ARTICLE

SOME REALISM ABOUT CRIMINAL JUSTICE LOCALISM

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The American criminal justice system is, by any conceivable measure, highly decentralized—with thousands of local police departments, local prosecutors' offices, and local governments with the power to craft their own criminal laws. Yet the consensus among a growing cadre of criminal justice scholars is that the way to address problems like mass incarceration and discriminatory or abusive policing is to make the system even more localized than it already is. Although some of these arguments are longstanding, they have gained additional traction in recent years in response to the "new criminal justice preemption"—a wave of laws passed by conservative-led states to overturn local reforms. Some states, for example, have prohibited local governments from reducing police budgets; others have gone after "progressive" prosecutors who pledge to take a less punitive approach. In response, a number of criminal justice scholars (joined in their effort by prominent local government scholars), have doubled down on the idea of local control, and have argued in favor of a robust new set of constitutional "home rule" protections that would better insulate local reform efforts from interference by the states.

This Article argues that those who are concerned about mass incarceration and police misconduct should not be so quick to embrace the localist turn. Even if a more locally democratic system could potentially improve outcomes in the largest cities (and this, too, is uncertain), it is likely to make the situation considerably worse in the suburbs and small towns in which the vast majority of Americans actually live. Meanwhile, efforts to insulate local decisionmaking from state preemption are almost certain to backfire. The constitutional "home rule" principles that scholars have

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proposed in an effort to shield blue city regulations from red state preemption would create a powerful one-way ratchet in favor of expanded criminal liability, while also making it far more difficult for states to address abusive practices on the part of local police. Preemption does sometimes pose a problem, but the problem ultimately is a political one—and the only viable long-term solutions must be political as well.

INTRODUCTION

The American criminal justice system is, by any conceivable measure, highly decentralized. Policing services are provided by more than 17,000 municipal police departments and county sheriffs' offices—the vast majority of which are tiny agencies with a couple dozen officers at most.[1] Prosecutors in all but a handful of states are elected at the county level, and often are insulated from meaningful state control.[2] Serious criminal offenses are typically defined at the state or federal levels, but local governments in most

1 ANDREA M. GARDNER & KEVIN M. SCOTT, U.S. DEP'T OF JUST., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2018 – STATISTICAL TABLES 1, 4 (2022); *see also* Maria Ponomarenko, *The Small Agency Problem in American Policing*, 99 N.Y.U. L. REV. 202, 203-10 (2024) (describing the many challenges to police regulation that stem from the highly decentralized character of American policing).

2 *See* U. OF N.C. SCH. OF L., THE PROSECUTORS AND POLITICS PROJECT: NATIONAL STUDY OF PROSECUTOR ELECTIONS (2020) (noting that Alaska, Connecticut, Delaware, and New Jersey have state-appointed prosecutors, and that in Rhode Island, criminal cases are all handled by the state attorney general).

states can (and do) enact their own criminal codes.[3] And in a majority of states, local officials can then prosecute these offenses in their own criminal municipal courts.[4]

Yet the consensus among a growing cadre of criminal justice scholars and advocates is that criminal justice policymaking in the United States is in fact *not local enough*. The late William Stuntz famously attributed the various ills of American criminal justice, from mass incarceration to the pervasiveness of racial inequality, to the fact that states and the federal government had gradually come to assume a more prominent role.[5] Centralization, he argued, took power away from the inner-city residents who disproportionately bore the costs of both crime and enforcement, and it amplified the voices of rural and suburban voters for whom the issues were far more abstract.[6] And it was this shift, he argued, that accounted for the nation's punitive turn. "Make criminal justice more locally democratic," he wrote in 2011, "and justice will be more moderate, more egalitarian, and more effective at controlling crime."[7] Many others over the years have made similar claims.[8]

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3 Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1414 (2001) (describing local governments' "considerable authority to enact criminal laws"); *see also infra* Section II.A (summarizing local criminal lawmaking authority based on an original fifty-state survey).

4 Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 968, 974 (2021) (noting that thirty states permit municipalities to create local criminal courts, where charges are brought by municipal attorneys, and occasionally by local police).

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

6 *Id.* at 6-7, 32-35.

7 *Id.* at 39.

8 *See, e.g.*, Joshua Kleinfeld, Laura I. Appleman, Richard A. Bierschbach, Kenworthey Bilz, Josh Bowers, John Braithwaite, Robert P. Burns, R. A. Duff, Albert W. Dzur, Thomas F. Geraghty, Adriaan Lanni, Marah Stith McLeod, Janice Nadler, Anthony O'Rourke, Paul H. Robinson, Jonathan Simon, Jocelyn Simonson, Tom R. Tyler & Ekow N. Yankah, *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1694-97 (2017) (broadly advocating for local democratic control over—and community participation in—all aspects of criminal justice policymaking and administration); Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1414 (2017) (tracing the problems of the criminal justice system to the lack of community participation in criminal adjudication); LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL 4 (2008) ("Policies widely supported by local officials and citizen alliances are sometimes thwarted by legislators representing much larger constituencies with little or no connection to local problems and much less connection to serious crime."); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2327 (2014) (arguing for "localizing" control over criminal "lawmaking and penalty-drafting"); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1376, 1408 (2017) (arguing that the way to address the pathologies of the criminal justice system is to "make criminal justice more community focused and responsive to lay influences"); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85 (2013) (arguing that cities should have greater control over gun control policy); Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 843-44 (2019) (arguing for greater local legal control in the immigration enforcement); Rick Su, Marissa Roy & Nestor Davidson, *Preemption of Police Reform: A Roadblock to Racial Justice*, 94 TEMP. L. REV. 663, 674–75 (2022) (arguing that the

Indeed, support for "criminal justice localism" has only hardened in recent years in response to what Richard Briffault has dubbed the "new preemption"—a wave of laws enacted (mostly) in conservative-led states to override local progressive reforms.[9] Preemption itself is nothing new. Local governments are creatures of the state, and states have routinely used their authority to displace local regulations in favor of a uniform, state-wide approach.[10] But as scholars point out, the last decade has witnessed a marked shift in the frequency, breadth, and tenor of state-local conflicts.[11] Scholars attribute the shift to a "profound political realignment" that rendered cities more solidly Democratic just as state legislatures (in many states) fell more squarely under Republican control.[12] Cities flexed their regulatory muscles, enacting local minimum wage laws, workplace safety laws, anti-discrimination ordinances, and various environmental measures.[13] States aggressively pushed back by not only "preempting" these local ordinances, but also going a step further to strip local governments of the authority to regulate across a variety of policy domains.[14]

Although the "new preemption" started out as primarily a regulatory phenomenon, a handful of conservative-led states have increasingly set their sights on local criminal justice reform. When local governments slashed police budgets in response to the George Floyd protests in the summer of 2020, a number of states responded by passing "anti-defunding" bills that imposed harsh penalties on local governments that reduce police budgets.[15]

"shortcomings" in local policing "must be remedied in local communities"); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1171-1176 (1998) (arguing that courts should consider community views when assessing the constitutionality of policing practices); Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1400—04 (2021) (arguing for consolidated control over police policymaking at the local level).

9 Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997-98 (2018).

10 *See, e.g.*, Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1133-57 (2007) (describing the longstanding phenomenon of preemption and the interest group politics that often drive it).

11 Briffault, *supra* note 9, at 1997 (highlighting a "new and aggressive form of state preemption"); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1164 (noting that "the last few years have witnessed an explosion of preemptive state legislation").

12 Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 134 (2017); *see also* Schragger, supra note 11, at 1191 ("In states in which Republicans dominate, cities are increasingly isolated, despite generating significant Democratic votes.").

13 *See* NATIONAL LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21st CENTURY 14-15 (2020) [hereinafter PRINCIPLES] (offering examples of "policy experimentation" by local governments).

14 Briffault, *supra* note 9, 1999-2007 (summarizing various preemption measures); Schragger, *supra* note 11, at 1169-83 (same); Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 963-74 (2019) (same).

