.¹⁹¹ Devolution of political authority, then, is an empathy-empowering institutional structure which results in enhanced individual liberty.

I am thinking here, of course, of the theories of Kahan and Meares as well as Stuntz. Inner city residents, according to Kahan and Meares, “have *not* renounced their concern for the very individuals who are, or who are likely to become, criminal victimizers,” and they are therefore subject to “competing pulls of interest and affection” due to “intimately bound . . . social and familial ties.”¹⁹² These local citizens may therefore choose the “new community policing” (of public order offenses) because they view such criminal laws as “the *least destructive*” method of deterring truly serious crime.¹⁹³ These local citizens choose to mitigate criminal justice’s potential “destructive toll” because of “[t]he pervasive sense of linked fate” with defendants.¹⁹⁴ Stuntz also observes the tension between citizens’ “anger at crime and empathy for the young men whom police officers arrest and prosecutors charge,” and concludes that this tension produces moderation: “[B]oth forces are powerful, and they push in opposite directions,” thus resulting in equilibrium and “moderate” or “lenient” punishment policies.¹⁹⁵ The institutional arrangement to “harness[]” this is localism, the empathy-enabler.¹⁹⁶

government.’ Moreover, as Akhil Amar has urged, the role of federalism as a check on the national government may distinguish federalism from decentralization since, although most of the other values of federalism can be obtained by decentralization in which the local units are legally subordinate to the central government, the local units have to be legally autonomous in order to be able to protect the people against central government tyranny.” (footnotes omitted)).

191. By “empathy” I mean the capacity of “understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other.” Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987).

192. Kahan & Meares, *supra* note 3, at 1165.

193. *Id.*

194. Meares & Kahan, *The Wages of Antiquated Procedural Thinking*, *supra* note 30, at 210.

195. STUNTZ, *supra* note 37, at 35–36.

196. *Id.* at 36. Stuntz states:

Local political control over criminal justice harnesses both forces without giving precedence to either. The balance between those dueling incentives looks different when power over criminal punishment is given to voters and officials outside the communities where crimes happen and punishments are imposed. Anger and empathy alike are weaker forces when they come from voters who see crime on the evening news than when they flow from voters’ lived experience.

Id. “Make criminal justice more locally democratic, and justice will be both more moderate and more egalitarian.” Stuntz, *supra* note 4, at 1974.

Will empathy-enabling localism increase individual liberty if the localism devolves power over substantive criminal law? Kahan and Meares were certainly thinking of criminalization devolution (despite including criminalization under the banner of “policing”). Stuntz, however, never directly discusses locally-promulgated offenses, and instead uses the jury as the institutional mediator of localism (coupled with vaguer mens rea elements).

Regarding the underlying psychological premise, there is important recent work which undermines it. Jonathan Rappaport, in a direct criticism of the Democratization movement, challenges the premise of “lay leniency,” and in doing so provides evidence against the claim of “local” leniency as well.¹⁹⁷ Citing to the work of James Forman’s “now-famous account of popular support for ‘tough on crime’ policies in majority-black Washington, DC,”¹⁹⁸ as well as studies demonstrating a similar phenomenon in New York City,¹⁹⁹ Rappaport concludes that “it is too simplistic to assume that ‘black communities’ will reflexively push toward greater leniency in criminal justice.”²⁰⁰ While Kahan and Meares would respond that such policies *are* examples of local empathy, Rappaport’s evidence shows that local support favors policies that would normally be thought of as harshly punitive—not moderate or lenient.²⁰¹ In other words, Kahan and Meares correctly identify substantive criminal law as a policy preference of many inner city communities, but they mistake the motivation behind it and the severity of the policy outputs.