15 *See* Su, Roy & Davidson, *supra* note 8, at 664 n.5, 667-68 (citing S. 171, H.R. 286, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); H.R. 1, S 484, 2021 Leg. Sess. (Fla. 2021); S. 66, S. 26, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); H.R. 2438, H.R. 2695, H.R. 3151, 87th Leg., Gen. Sess. (Tex. 2021)).

Some states also have banned local governments from declaring themselves to be "sanctuary cities" for immigrants.[16] And they have enacted a variety of measures designed to make it easier to oust so-called "progressive" prosecutors or to strip them of meaningful control over the cases they bring.[17]

Criminal justice scholars and advocates have responded to these measures with growing alarm—and a still stronger commitment to local control over the machinery of the criminal law. Countless articles have lamented the "preemption of progressive prosecutors" and the "preemption of police reform," describing them as "anti-democratic checks" on local efforts to create a more just criminal system.[18] Recognizing the parallels between the "new criminal justice preemption" and the broader assault on local regulatory policymaking, criminal justice scholars also have increasingly joined forces with local government scholars in calling for a more robust set of legal protections to insulate local and county decisionmaking from interference by the state. In place of "community policing" and "community prosecution," the latest wave of localist scholarship has increasingly embraced the idea of

16 Gulasekaram, Su & Villazor, *supra* note 8, at 844, 848 n.55 (citing Ala. Code § 31-13-5 (2018); Ind. Code §§ 5-2-18.2-3–4 (2018); Miss. Code Ann. § 25-1-119 (2019); N.C. Gen. Stat. §§ 153A-145.5, 160A-205.2 (2018); Tenn. Code Ann. § 4-42-103 (2019); S.F. 481, 87th Gen. Assemb., Reg. Sess. (Iowa 2018) (to be codified at Iowa Code § 825.4)).

17 Nicholas Goldrosen, *The New Preemption of Progressive Prosecutors*, 2021 U. ILL. L. REV. ONLINE 150, 151-52 (2021) (providing an overview of laws targeting local prosecutorial discretion); JORGE CAMACHO, NICHOLAS GOLDROSEN, RICK SU & MARISSA ROY, PREEMPTING PROGRESS: STATES TAKE AIM AT LOCAL PROSECUTORS 3-4 (2023) (tracking proposed preemption bills); Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669, 1676-82 (2023) (summarizing tactics states have used to "undermine the authority and discretion of local prosecutors"); John F. Pfaff, *The Poor Reform Prosecutor: So Far from the State Capital, So Close to the Suburbs*, 50 FORDHAM URB. L.J. 1013, 1041-47 (2023) (documenting mechanisms available to state officials seeking to override the authority of local prosecutors).

18 *See* CAMACHO, GOLDROSEN, SU & ROY, *supra* note 17, at 4; Su, Roy & Davidson, *supra* note 8, at 667; *see also* Goldrosen, *supra* note 17, at 153 (situating various bills regulating local prosecutors as part of the "new preemption"); Gulasekaram, Su & Villazor, *supra* note 8, at 867 (arguing that anti-sanctuary laws "threaten the long-standing fundamentals of American-style local democracy); LOCAL SOLUTIONS SUPPORT CENTER, *Preemption of Local Police Budgets* (Apr. 4, 2022), https://www.supportdemocracy.org/issuespecific-preemption-guides/preemption-of-local-police-budgets [https://perma.cc/6JLJ-9RXM] (describing anti-defunding bills as an effort to "take political power and local control away from BIPOC communities, immigrants, women, and workers in low-wage industries"); Tyler Q. Yeargain, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 99 (2018) (predicting that states will increasingly use their supersession authority in ways that challenge "traditional notions of prosecutorial discretion and democratic accountability"); John Pfaff, THE APPEAL, *The Greatest Threat to Defunding the Police? State Pre-emption* (Apr. 29, 2021), https://theappeal.org/defund-the-police-pre-emption [https://perma.cc/Y4FQ-7CVF] (discussing the threat state preemption poses to progressive prosecution and movements to defund the police).

reinvigorating municipal home rule to insulate local decisions from state preemption.[19]

This Article sounds a cautionary note. Scholars and advocates undoubtedly are right to be concerned about the "new preemption," but there is a danger to articulating a theory of localism based primarily on the red-state, blue-city battles of recent years. A principled vision of criminal justice localism—and localism more broadly—must take into account not only the recent events in states like Texas, Florida, and Tennessee, but also the broader structure of criminal justice policymaking, both state and local, in all fifty states.

This Article takes that more expansive view of localism and preemption in the criminal justice space. It argues that those who are concerned about mass incarceration and police misconduct should not be so quick to embrace the localist turn—and that they should be *especially* wary of proposals to *constitutionalize* localism through a revitalized model of home rule. A more locally democratic system could potentially improve outcomes in the largest cities, but it is likely to make the situation considerably worse in the suburbs and small towns in which the vast majority of Americans actually live. (Indeed, even in the largest cities, there are reasons to doubt that localism and leniency necessarily go hand in hand.)

Part I situates the contemporary debates over criminal justice localism within the decades-long back and forth over the proper allocation of authority between local governments and the states. It then describes the rise of the "new preemption" and the ways in which it has generated new-found enthusiasm for local control among local government scholars and criminal justice scholars alike.

Part II sounds a cautionary note for those who see localism as the path to a less punitive carceral state. Drawing on a comprehensive survey of state oversight over local criminal justice policymaking, Part II begins by showing that the very same arguments that reform advocates have used to push back

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19 The Local Solutions Support Center—a consortium of academics and advocates working on state and local government issues—has drawn the closest link between criminal justice reform and strengthening home rule. The organization routinely highlights "preemption" of various criminal justice issues and has signed on to the National League of Cities' *Principles of Home Rule for the 21st Century*, which, as discussed in greater detail in Parts I and II, articulates an expansive new vision for municipal home rule. *See, e.g.*, *Resources About Racial Justice*, LOCAL SOLUTIONS SUPPORT CENTER, https://www.supportdemocracy.org/racial-justice [https://perma.cc/7ZBL-8CEZ] (last visited Feb. 9, 2024) (featuring articles that discuss preemption in a negative light across multiple contexts); PRINCIPLES, *supra* note 13, at 7-9 ("With cities now at the forefront of governance in our interconnected, global economy, and states seeking to constrain local authority with growing vehemence, the time is ripe to examine home rule anew."); *see also, e.g.*, O'Rourke, Su & Binder, *supra* note 8, at 1403 ("Given the desirability of local control, it is worth mapping the steps required to vest policing authority exclusively in these jurisdictions."); Gulasekaram, Su & Villazor, *supra* note 8, at 874-82 (advocating for "immigration localism").

against the "new preemption" could just as easily be deployed by conservative forces in more liberal states toward politically opposite ends. It then explains why, on balance, local control is in fact unlikely to generate better criminal justice outcomes in ways that might justify foregoing the progress that some states have made in regulating policing, constraining prosecutorial discretion, and cabining the scope of the criminal law. Specifically, it shows that many of the arguments in favor of criminal justice localism focus overwhelmingly on the largest cities—and that the case for localism is considerably shakier if one focuses instead on the suburbs and small towns in which the vast majority of Americans reside.

Finally, Part III turns to the growing enthusiasm among local government scholars (and some criminal justice scholars) for strengthening municipal home rule in an effort to limit the "new preemption" of local progressive reforms. Part III uses as its jumping-off point a set of *Principles of Home Rule for the 21st Century*, put forward by the National League of Cities ("NLC") in collaboration with a group of prominent local government scholars, to consider what strengthening home rule might mean for criminal justice reform.[20] The *Principles* propose a new set of constitutional home rule provisions that, if adopted, would dramatically expand the scope of municipal authority, and would make it much harder for states to preempt local laws with which they disagree.[21] As Part III makes clear, whatever the merits of these proposals generally, criminal justice scholars who are worried about mass incarceration or abusive policing should be extremely wary of jumping on board. The NLC *Principles* could very well shield local minimum wage laws and plastic bag bans from the new preemption. But they also would create a powerful one-way ratchet in favor of more expansive criminal liability and harsher criminal punishment. And they would make it far more difficult for states to impose sensible limits on the conduct of local police.

Before turning to the substance of this Article, a few words on terminology and scope. First, many of the proponents of "criminal justice localism" envision a system that not only is more *local* but also more heavily *democratic*.[22] They want to see fewer plea bargains and more juries, not just at the adjudication phase but also for bail determinations, sentencing, and

20 PRINCIPLES, *supra* note 13, at 2.

21 *Id.* at 53-61.

22 *See, e.g.*, Kleinfeld, *Manifesto of Democratic Criminal Justice*, *supra* note 8, at 1408 ("[D]emocratic values and institutional arrangements represent the best hope for the future of racial justice in criminal law."); Kleinfeld et al., *White Paper of Democratic Criminal Justice*, *supra* note 8, at 1694-96 (noting that the authors, in advocating "to make criminal justice more community-focused," seek a "more just, effective, and reasonable . . . criminal system").

parole.[23] And they want to see far more lay participation throughout the criminal justice bureaucracy.[24] These two arguments are closely linked insofar as local institutions generally are more welcoming of informal, lay participation of various sorts. But one can imagine a *localized* system of criminal justice that offers few opportunities for public involvement—as well as a more centralized system in which key policy choices are resolved through democratic means. The focus on this article is on the vertical allocation of policymaking authority—that is, the *local* dimension of various calls for more "local democratic control" over the carceral state.[25]

Second, throughout the paper I focus primarily on three core criminal justice policymaking functions—policing, prosecution, and criminal lawmaking. I do so because all three represent critical *policy* levers through which states and localities can define the scope of the carceral state. Other institutions matter as well, of course, but not to the same degree. Shifting control over jails or courts, for example, undoubtedly can shape the experience of the individuals who interact with these institutions (and in the case of judicial selection and jury pool composition, can potentially influence outcomes as well). But these institutions typically are not exercising the same sort of formal *policymaking* discretion that is at the heart of debates over localism, preemption, and home rule.

In addition, considering all three together highlights some of the tensions inherent in localism, which are easy to miss when focusing on just one or more of these functions in isolation. For example, some have argued in recent years that local prosecutors should have near-unreviewable discretion to refuse to enforce state laws with which a majority of their constituents disagree. And they have justified this stance on the ground that local communities should decide for themselves what conduct warrants criminal sanction. But this necessarily begs the question of whether localities also should have the option to criminalize more broadly (or punish more harshly) than state law allows by enacting their own more punitive criminal laws. One need not treat these questions as necessarily symmetrical—but viewing them in tandem can help to illuminate the extent to which the desire for "local

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23 *See, e.g.*, Appleman, *supra* note 8, at 1426 ("Only the local citizen can truly bring the values of the community into the courtroom whether for a trial or a plea bargain."); Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1659 (2017) ("[W]e should want to move juries from the trial stage to the stages of arrest, bail, charge, bargain, and sentence.").

24 *See, e.g.*, Kleinfeld et al., *supra* note 8, at 1705; Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 781-92 (2021) (discussing movements seeking to expand community control of the police in different cities).

25 In this regard, this Article complements John Rappaport's critique of the various assumptions behind calls to "democratize" criminal justice decisionmaking. John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 714-19 (2020).

democratic control" is really about honoring the preferences of local communities, whatever those preferences turn out to be.

I. THE LOCALIST TURN

The localist turn among criminal justice scholars and advocates is simply the latest chapter in a long-running back-and-forth with respect to the proper allocation of authority between cities and states. This Part begins with an overview of this longstanding debate, as well as the broader institutional developments that shaped it (and were in turn shaped by it). It then describes the rise of the "new preemption" and the ways in which the present-day conflicts between Republican-controlled legislatures and Democratic cities within their borders has generated newfound enthusiasm for strengthening local control over the carceral state.

A. *Localism and Its Discontents*

The highly decentralized character of the American criminal justice system solidified early in the nation's history. Local criminal lawmaking dates back to the colonial period.[26] The uniquely American approach to picking prosecutors through popular elections emerged in the decades prior to the Civil War as part of a broader effort to insulate the administration of criminal justice from partisan influence.[27] (And it appears that at least some states settled on the county as the geographic unit for prosecutorial elections "because they feared it would take too long to travel" across larger districts, "presumably by horse.")[28] It was less obvious at first that policing would remain entirely local. As Professors O'Rourke, Su, and Binder point out, state legislatures and their urban centers spent a good part of the nineteenth century battling for control over municipal police.[29] But by the early twentieth century, local control over municipal policing likewise had become more or less a foregone conclusion, with thousands of municipal departments cropping up across the country.[30] In short, Stuntz surely is right that localism

26 Logan, *supra* note 3, at 1414 ("[S]ince colonial times localities have wielded considerable power to legislate against perceived forms of social disorder in tandem with, and very often independent of, state government.").

27 *See* Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530-31 (2012) (noting that prosecutorial elections began in 1832).

28 Carissa Byrne Hessick & Michael C. Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1582 (2020).

29 O'Rourke, Su & Binder, *supra* note 8, at 1368-69.

30 Maria Ponomarenko, The Department of Justice and the Limits of the New Deal State, 1933-1945 (Dec. 2010) (Ph.D. dissertation, Stanford University), https://purl.stanford.edu/ms252by4094 [https://perma.cc/D38R-D6HC] at 143 n.20 (estimating that there were likely 20,000 to 40,000 agencies by the 1930s).

had long been the default—and that centralization of various criminal justice functions, to the extent that it exists, came later.

Decentralization potentially brings with it a number of advantages. Local governments are thought to be "closer to the people" in ways that facilitate broader democratic engagement.[31] Local governments can be potent sites for innovation and experimentation, generating ideas that later can be replicated at scale.[32] Smaller political units also "map more closely onto communities of interest."[33] And especially in times of heightened political polarization, local decisionmaking can enable a greater share of the electorate to secure their preferred policies across a variety of domains.[34] With respect to the criminal justice system in particular, proponents of local control also emphasize the expressive, communitarian character of criminal punishment, as well as the fact that the consequences of both crime and enforcement tend to be locally felt.[35]

The drawbacks of decentralization are familiar as well. Devolving policymaking authority to tens of thousands of local government units generates a patchwork of inconsistent regulations that can impose externalities on neighboring jurisdictions.[36] Actual rates of public participation in local hearings and elections often are abysmally low, and predictably skewed toward those with greater means.[37] Local decisionmaking can be parochial—and exclusionary.[38] And especially in the context of

31 Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 23 (2010); *see also* Davidson, *supra* note 14, at 975 (describing local governments as "critical sites for democratic participation"); Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1541 (2019) ("Political accountability is said to be enhanced by having locals make local decisions whenever it is feasible to do so.").

32 *See* Davidson, *supra* note 14, at 975 ("[L]ocalities have a particularly important role to play in a distributed, competitive approach to policy experimentalism.").

33 Gerken, *supra* note 31, at 23.

34 *See* Briffault, *supra* note 9, at 1998.

35 JOSHUA KLEINFELD, STEPHANOS BIBAS & RICHARD BIERSCHBACH, BY THE PEOPLE: RESTORING DEMOCRACY IN CRIMINAL JUSTICE (forthcoming) (book proposal at 29) (book proposal available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4107451 [https://perma.cc/86J4-T7VF]).

36 *See* PRINCIPLES, *supra* note 13, at 57 (citing this oft-repeated concern).

37 *See* Davidson, *supra* note 14, at 976-77 (describing a "decided lack of democratic engagement at the local level" and noting that local actions "have significant practical and distributional implications for those not able to participate in . . . any particular local political process"); *see also* Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 U. PA. L. REV. 1527, 1573 (2022) ("[O]verall levels of participation in agency procedures are typically quite low.").