Next, in order to assess whether localism in criminalization would result in more or less individual liberty, we need to be clear about our definition of liberty. One would think that in the context of criminal justice, “liberty” means an individual’s freedom from official coercion and abuse, as well as freedom from state punishment. Thus, liberty here is the liberty of an individual as oppositional to intrusions by state coercion. As the Supreme Court wrote in the federalism context, “the Constitution divides authority between federal and state governments for the protection of individuals.”²⁰² One might add: protection *of* individuals *from* the two named governments.

197. John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 732, 736 (2020).

198. *Id.* at 788–89 (citing JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017)).

199. *Id.* at 778 (citing VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* (2009)). *See generally* FRITZ UMBACH, *THE LAST NEIGHBORHOOD COPS: THE RISE AND FALL OF COMMUNITY POLICING IN NEW YORK PUBLIC HOUSING* (2011).

200. Rappaport, *supra* note 197, at 791.

201. *Id.*

202. *New York v. United States*, 505 U.S. 144, 181 (1992).

If one adopts this standard conception of liberty, then one must conclude that liberty is only diminished by increased devolution of criminalization power. The nature of the creation of a criminal offense is that it restricts liberty both (1) prospectively, by altering the conduct of law-abiding citizens that would otherwise engage in the conduct but for the proscription; and (2) in the default use of a carceral penalty for violation. Empowering a sub-state jurisdictional entity—a locality—to promulgate more offenses in addition to those that already exist at the state level therefore shrinks individual liberty (assuming the locality will use its power) by expanding the realm of conduct that is prohibited and that results in state carceral punishment.

Kahan and Meares are able to embrace the counterintuitive claim that increased local criminalization also increases liberty, then, only by introducing a very different conception of liberty. They agree with the basic understanding of liberty as a function of “the number of options from which individuals would otherwise be free to choose” in life, but argue that criminal law’s effect on these options is not always to reduce them.²⁰³ Because of “social norms,” many individuals will choose certain courses of action that they do not actually want to pursue, and therefore “a law forbidding the norm-driven conduct will have an ambiguous effect on liberty.”²⁰⁴ In other words, liberty-maximizing localism should be concerned with private, non-official forms of oppression, and criminal laws can thus be liberating. Even if we accept that the phenomenon of social norms identified by Kahan and Meares exists, is it really widespread enough to justify adopting their counterintuitive version of liberty? It seems that such a limited observation²⁰⁵ should not support a larger project of wholesale devolution of substantive criminal law. Widely-resented social norms are surely not the *general* cause of antisocial conduct, and therefore when asking whether devolution will be “liberty enhancing on net,”²⁰⁶ it makes more sense to use the standard definition of liberty and to apply a heavy presumption against criminalization.

C. Equality Localism

The promotion of equality—especially racial equality—is also a prominent theme in the work of many of the criminal justice localists. It is easiest to understand these egalitarian theories as derivative of claims regarding localism’s effects on liberty and its facilitation of moral diversity.

203. Kahan & Meares, *supra* note 3, at 1181.

204. *Id.*

205. They make only a modest claim: Because “[m]any forms of inner-city criminality are fueled by widely resented norms,” judges should be epistemically “humble” about the liberty maximizing effects of invalidating local criminal laws. *Id.* at 1181–82. This claim on its face, then, is limited to certain forms of criminality, and to those that occur in the “inner-city.” *Id.* at 1181.

206. *Id.* at 1182.

Newly restrained use of criminal punishment in response to historically excessive use (especially against Black people), has an equality payoff as well as a liberty payoff. Similarly, concentrating the political power of minority groups by reducing jurisdictional size creates equality. This is mediated through the minority group's newfound ability to erase unwanted legal burdens but also to create new rules responsive to its preferences (moral diversity).

The localistic equality-through-liberty argument is that of Stuntz. Recall his prescription for reform:

[P]lace more power in the hands of residents of high-crime city neighborhoods—for they feel the effects of rising and falling rates of crime and punishment, just as shareholders feel the effects of rising and falling corporate profits. Make criminal justice more locally democratic, and justice will be both more moderate and more egalitarian.²⁰⁷

The empathy-enabling effect of localism still does most of the work here, but it has an equality-increasing effect. “[M]oderation and equality travel together,” he writes, and “reinforce one another.”²⁰⁸

The localistic equality-through-power argument is that of Simonson. It is a power to instantiate the moral viewpoints of a historically oppressed community into the law that binds that community. With respect to power over policing, she writes that “[t]he idea of power shifting is not inherently abolitionist, or even left-leaning; community control, for instance, could be an institution that people who want more policing take up in the name of public safety.”²⁰⁹ This commitment to giving the people what they want, though, is qualified by some outer bounds. Localism must enable power-shifting that increases equality by empowering historically powerless groups: “Our normative call, then, is not for localism-qua-localism, but rather for a scholarly focus on concrete mechanisms of power-shifting in governance toward the relatively powerless.”²¹⁰

The egalitarian variants of localism, like the theories on which they are based, are contestable. Consider them in turn.

207. Stuntz, *supra* note 4, at 1974; STUNTZ, *supra* note 37, at 311 (“The notion that condemnation and punishment are essential but also dangerous comes most naturally to those whose lives most resemble the lives of the criminal defendants who are subject to the justice system’s justice. This is why the style of local democracy that governed much of America’s criminal justice system for much of the nation’s past worked reasonably well . . .”).

208. Stuntz, *supra* note 4, at 2031.

209. Simonson, *supra* note 15, at 809.

210. Rahman & Simonson, *supra* note 16, at 741 (footnotes omitted); *id.* at 741 n.273 (“To the extent that we are entering the debate over the value of localism in the context of federalism, we would also endorse a normative frame that places limits on localism to the extent that it bumps up against values of equality and inclusion.” (citing Davidson, *supra* note 20, at 984–93)).

First, Stuntz's equality localism is premised on the same psychological claim of empathy enablement as his claim about leniency, and as mentioned above, it has been strongly criticized. Rappaport addresses this directly in his assessment of Stuntz and the democratizers.²¹¹ "Blacks are far more likely than whites to be victims of crime," he writes, and therefore "[u]nsurprisingly, research suggests that blacks are, on average, more fearful of crime than whites are, and that blacks for whom crime is more salient are more supportive of punitive measures that disproportionately burden black offenders."²¹² Rappaport notes that then-U.S. Attorney for Washington, D.C. Eric Holder (a Black man) "blessed pretextual traffic stops as a tool to get guns 'out of the hands of young black men.'"²¹³ Supporting Rappaport's point, it is worth noting that the "anti-sagging" ordinances described in Section III.A were "proposed largely by African-American officials."²¹⁴ More insidious than the possibility of a self-directed punitiveness on the part of the Black community is Rappaport's objection that in mixed neighborhoods—and this would be most neighborhoods—increased diversity (say, through increased localism) might result in a punitive backlash by whites who feel "threat[ened]."²¹⁵ Since leniency and equality travel together, if the psychological underpinning of the leniency claim is undermined, so too is equality.

While Simonson does not deploy her version of egalitarian localism in the realm of substantive criminal law, such an application would be problematic. The egalitarian valence of localism's downward power-shift becomes counterintuitive when applied to criminalization. How would allowing a neighborhood to create its own crimes result in greater equality (especially racial equality)? Again, the peculiar nature of devolution over substantive criminal law in the United States—the one-way ratchet—means that egalitarian goals would *not* be served by localism here. Further empowering smaller and smaller jurisdictions to create more and more misdemeanors seems to produce not more equality, but less. As Natapoff demonstrates, a key feature of the misdemeanor system generally is that it will disproportionately impact the poor, trapping them in a vicious cycle of fines being due and fines being assessed for failure to pay prior fines (as well as disqualification by conviction for money-earning opportunities).²¹⁶ Even

211. Rappaport, *supra* note 197, at 786; *see also* Benjamin Levin, *Mens Rea Reform and its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 543 n.251 (2019) (critiquing empathy-based arguments of Stuntz).