38 Richard Briffault famously observed that "[l]ocalism reflects territorial economic and social inequalities and reinforces them with political power." Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990).

criminal enforcement, Madisonian concerns about the tendency of smaller political units to trample on minority rights are notably acute.[39]

At various points over the course of the twentieth century, these competing concerns have gained (and lost) traction among policymakers and scholars alike, prompting successive waves of state intervention, followed by calls for greater local control. Progressive Era reformers took a dim view of the local machinery of criminal justice.[40] In one commissioned study after another, they painted a picture of a system that was equal parts ineffective and corrupt.[41] Police officers had little training and even less supervision. And to the extent that they bothered to enforce the law, "they often did so with shocking brutality."[42] Courts struggled to maintain their dockets, trials were often "chaotic," and countless cases were dismissed simply because they fell through the cracks.[43] To be sure, reformers did not think much of state legislatures, either.[44] For them, the goal was to professionalize the criminal justice bureaucracy and to insulate it from politics (both state and local) through civil service requirements, state-level standards and training requirements, and various bureaucratic reforms.[45]

By the 1960s, however, the idea that criminal justice actors (and local governments more broadly) ought to be more responsive to their communities had begun to take hold.[46] Although the professionalization movement succeeded in insulating police from the excesses of local machine politics, it also left them increasingly isolated from the neighborhoods they

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39 *See, e.g.*, Sheryll Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1986-87 (2000) (describing how Madisonian concerns about tyranny and faction in small polities show up in exclusionary).

40 *See* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990, at 8 (1993) (describing Progressive Era concerns over "corrupt political influence, unqualified personnel, and inadequate resources").

41 *See* Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1050-56 (2013) (summarizing the Cleveland Report and subsequent studies that revealed corruption and inadequacy).

42 Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1858-59 (2015); *see also* Schulhofer, *supra* note 41, at 1051 (stating that "[l]ack of professionalism affected operations in all areas" of police and prosecution).

43 Schulhofer, *supra* note 41, at 1053, 1055.

44 *See* Schragger, *supra* note 11, at 1186 ("Reformers sought first to insulate city government from a (corrupt and meddling) state government . . . .").

45 Schulhofer, *supra* note 41, at 1055; Friedman & Ponomarenko, *supra* note 42, at 1859 (explaining that reformers wanted "an autonomous police force in which 'professionalism' was the code").

46 *See, e.g.*, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 150, 154 (1968) [hereinafter KERNER COMMISSION REPORT] (arguing for "Neighborhood Action Task Forces" and "more effective community participation" to give Black residents a greater say in municipal governance).

policed.[47] As one presidential commission observed in 1968, Black residents in particular "increasingly believe that they are excluded from the decisionmaking process which affects their lives and community."[48] Successive waves of proposals, from community-informed police rulemaking and civilian review in the 1970s, to community policing in the 1980s and 1990s, were intended to address these concerns.[49]

For much of this period, however, enthusiasm for "community" control was tempered by an equally strong commitment to robust judicial enforcement of constitutional rights, along with various state and national-level efforts to rationalize the criminal justice system and cabin official discretion at all stages of the criminal process. The Warren Court struck down local loitering and vagrancy ordinances, imposed new rules for police searches and seizures, and guaranteed a variety of new trial rights for the accused.[50] States overhauled their messy, outdated criminal codes, often replacing them with portions of the American Law Institute's *Model Penal Code*.[51]

Beginning in the mid-1990s, however, a cadre of scholars adopted a still more robust view of "community" control that called into question the previous waves of judicial and bureaucratic reforms. Professors Tracey Meares and Dan Kahan, for example, famously criticized the Supreme Court for striking down Chicago's gang loitering ordinance in *Chicago v. Morales*, arguing that the Court's 1960s-era skepticism toward harsh order maintenance policing was no longer warranted because "inner-city residents" were now fully capable of protecting their own interests through the local democratic process.[52] Stephanos Bibas and others have attributed the punitiveness of the criminal justice system to the fact that lawyers and

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47 *See* STUNTZ, *supra* note 7, at 194 ("Professionalized police forces grew detached from the neighborhoods they patrolled . . . ."); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV 551, 572–73 (highlighting the inability of "professionally oriented police departments . . . to deal with urban unrest").

48 KERNER COMMISSION REPORT, *supra* note 46, at 149.

49 *See* Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 13-15 (2019) (describing calls to apply an administrative rulemaking model, including public comment, to the development of policing policies); Livingston, *supra* note 47, at 572-78 (describing the rise of community policing).

50 *See* STUNTZ, *supra* note 5, at 216-43 (summarizing the Warren Court procedural revolution); Kahan & Meares, *supra* note 8, at 1156-59 (same).

51 *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326-27 (2007) (summarizing the history of code reform).

52 Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v Morales, 1998 U. CHI. LEGAL F. 197, 210 (arguing that the Court's decision in *Morales* wrongly obstructed innovative community policing efforts and harmed both communities and criminal defendants by upholding outdated views of individual rights).

experts—as opposed to lay members of the local community—have assumed control over the criminal process.[53]

By far the best-known proponent of this localist view was William Stuntz, who blamed the problems of mass incarceration and racial inequality on the loss of local control over the machinery of the criminal law.[54] Stuntz argued that criminal law works best when "those who bear the costs of crime and punishment alike . . . exercise more power over those who enforce the law and dole out punishment."[55] For much of American history, he argued, this was precisely the case: the criminal system was highly responsive to local preferences, and (outside the South) it "punished sparingly, mostly avoided the worst forms of discrimination, [and] controlled crime effectively."[56] All of this changed when state legislatures assumed greater control.[57] This put more power in the hands of rural and suburban voters, for whom urban crime is little more than an abstraction.[58] And it "limited the power of residents in poor city neighborhoods . . . . to govern the police officers and prosecutors who govern them."[59] The result was the system of mass incarceration with which we live to this day. Stuntz argued that the answer was to reverse course: "Make criminal justice more locally democratic, and justice will be more moderate, more egalitarian, and more effective at controlling crime."[60]

Calls to "democratize" and "localize" control over the criminal justice system picked up steam in the decade that followed. In 2016, for example, nineteen prominent criminal law professors—all self-described "democratizers"—gathered at Northwestern Law School to articulate a shared vision of local democratic control over criminal law and punishment.[61] Echoing Stuntz, Laura Appleman observed that "[m]any of our criminal justice woes can be traced to the loss of the community's decisionmaking ability in adjudicating crime and punishment."[62] Jonathan Kleinfeld insisted that local democratic institutions "represent the best hope for the future of racial justice in criminal law."[63] Richard Bierschbach argued that city councils should "be given real power to craft their own substantive criminal codes in response to community concerns . . . even if far-flung state legislators

53 STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE xvi (2012); MILLER, *supra* note 8, at 50.

54 STUNTZ, *supra* note 5.

55 *Id.* at 7.

56 *Id.* at 2.

57 *Id.* at 7.

58 *Id.* at 38.

59 *Id.* at 7.

60 *Id.* at 39.

61 Kleinfeld et al., *supra* note 8, at 1695.

62 Appleman, *supra* note 8, at 1413.

63 Kleinfeld, *supra* note 8, at 1408.

disagree."[64] Jocelyn Simonson articulated a still more decentralized vision of criminal justice policymaking that would shift power to residents in the neighborhoods that are most heavily policed.[65]

Still, the growing localist consensus kept bumping into the inconvenient truth that local governments, far from being responsive to the needs of their most marginalized residents, often deployed municipal power in ways that exacerbated their plight. The town that came to epitomize the many failings of local criminal justice was Ferguson, Missouri, a small St. Louis suburb that for years had used its police department and municipal court system to generate revenue through aggressive, discriminatory enforcement of its municipal code.[66] But there were many others as well. Throughout the Obama years, the Justice Administration released one damning report after another documenting the utter failure of cities large and small to get policing under control.[67] James Forman published *Locking Up Our Own*, which documented how the majority-Black political leadership of Washington, D.C. had come to embrace the same mandatory minimums and harsh policing tactics that were responsible for mass incarceration.[68] Although some continued to trumpet localism's potential, others expressed deep skepticism about the valorization of local democracy, emphasizing the continued importance of courts and bureaucratic institutions, as well as the potential for federal or state-level reform.[69] Authors highlighted the role that state

64 Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1452 (2017); *see also* Ouziel, *supra* note 8, at 2327 (likewise arguing that the goal of "[m]aking criminal justice systems more accountable to the local citizenry" must include not only local control over adjudication and enforcement, but localized "lawmaking and penalty-drafting as well").