212. Rappaport, *supra* note 197, at 788 (footnote omitted) (citing studies).

213. *Id.* at 789 (internal citation omitted).

214. Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail*, N.Y. TIMES (Aug. 30, 2007), <https://www.nytimes.com/2007/08/30/fashion/30baggy.html>.

215. Rappaport, *supra* note 197, at 798.

216. NATAPOFF, *supra* note 6, at 127–28.

more fundamentally, it is hard to think of cases in which the criminalization of new categories of conduct will ever advance equality. This would certainly be the goal of civil rights and hate crimes, but these are outliers.²¹⁷

One possibility is to conceive of the current state of inequality as a problem of the discriminatory criminalization of conduct engaged in mostly by out-groups. Many commentators view loitering offenses to be of this nature. In the memorable words of Bernard Harcourt, the creation of “order maintenance” offenses pursuant to “[B]roken [W]indows” theory turned the “losers’ of society,” the “hoboes, bums, [and] winos,” from “losers” to criminals.²¹⁸ Concentrating the political power of the out-group in a smaller local jurisdiction, though, will not remedy the existence of these offenses at the state level; again, the only viable policy output is to create new crimes. The only equality-enhancing option, then, would be to “level up” with respect to punishment—for the newly empowered (formerly oppressed) group to use its new political power to “remedy” its unequal treatment in the criminal code by placing criminal law burdens on the newly disempowered (formerly oppressive) group. Imagine a freshly drawn neighborhood jurisdiction creating new misdemeanors aimed at punishing the populace that frequents country clubs or plays golf, and all this in the name of equalizing the effect of misdemeanors on marginalized communities.²¹⁹ As Benjamin Levin concludes (in another context), “the instinct to level or equalize up is a dangerous one—rather than addressing substantive issues or working towards a system in which all are treated well, it legitimates the exact same abuses that are so objectionable when leveled against the marginalized defendant.”²²⁰ The kind of egalitarianism criminal justice localists seek is a decarceral, de-managerial egalitarianism, which creates equality by leveling *down* the excessive and disproportionate punishment of marginalized communities. This goal is illusory if the means to achieve it is localism in substantive criminal law.

217. Perhaps it might be said that discriminatory under-enforcement of the law (say, with white teenagers and marijuana possession) might be remedied by increasing enforcement across the board, and therefore equality, but this is a claim about *enforcement* and not the content of substantive criminal law.

218. BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 185 (2001) (“And the principal justification is no longer offense nor immorality but harm—the harm that these misdemeanor offenses cause.”).

219. I use this example as an activity that is overwhelmingly engaged in by suburban white people. “American golfers are 77 percent male and 80 percent white, according to the 2015 Golf Diversity & Inclusion Report.” Michael Cottman, *Golf’s Lack of Color: Finding More Brown for the Green*, *EBONY* (Nov. 15, 2016), <https://www.ebony.com/news/golf-diversity/>.

220. Levin, *supra* note 211, at 543 (emphasis omitted).

D. Experimentation Localism

A fourth justification for localism is grounded in the notion of localities as efficient “laboratories” of policy experimentation.²²¹ This argument is premised on the value of having multiple jurisdictions working toward solving the same problem or reaching the same goal; it implies devolution because devolution allows for a multitude of jurisdictions, as opposed to a single jurisdiction with a uniform approach not amenable to experimentation. This presupposes that policy innovations will usually not create maximally optimal results on their first iteration and will inevitably need revision. Moreover, it seems to assume that localities will learn from each other’s experiments—that they will “compare notes.” The genesis of this argument is thought to be Justice Brandeis’s dissent in *New State Ice Co. v. Liebmann*:

To stay experimentation in things social and economic is a grave responsibility. 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.²²²

Scholars help to elaborate this claim, writing that devolution “promote[s] the efficiency of government administration.”²²³ In the context of criminal law, Susan Klein writes, “[localism] seeks to preserve local control of the criminal-justice system and to foster diversity and experimentation that might improve efficiency in areas where there is [widespread] agreement as to general goals, though perhaps not as to the best means for achieving those goals.”²²⁴ Klein’s formulation adds important precision—experimentation localism is normally invoked to allow for inter-jurisdictional experimentation with respect to the means of achieving shared goals.²²⁵ This is not localism for the sake of diverse viewpoints on policy

221. See *supra* note 16 and accompanying text.

222. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also *Powell v. Texas*, 392 U.S. 514, 536–37 (1968) (“[F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze [it] . . . into a rigid constitutional mold.”); *Rummel v. Estelle*, 445 U.S. 263, 283–84 (1980) (observing that “[p]enologists themselves have been unable to agree” on appropriate punishments, and that in this context of “uncertainty,” it was the place of the “legislatures” (plural) to continue experimentation).

223. Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1614 (1977).

224. Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1541–42 (2002) (footnotes omitted). Klein’s statement is taken from a discussion of the values of federalism, but it is equally applicable to localism, and the argument is often used in that context.

225. As Barry Friedman writes, “[c]ountless state and local governments, remote from one another but facing similar problems, develop numerous twists on solving them.” Friedman, *supra* note 157, at 399–400.

goals or ends (that would be the “moral diversity localism” discussed earlier).²²⁶

Of the criminal justice localists, Natapoff’s endorsement of this version of experimentation localism is most explicit. Recall the end of her book, where she writes that “many misdemeanor changes will of necessity be bottom-up, driven by local residents, advocates, and public officials.”²²⁷ This is a cause for optimism: “The beauty of localism . . . is that it offers enormous room for creativity and experimentation In the misdemeanor world, every . . . municipality can launch its own experiment.”²²⁸

Consider also Rahman and Simonson’s description of cities as places that can “innovate and experiment with” both “substantive policies” and also “processes and strategies for power-shifting.”²²⁹ They update Brandeis’s outdated metaphor of a laboratory for our Silicon Valley age: “Cities, on our read, are vital in part as incubators for new democratic practices and strategies.”²³⁰

Now that we understand the theory of localism grounded in the value of experimentation, we are able to assess how well this comports with theories of criminal law. Should the power to criminalize conduct be given to smaller jurisdictions in the expectation that experiments in criminalization will produce better or more efficient criminal law outputs in the long run? I think the answer should be “no,” and I base my opposition on the crucial assumption of this theory that rules and policies are made on a *tentative* basis with the expectation that some will fail. My claim is that *tentativeness* is incompatible with legitimate state punishment.

Tentative state punishment, a key premise of criminal law localism rooted in the value of experimentation, contemplates deliberate use of criminalization in potentially erroneous or sub-optimal manners so that jurisdictions as a group can make progress by “comparing notes.” It is the one laboratory that demonstrates success that should then be emulated, but what of those that failed in their experiments? Perhaps this would be acceptable with zoning regulations or taxation policies, but we should not accept it with punishment. The distinctive features of the criminal sanction set it apart as an inappropriate area for experimentation. As Joel Feinberg wrote almost sixty years ago, state punishment involves “hard treatment”

226. See *infra* Section III.A.

227. NATAPOFF, *supra* note 6, at 226.

228. *Id.* at 226–27. I am not alone in drawing this conclusion. Consider Judge Bibas’s review of the book. Bibas, *supra* note 10, at 1041.