65 Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612-1613 (2017) (advocating for bottom-up participation by marginalized groups in criminal justice policymaking); *see also* Simonson, *Police Reform*, *supra* note 24, at 787 (arguing in favor of shifting power over policing to the communities most affected by mass criminalization); M. Adams & Max Rameau, *Black Community Control Over Police*, 2016 WIS. L. REV. 515, 538 (2016) (calling for "Community Control over Police").

66 *See* U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42-62 (2015) https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/NYT6-U45R] (documenting a widespread pattern of abusive, discriminatory, and revenue-motivated code enforcement on the part of Ferguson police and municipal court officials). As Alexandra Natapoff points out, Ferguson served as an especially stark reminder "that localism alone cannot be counted on to provide reliable protection for vulnerable criminal defendants." Natapoff, *supra* note 4, at 1030.

67 *See* U.S. DEP'T OF JUST., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT 41-48 (2017), https://www.justice.gov/crt/file/922421/dl?inline [https://perma.cc/Z23W-Z2AD] (summarizing pattern-or-practice policing cases).

68 JAMES FORMAN, JR., LOCKING UP OUR OWN 10-11, 60-61 (2017).

69 *See, e.g.*, Rappaport, *supra* note 25, at 719 ("The democratization position . . . rests on conceptually problematic and empirically dubious premises about the existence, makeup,

licensing boards (typically called Peace Officer Standard and Training boards, or POSTs) and attorneys general could play in addressing the various harms of policing.[70] They emphasized the importance of Justice Department investigations,[71] and they outlined ambitious models for federally-driven reform.[72]

B. *The New Preemption and the Localist Turn*

Enter the "new preemption"—a wave of measures enacted (mostly) in conservative-led states to reverse local policy choices across a variety of domains. As Richard Briffault and others explain, the initial targets for the

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preferences, and independence of local 'communities' and ignores the ways in which deliberative mechanisms tend to amplify predictably dominant voices."); Albert Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 216-17 (1998) (criticizing reliance on the "appealing but highly manipulable rhetoric of 'community'"); Schulhofer, *supra* note 41, at 1080-83 (arguing that localism does not constitute a fundamental "shift in political authority" because "affluent voters and powerful economic interests" are just as likely to control politics at the local level as they are at the federal or state level); Elizabeth G. Janszky, *Defining "Local" in a Localized Criminal Justice System*, 94 N.Y.U. L. REV. 1318, 1331–1346 (2019) (highlighting the many conceptual and practical challenges to implementing "localized" criminal justice); Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1182 (2017) (examining the risks of placing control over criminal procedure in the hands of local government); David Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1152-53 (2014) (arguing that state courts should use intrastate preemption doctrine to nudge state legislatures to take a more active role in regulating local police).

70 *See, e.g.*, Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L.J. 999, 1012, 1050-72 (2020) (offering recommendations for empowering state attorneys general to reform local police departments); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 814 (2012) (describing how POSTs allow states to further civil rights reform); Hilary Rau, Kim Shayo Buchanan, Monique L. Dixon & Phillip Atiba Goff, *State Regulation of Policing: POST Commissions and Police Accountability*, 11 U.C. IRVINE L. REV. 1349, 1352-1353 (2021) (discussing the unique power of POST Boards to hold officers accountable); Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L.J. 363, 381-86 (2016) (describing how POSTs can help states address police misconduct); Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 57 (2018) (providing an example of a state's attorney general instituting bail reform); Samuel Walker & Morgan Macdonald, *Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R.L.J. 479, 537-51 (2009) (analyzing the trend of increased authority and independence for states attorneys general).

71 *See* Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3226-28 (2014) (describing the structure and impact of formal Justice Department investigations into police misconduct).

72 *See, e.g.*, Harmon, supra note 70, at 814-16 (emphasizing the role of Congress and federal institutions in regulating the police); Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 380-99 (2011) (proposing federal mechanisms for policing reform). For a more recent example, see Barry Friedman, Rachel Harmon & Farhang Heydari, *The Federal Government's Role in Local Policing*, 109 VA. L. REV. 1527, 1534-35 (2023) (offering recent examples of federal involvement in local policing).

"new preemption" fell largely outside the criminal justice space.[73] Beginning around 2010, states enacted dozens of laws ousting local governments from regulating specific industries or practices. As of 2019, at least twenty-five states had passed laws banning local minimum wage ordinances, and at least nineteen had preempted local paid sick leave rules.[74] Thirty-one states had imposed at least some limits on local tobacco regulations,[75] and at least twelve had banned local governments from regulating the use of plastic bags.[76] States also passed laws targeting local anti-discrimination protections, workplace safety rules, and much else.[77] In a sign of growing hostility, some of these laws threatened local governments or officials with harsh penalties for enacting—or even proposing—ordinances that conflicted with state law.[78]

Notably, these laws had a decidedly partisan slant, reflecting the red-state, blue-city dynamics in play in a growing number of states.[79] Kenneth Stahl notes that by 2016, Democratic mayors presided over "[t]wenty-six of the nation's thirty largest cities," whereas Republicans controlled "both houses of the legislature in thirty-two states."[80] Stahl and others attribute this partisan realignment to a number of factors. "Immigrants and young professionals," Stahl notes, "have flocked to cities in recent years."[81] Rural voters, meanwhile, have become far more solidly conservative than they had been even two decades prior.[82] Republicans also just so happened to take over a number of state houses just in time for the decennial redistricting, which allowed them to draw maps that solidified their control for years to come.[83]

For many local government scholars, the unprecedented wave of state legislation called into question the prevailing approach to municipal home

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73 *See, e.g.*, Briffault, supra note 9, at 1999.

74 Davidson, *supra* note 14, at 965.

75 *Id.* at 966.

76 *Id.* at 967.

77 *See id.* at 964-68 (citing dozens of additional laws); *see also* Briffault, *supra* note 9, at 1999-2007 (citing the same); Schragger, *supra* note 11, at 1164-81 (citing the same).

78 Erin Scharff described these efforts as "hyper preemption." Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1473 (2018). Briffault and Schragger refer to these measures as "punitive" or "vindictive" preemption. Briffault, *supra* note 9, at 1997; Schragger, *supra* note 11, at 1181-82.

79 Briffault notes that as of 2016—around the height of the "new preemption"—Republicans had "trifectas" (i.e. control of both houses and the governorship) in twenty-five states and controlled both houses of the legislature in an additional seven. Briffault, *supra* note 9, at 1998.

80 Stahl, *supra* note 12, at 137, 139; *see also* Schragger, *supra* note 11, at 1191 (making the same point).

81 Stahl, *supra* note 12, at 137.

82 *Id.* at 139. Stahl notes that "[a]s recently as the 1990s, half of all rural residents were represented by a Democratic congressperson" as compared to less than twenty-five percent in 2016. *Id.*

83 *Id.* at 140; *see also* Davidson, *supra* note 14, at 957 (discussing state-level redistricting following the 2010 census).

rule.[84] In most states, "home rule" provisions in state constitutions (and sometimes in statutes statutes) give municipal governments wide latitude to legislate on a variety of topics without prior state authorization. But conversely, states retain equally broad, and often unreviewable, authority to supplant local legislation whenever they choose.[85] The basic intuition behind this approach is that the political process should generally be sufficient to protect local interests—and that the very fact that state legislators decide to intervene suggests that the matter in question is one of "statewide concern."[86] To many scholars, the rise of the "new preemption" signaled that states had "become unreliable arbiters" of the appropriate balance between local and state authority,[87] and that the prevailing approach to intrastate federalism had become increasingly ill-suited to these polarized times.[88]

In its place, a growing number of local government scholars have argued in favor of a robust new set of legal protections from state interference, through a revitalized system of municipal home rule. Emblematic of this trend, the National League of Cities released in 2020 a set of *Principles of Home Rule for the 21st Century*, which proposed to significantly expand local policymaking authority, and to give local governments a powerful set of tools with which to resist state control.[89] The authors of the report included some of the most prominent scholars of state and local government law, including professors Richard Schragger, Laurie Reynolds, Nestor Davidson, and Richard Briffault.[90] The NLC described *Principles* as an update to the organization's 1953 *Model Constitutional Provisions for Municipal Home Rule*, which had influenced the trajectory of home rule in dozens of states.[91] Notably, the *Principles* firmly rejected the 1953 *Model's* reliance on the political process to police the boundaries of local authority. Instead, they proposed sharp new limits on the ability of states to preempt local legislation—or to use the power of the purse to coerce local governments into compliance with

84 Davidson, *supra* note 14, at 979-983 (describing attempts in scholarship to balance the promise and risks of "local empowerment").

85 Notably, as Davidson and Schragger point out, even states that formally embrace a more robust "imperio" model of home rule in practice give local governments very little protection from state preemption. Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities'* Principles of Home Rule for the 21st Century, 100 N.C. L. REV. 1385, 1394 (2022). *See also* Diller, *supra* note 10, at 1127 (noting the same); Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338-39 (2009) (similarly describing "imperio" states as falling along a continuum).

86 Baker & Rodriguez, *supra* note 85, at 1368.

87 These various terms appear in, for example, Briffault, *supra* note 9, at 1997 ("new preemption"); Davidson, *supra* note 14, at 981 ("unreliable arbiters").

88 Davidson, *supra* note 14, at 981.

89 PRINCIPLES, *supra* note 13, at 23-27.

90 See *id.* at 2 (listing the authors).

91 *Id.* at 4.

state law. "[S]tate oversight," the authors declared, "is no longer serving the constructive, collaborative role in the state-local legal relationship."[92]

A similar dynamic is starting to play out among criminal justice scholars and advocates in response to the "new preemption" of local criminal justice reform. Among the first targets for conservative lawmakers were so-called "sanctuary cities": local governments that publicly vowed to "limit local cooperation and communication with federal immigration authorities."[93] In response, approximately a dozen states have passed laws that prohibit local governments from adopting sanctuary policies, sometimes going so far as requiring local officials to cooperate in the enforcement of federal immigration law.[94] Local policing came next. In 2020, a number of cities slashed police budgets as part of a broader reckoning over the role of policing in public safety after the murder of George Floyd. In response, a handful of states passed "anti-defunding" bills that imposed harsh fiscal penalties on local governments that tried to "defund" the police.[95] More recently, the battleground has shifted to "progressive prosecutors." By 2022, at least 70 counties—most of them in large urban areas—had elected prosecutors who promised to scale back enforcement of low-level offenses and generally embrace a less punitive approach.[96] Again, conservative-led states responded with a variety of measures making it easier to oust local prosecutors, or expanding the authority of state officials to prosecute crimes that local officials would not.[97]

Scholars and advocates have viewed these anti-reform measures with considerable alarm—and with a renewed interest in strengthening local control. Countless articles highlighted the risk that state preemption posed to "progressive prosecutors" and local reform efforts. And they argued in favor of various measures to insulate local decisionmaking from state control.[98]

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92 *Id.* at 14.

93 Gulasekaram, Su & Villazor, *supra* note 8, at 841.

94 *See generally id.* (analyzing local sanctuary policies and state preemption); Mark A. Hall, Lilli Mann-Jackson & Scott D. Rhodes, *State Preemption of Local Immigration "Sanctuary" Policies: Legal Considerations*, 111 AM. J. PUB. HEALTH 259 (2021) (same).

95 Su, Roy & Davidson, *supra* note 9, at 667-68.

96 Pfaff, *supra* note 17, at 1021.

97 *See* Goldrosen, *supra* note 17, at 151-52 (describing various measures); CAMACHO, GOLDROSEN, SU & ROY, *supra* note 17, at 3-4 (same); Hessick & Su, *supra* note 17, at 1676-80 (same); Pfaff, *supra* note 17, at 1040-42 (same).

98 *See, e.g.*, Su, Roy & Davidson, *supra* note 8, at 664 (illustrating how preemption has been used to halt criminal justice reform); Goldrosen, *supra* note 17, at 153 (arguing that state preemption harms progressive prosecutors); CAMACHO, GOLDROSEN, SU & ROY, *supra* note 17, at 4 (opining on the harms of state preemption of prosecutorial discretion); Pfaff, *supra* note 17, at 1040-42 (providing examples of state preemption over prosecutors); Hessick & Su, *supra* note 17, at 1673-80

What is particularly striking about the new wave of localist scholarship is the degree to which "criminal justice localism" has moved beyond vague notions of "community policing" and "community prosecution," and has instead embraced the language of home rule—and with it, the more formal insulation of local discretion from interference by the state. A number of scholars, for example, have urged courts to apply various home rule doctrines to "expand local powers over police personnel matters"[99] and "limit state interference with the organization and operation of municipal departments."[100] Researchers at the Local Solutions Support Center urged states to enact "legislation that safeguards prosecutorial discretion" and "ensures the autonomy of locally elected prosecutors."[101] Part of this has to do with the growing engagement on the part of local government scholars with criminal justice policymaking.[102] But it also is driven in part by the ways in which the new criminal justice preemption appears to be part and parcel of a broader conservative onslaught on local reform. If preemption is indeed the "biggest threat" to criminal justice reform, it is easy to see why strengthening home rule would appear to be an increasingly attractive response.[103]

II. THE LIMITS OF LOCALISM

This Part offers a cautionary note to the scholars and advocates who see criminal justice localism as a path to a less punitive, more equitable carceral state. It begins in Section A with a broad overview of the prevailing allocation of authority between local governments and the states across various criminal justice functions, and it offers a more nuanced account of the states' role in local criminal justice policymaking than often is evident in the localist critique. This Part then turns in Section B to the new criminal justice preemption and shows that in both form and function, many of the most

(establishing three categories of preemption); Pfaff, *supra* note18, at 1041-47 (enumerating the threats posed by state intervention in local prosecutions).

99 Nadav Shoked, *Local in a Peculiar Way: The Police Force in American Law*, 172 U. PA. L. REV. 1291, 1358 (2024).

100 O'Rourke, Su & Binder, *supra* note 8, at 1403.

101 Preeti Chauhan, Rachel Marshall & Dalia Racine, *Strategies for Protecting Prosecutorial Discretion*, LOC. SOLS. SUPPORT CTR. (Jan. 17, 2024), https://www.supportdemocracy.org/the-latest/strategies-for-protecting-prosecutorial-discretion [https://perma.cc/LH67-6X5W].

102 Nestor Davidson, Nadav Shoked, and Rick Su, all cited in this Article, for example, are first and foremost local government scholars.

103 To be sure, some have continued to push back against the localist consensus. Brenner Fissell has argued persuasively against local criminal lawmaking. Brenner M. Fissell, *Against Criminal Law Localism*, 81 MD. L. REV. 1119, 1121 (2022). Ava Ayers highlighted the "impossibility" of local police reform. Ava Ayers, *The Impossibility of Local Police Reform*, 50 FORDHAM URB. L.J. 609, 613-14 (2023). Similarly, a number of scholars have instead concluded that the threat posed by preemption illustrates why local advocates should not put "too many reform eggs in the prosecutorial basket" and that ultimately solutions must be "*political*, not legal." Pfaff, *supra* note 17, at 1018, 1047.

criticized measures are indistinguishable in principle from blue state reforms that limit the authority of their more conservative towns. There is, in short, no politically neutral theory of localism that predictably leads to more progressive results. Finally, Section C turns to the argument advanced by William Stuntz and others that even if localism might occasionally lead to more punitive outcomes, it would *on balance* create a system that is less punitive and more just. Here, too, I offer a number of reasons to doubt that this would in fact be the case.