229. Rahman & Simonson, *supra* note 16, at 741.

230. *Id.*

(such as incarceration or fines), but also an expression of “ritualistic condemnation” with “symbolic conventions.”²³¹

Experimentation seems especially inappropriate as a basis for doling out hard treatment. The primary form of hard treatment in the United States is incarceration, and liberty deprivations seem to be impossible to compensate post hoc after it is admitted that an experiment has “failed.” They are irrevocable acts. The intuitive disgust one feels when thinking of discrete monetary payments to those wrongfully imprisoned for many years helps illustrate this. Were hard treatment on the basis of experimentation limited to fines, this would be less problematic. However, the misdemeanor literature demonstrates that even when an offense cannot carry a carceral sentence, “the process . . . is the . . . punishment”—lost time and energy due to procedure hassle cannot be repaid.²³²

The experimental use of state punishment’s condemnatory aspect is even more problematic than hard treatment: It almost seems conceptually impossible. Returning to Feinberg, state punishment communicates an “[a]uthoritative [d]isavowal” of the conduct.²³³ One would think that implicit in the symbolic meaning of an “authoritative” disavowal is that the decision to condemn the conduct is a considered conclusion made after a determination that the conduct must be condemned—in other words, that it is not a tentative decision. This is not to say that criminal law must be ossified once enacted, but instead that at the time of the enactment the community and its representatives must intend for permanence; deliberate tentativeness by officials, I think, deprives the communication of its authoritative condemnatory stigma. Consider how shamed this defendant would feel: At sentencing, the judge informs him that he is being punished for conduct that the locality tentatively believes is antisocial, but that it may revise this conclusion in the future based on a study of other localities. The judge reassures the defendant that the effort is in service of a longer-term goal, and that even if he was erroneously condemned, he contributed to the larger effort. I would think that this admission of tentativeness substantially deprives the communication of its condemnatory aspect.

All this is to say that experimentation and state punishment are in tension. The lab rat in the failed vaccine trial would find little consolation, I think, in knowing the circumstances of his sacrifice. Yet experimentation localism in criminal law treats human beings like lab rats. Of the various mainstream theories of state punishment, perhaps only one would endorse such a justification: a thoroughgoing utilitarian theory. Of course,

231. Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 400 (1965).

232. FEELEY, *supra* note 91, at 199.

233. Feinberg, *supra* note 231, at 404–05.

experimental use of punishment for long term utility gains brings to mind the familiar objection of the sacrifice of the innocent.²³⁴

Woe to those who were subject to a failed criminal law experiment, and history is replete with such examples. One might conceive of the local criminalization of baggy pants²³⁵ (discussed earlier) to be an “experiment” in whether fashion regulation can be a determinant of “community standards” of conduct more generally.²³⁶ After a decade of experience with these types of ordinances, though, some communities have eliminated them. Opa-locka, Florida, abolished its thirteen-year-old anti-sagging ordinance in late 2020 after the city council determined that it had racially disproportionate effects.²³⁷ Shreveport, Louisiana, abolished its ordinance in 2019 after twelve years; the city’s data indicated that “Black men made up 96 percent of the 726 arrests for sagging in Shreveport since the law passed 2007.”²³⁸ These localities, it appears, viewed their innovative offense to be a failed experiment—one that did more harm than good. The hundreds of Black men arrested, jailed, and fined during the experiment, though, have no remedy to make them whole. Indeed, in one incident a police encounter triggered by the Shreveport ordinance led to the death of the fleeing suspect in a shootout.²³⁹ Criminal law “experiments,” after all, always unholster the deadly power of police by justifying interactions with citizens, even if the penalty in the ordinance is itself minor.

Consider another more widespread failure in the history of American criminal law: the experimentation with the criminalization of sex work. While perhaps originally supported for moralistic reasons, with the decline of moralism in criminal law these offenses are now defended on the basis of

234. See generally Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115 (2000) (describing and critiquing the objection).

235. See *supra* notes 181–186 and accompanying text.

236. Sinopole, *supra* note 181, at 368–69.

237. Richard Luscombe, *Florida City Ends Anti-Sagging Saga with Move to Allow Low Trousers*, GUARDIAN (Sept. 14, 2020), <https://www.theguardian.com/us-news/2020/sep/14/florida-city-sagging-low-trouser-opa-locka-barack-obama> (“In a 4-1 vote, commissioners in Opa-locka acted to strike the original regulation, and a 2013 amendment extending the ban to women, from its statute book. Officials in the majority-Black city said the move was meant to increase equality. ‘I was never in support of it, even as a resident,’ Vice-Mayor Chris Davis, one of five city commissioners who are all Black, told the Miami Herald. ‘I felt it disproportionately affected a certain segment of our population, which is young, African American men.’”).

238. Sara MacNeil, *Sagging Pants Law Abolished in Shreveport*, SHREVEPORT TIMES (June 11, 2019, 6:03 PM), <https://www.shreveporttimes.com/story/news/2019/06/11/sagging-pants-law-abolished-shreveport/1425135001/>.

239. Flynn, *supra* note 183 (“For weeks, residents have stormed city council meetings demanding answers to one unshakable question: How did a man’s loose shorts lead to a fatal police encounter?”).

the purported harm to the female sex worker.²⁴⁰ With protection of sex workers now the primary justification for criminalizing their work, jurisdictions are now experimenting with how best to accomplish that end—some punishing the sex worker themselves (in the name of deterrence), others punishing only the “Johns” (the “Nordic Model”), and others choosing different variations.²⁴¹ However, as time passes, experience shows that the traditional as well as the Nordic Model both carry with them too many counteracting harms to outweigh any larger benefit.²⁴² In some sense, then, experimentation has achieved its desired result of identifying non-ideal policy options. However, in the decades it has taken to come to this conclusion, vast amounts of harm—incarceration, managerial control, policing, and surveillance—have been imposed on the same sex workers who were intended beneficiaries of the criminal offense’s protection.²⁴³ If all criminalization models are finally abandoned by all jurisdictions, it will be impossible not to look back on this as a mistake, and as illegitimate state punishment.

CONCLUSION

Scholarly frustration with the state of American criminal justice is at a high point. When one considers the crisis of racialized mass incarceration, of deadly and discriminatory policing, and of the phenomenon of managerial social control through the misdemeanor process, one can be excused for thinking that big-picture, systemic change is needed. One thread running throughout this frustration is the thought that an invigorated localism would be a major part of the solution.

The goal of this Article is to demonstrate that this would not be true of localism in substantive criminal law. Because of foundational principles in local government law, themselves enshrined in state constitutions and their

240. See Harcourt, *supra* note 171, at 147 (discussing shifting justifications for criminalization of sex work).

241. “Three primary legislative responses to prostitution have emerged in response to these commitments: (1) criminalization, (2) legalization/decriminalization, and (3) the Nordic model.” Ane Mathieson, Easton Branam & Anya Noble, *Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. FOR SOC. JUST. 367, 368 (2015).

242. See I. India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159, 166 (2019) (advocating for decriminalization of sex work by “consider[ing] the harms that [result from] this class of sex workers’ experiences from any form of criminalization, including partial criminalization”); Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47, 60 (2016) (discussing debate about efficacy of Nordic Model).

243. See Thusi, *supra* note 242, at 206–07 (discussing harms of criminalization); Chelsea Breakstone, “I Don’t Really Sleep”: *Street-Based Sex Work, Public Housing Rights, and Harm Reduction*, 18 CUNY L. REV. 337, 354 (2015) (discussing local NYC offenses covering sex work and deleterious collateral consequences relating to public benefits and housing).

judicial interpretations, criminal law localism carries with it a necessarily pro-criminalization valence. Facilitating the growth of a subterranean body of local misdemeanors will not promote the values that criminal justice localists cherish—it will counteract them. Localism with respect to the rules of criminal procedure (especially policing and prosecution) may be more promising, but when calling for such devolution localists should be explicit that their devolutionary program excludes substantive criminal law.