A. *Our Fifty State System of Criminal Justice*

Although it is tempting to generalize about the "American" system of criminal justice, the reality is that there are fifty separate state systems—many of which have made widely divergent choices about how to allocate criminal justice policymaking authority between cities and states.[104] This Section draws on a mix of existing scholarship and an original fifty-state survey of specific criminal justice functions to provide a broad overview of the status quo. It shows that criminal justice policymaking in the fifty states *already* is highly decentralized—and that to the extent states have intervened, it often has been in ways that were designed to dampen the harshness of local criminal lawmaking and enforcement.

1. Criminal Lawmaking

In most jurisdictions, criminal lawmaking is a shared endeavor between cities and states. Felonies are enacted exclusively at the state level in all fifty states, which means states also are responsible for setting the penalty ranges that attach to more serious crimes.[105] In all but three states, however, local governments are authorized to enact their own misdemeanor criminal codes,[106] and they have in fact used this authority to create a dizzying array

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104 The federal government also plays an important role in both criminal lawmaking and enforcement—and its involvement has garnered no shortage of criticism from those who favor a more localized carceral state. *See generally* Friedman, Harmon & Heydari, *supra* note 72 (exploring the federal government's role in regulating local policing); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 523-30 (2011) (summarizing debates over federalism in criminal law). The focus here, however, is on the allocation of authority between cities and states.

105 The one notable exception is the District of Columbia (which is not part of any given state), whose city council is authorized to enact its own criminal code (including felony offenses); Congress, however, may vote to override any ordinance that the City enacts. D.C. CODE § 1-206.02(c)(1) (2024).

106 Connecticut, Indiana, and Wisconsin all prohibit local governments from imposing criminal penalties for violations of local ordinances. CONN. GEN. STAT. § 7-148(10)(A) (2024); IND. CODE § 36-1-3-8(a)(9) (2024); State *ex rel.* Keefe v. Schmiege, 28 N.W.2d 345, 348 (Wis. 1947).

of local misdemeanor crimes.[107] Wayne Logan cites dozens of examples, including criminal assault and battery; public order offenses such as littering, "aggressive begging and panhandling," and "sleeping, lying, or camping in public places"; possession of drugs or "drug paraphernalia"; and morals offenses such as obscenity and "nude dancing."[108]

Most states, however, also impose a variety of constraints on local criminal lawmaking that limit the punitiveness or breadth of local criminal law. The vast majority of states, for example, sharply limit the penalties that local governments can impose.[109] In addition, at least fifteen states broadly preempt local governments from enacting criminal ordinances on topics that already are covered by state law,[110] or prohibit local governments from imposing higher penalties than what is provided for analogous state law

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107 See Logan, *supra* note 3, at 1448-51 (describing localities' "aggressive use of the criminal law"); Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837, 870 (2020) (describing the broadening of criminal liability through the local expansion of strict liability criminal offenses); Fissell, *supra* note 103, at 1140-42; *see also infra* notes 328–357 (giving examples of various offenses criminalized as a matter of local law).

108 Logan, *supra* note 3, at 1426-28.

109 Connecticut, Indiana, and Wisconsin prohibit local governments from enacting *any* criminal ordinances (which means locally defined offenses are mere civil infractions). *See supra* note 106. Massachusetts and Texas only permit local governments to impose a criminal fine (though Texas has one exception for laws regulating "sexually oriented businesses"). MASS. GEN. LAWS ch. 40, § 21 (2024); TEX. LOC. GOV'T CODE ANN. § 54.001 (West 2023); TEX. LOC. GOV'T CODE ANN. § 243.001 (West 2023); Commonwealth v. Lammi, 435 N.E.2d 360, 362 (Mass. 1982). Eighteen additional states limit the permissible term of imprisonment to 90 days or fewer. ALASKA STAT. § 29.25.070(a) (2024); FLA. STAT. ANN. § 162.22 (West 2024); IOWA CODE ANN. §§ 364.3, 903.1 (West 2024); LA. STAT. ANN. § 33:362(b) (2024); MICH. COMP. LAWS § 66.2(5) (2024) (except for certain vehicular offenses and violations similar to state offenses); MINN. STAT. § 412.231 (2024); MISS. CODE ANN. § 21-13-1 (2024); MO. ANN. STAT. § 77.590 (West 2024); N.C. GEN. STAT. §§ 14-4, 15A-1340.23 (2024); N.D. CENT. CODE § 40-05-06 (2023); N.H. REV. STAT. ANN. § 49-C:31 (2024); N.J. STAT. ANN. § 40:49-5 (West 2024); N.M. STAT. ANN. § 3-17-1 (West 2024) (except for DWI offenses); 53 PA. CONS. STAT. § 13131 (2024); 45 R.I. GEN. LAWS § 45-6-2 (2024); S.C. CODE ANN. § 5-7-30 (2024); S.D. CODIFIED LAWS § 9-19-3 (2024); TENN. CODE ANN. § 6-54-306(a) (West 2024); W. VA. CODE § 8-11-1(a)(2) (2024). Just twelve states authorize local governments to sentence individuals for up to a year. ARK. CODE ANN. §§ 14-55-501, 502 (West 2024); COLO. REV. STAT. ANN. § 13-10-113(1)(a) (West 2024); DEL. CODE ANN. tit. 22, § 802 (West 2024); HAW. REV. STAT. §§ 46-1.5, 706-663 (2024); Junction City v. Cadoret, 946 P.2d 1356, 1358 (Kan. 1997) (striking down a specific ordinance carrying a one year sentence due to conflict with state law, but allowing such ordinances to stand generally); KY. REV. STAT. ANN. §§ 83A.065, 532.090 (West 2024); N.Y. TOWN LAW § 135 (McKinney 2024); N.Y. PENAL LAW § 70.15 (McKinney 2024); Portland v. Dollarhide, 714 P.2d 220, 226-27 (Or. 1986) (striking down local ordinance that imposed a higher mandatory minimum than state law provided for a comparable offense); VA. CODE ANN. §§ 15.2-1429, 18.2-11 (2024); VT. STAT. ANN. tit. 24, § 1974(a)(2) (2024); WASH. REV. CODE ANN. § 35.27.370(14) (2024). The remaining fifteen states limit local misdemeanor penalties to a maximum of six months in jail.

110 For discussions of preemption of criminal ordinances in these states, see City of Atlanta v. Hudgins, 19 S.E.2d 508, 511 (Ga. 1942); State v. Felder, 748 A.2d 163, 164-65 (N.J. Super. Ct. App. Div. 2000); Richardson v. City of Honolulu, 868 P.2d 1193, 1207-09 (Haw. 1994); O'Connell v. City of Stockton, 162 P.3d 583, 586-90 (Cal. 2007); State v. Tenore, 185 S.E.2d 644, 649 (N.C. 1972).

violations.[111] This means that if a state decides to lower the penalties for a particular violation (or decriminalize the conduct entirely), local governments must necessarily do the same.[112]

To be sure, a small number of states take a decidedly hands off approach that gives local governments considerable leeway to shape their own criminal codes. In Colorado, for example, local governments can enact whatever criminal laws they wish, irrespective of whether the conduct at issue already is criminal as a matter of state law.[113] They can impose penalties of up to a year in jail.[114] And importantly, penalties for local ordinance violations can be

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111 ALASKA STAT. § 29.25.070(f) (2024); KY. CONST. § 168; *see also* State v. Loyd, 655 N.W.2d 703, 705-06 (Neb. 2003) (explaining that the controlling state criminal statute "does not give municipalities the power to enact ordinances with penalties that differ from the statute"); State v. Reyes, 203 P.3d 708, 711 (Idaho Ct. App. 2008) (holding that when a city ordination "is in direct conflict with the state statute . . . the state statute controls, and the city ordinance is unconstitutional"); Thomas v. State, 614 So. 2d 468, 470 (Fla. 1993) ("While a municipality may provide a penalty less severe than that imposed by a state statute, an ordinance penalty may not exceed the penalty imposed by the state."); Strout v. City of Virginia Beach, 596 S.E.2d 529, 530 (Va. App. 2004) ("We cannot harmonize the local and state provisions because the Virginia Beach ordinance establishes a penalty which exceeds the penalty 'prescribed by general law for' the 'like' offense."); Cook v. City of Pascagoula, 83 So. 305, 306 (Miss. 1919) ("[T]he penalty to be imposed upon conviction in each case by the municipality is the same penalty imposed by the state for conviction in like cases."); City of Fargo v. Little Brown Jug, 468 N.W.2d 392, 396 (N.D. 1991) (allowing variations in penalties imposed by municipal ordinances only when lesser than state law penalties); City of N. Charleston v. Harper, 410 S.E.2d 569, 570-71 (S.C. 1991) ("Local governments may not enact ordinances that impose greater or lesser penalties than those established by [state law]."); Allgood v. Larson, 545 P.2d 530, 531 (Utah 1976) (limiting the state's grant of authority to municipalities to areas not in conflict with the state's general law); *see also* Ford v. City of Hot Springs, 743 S.W.2d 394, 395 (Ark. 1988) (providing that municipal penalties may be neither greater than nor less penalties prescribed by state statutes); City of Portland v. Dollarhide, 714 P.2d 220, 228 (Or. 1986) (prohibiting both lower penalties than state minimums as well as higher penalties than state maximums).

112 South Carolina and Arkansas take an alternative approach to reach this outcome. In these states, local governments can promulgate local analogues to state criminal statutes—and prosecute them in municipal courts—but they cannot define new crimes, expand the scope of criminal liability, or alter the attendant penalties in any way. *See* Beachfront Ent., Inc. v. Town of Sullivan's Island, 666 S.E.2d 912, 914 (S.C. 2008) (invalidating a criminal penalty for smoking in places where smoking was not illegal under state law); Palmetto Princess, LLC v. Town of Edisto Beach, 631 S.E.2d 76, 77 (S.C. 2006) (holding that the state constitution prevented local governments from making an act a crime that was not a crime under state law); *Ford*, 743 S.W.2d at 395 ("[Localities] are authorized to prohibit and punish any act which the laws of this State make a misdemeanor, and to prescribe penalties for all offenses in violating any such ordinance, provided the penalties are neither greater than nor less than those penalties prescribed for similar offenses by state statutes.").

113 *See* People v. Wade, 757 P.2d 1074, 1077 (Colo. 1988) ("Indeed, to find that a home rule city's penal ordinances must share the state's so-called 'philosophy in sentencing' would diminish, to a large degree, the independence and self-determination vested in those cities by the constitution.").

114 COLO. REV. STAT. § 13-10-113(1)(a) (2024).

substantially higher than what is permitted under analogous state laws.[115] But these examples are exceptions to the rule.

2. Policing

Policing is far more decentralized—but states nevertheless play an important role in ensuring the quality of local police. The United States has nearly 12,000 municipal police departments, and just over 3,000 county sheriffs' offices.[116] The vast majority of these agencies are small departments with just a couple dozen officers at most.[117] Towns with just a few hundred residents often proudly claim to have their own local police.[118] And as Nadav Shoked points out, state law says comparatively little about what local police do.[119] Local officials typically get to decide how many officers to hire, and where to deploy them.[120] They decide what offenses to prioritize, what programs to launch, and what units to staff.[121] At the end of the day, local cultures and norms go a long way in shaping the kind of policing that communities get.

As a legal matter, however, local police departments are creatures of the state. "[L]ocal powers," writes Shoked, "are never inherent," and that is true for local policing as well.[122] State enabling acts authorize local governments to establish their own departments.[123] And perhaps more importantly, it is *state law* that authorizes local police officers to make stops, conduct searches, issue commands, and use force.[124] In all but a handful of states with more robust home rule protections, states have near-plenary authority to regulate the conduct of local police.[125]

New Jersey stands out for the degree to which the state has exercised centralized control over local police. A 1970 law designates the Attorney

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115 *See, e.g.*, People v. Hizhniak, 579 P.2d 1131, 1132 (Colo. 1978) (upholding a local ordinance that imposed up to ninety days jail time for speeding violations, despite the fact that state law classified speeding as a non-criminal infraction punishable by a small fine).

116 Ponomarenko, *supra* note 1, at 203 n.1; *see also* GARDNER & SCOTT, *supra* note 1, at 11-13.

117 Ponomarenko, *supra* note 1, at 205.

118 *Id.*; *see also* GARDNER & SCOTT, *supra* note 1, at 11-13.

119 Shoked, *supra* note 100, at 1295.

120 *See id.* at 1311 (noting that just two states regulate the size of (some) police departments within their borders).

121 *Id.* at 1311-12.

122 *Id.* at 1294.

123 *See id.* at 1302 ("States have adopted enabling acts explicitly and specifically empowering local governments to establish police forces.").

124 *See* Rachel Harmon, *Law and Orders*, 123 COLUM. L. REV. 943, 952 (2023) ("Police officers get their authority from state law. That law gives officers limited coercive powers to use as they patrol the streets, answer calls, and try to prevent and discover crimes.").

125 *See infra* notes 359–393, discussing the intersection between home rule and states' ability to control the conduct of local police.

General as the "chief law enforcement officer of the State" with broad authority to direct the conduct of local officers and departments.[126] The Attorney General can direct local departments to change their policies and practices on any topic—a power the Attorney General's office has used to issue dozens of comprehensive, binding regulations on everything from police use of force, to the use of various surveillance technologies, to the conduct of internal affairs investigations.[127] Even more striking is the Attorney General's near-unreviewable authority to take over (or "supersede") a local police department—or to take over a specific function within the department, such as internal affairs.[128] The Attorney General has used this authority on at least three occasions, most recently in 2023, in response to widespread allegations of corruption and excessive force on the part of the Patterson Police Department.[129]

Outside of New Jersey, state oversight is more piecemeal—but states nevertheless play a consistently important role. All fifty states, for example, have established Peace Officer Standard and Training (POST) boards, which establish the qualifications and training requirements that an individual must meet in order to be licensed as a police officer in the state.[130] In every state except Rhode Island, the POST is also authorized to suspend or revoke an officer's license if the officer is convicted of a crime, and in most states, for serious misconduct as well.[131] Notably, some of the more conservative states—like Florida, Arizona, and Georgia—have for many years maintained some of the most robust decertification regimes, disqualifying officers for various

126 N.J. STAT. ANN. § 52:17B-98 (West 2024).

127 N.J. STAT. ANN. § 52:17B-4(d) (West 2024); *see also Resources: AG Directives*, N.J. OFFICE OF THE ATT'Y GEN., https://www.njoag.gov/resources/ag-directives [https://perma.cc/FT3S-S3BB] (last visited Feb. 10, 2024) (listing the various types of regulations put forward by the Attorney General's office).

128 *See* N.J. OFF. OF THE ATT'Y GEN., LAW ENFORCEMENT DIRECTIVE NO. 2022-14, at 11 (2022), https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2022-14_Transparency-in-Internal-Affairs-Investigations.pdf [https://perma.cc/B7BU-TVER] ("The Attorney General may supersede and take control of an entire law enforcement agency, may supersede in a more limited capacity and take control of the internal affairs function of an agency, or may supersede and take control of a specific case or investigation.").

129 Press Release, Matthew J. Platkin, N.J. Att'y Gen., Attorney General Platkin Assumes Control of Paterson Police Department (Mar. 27, 2023), https://www.njoag.gov/attorney-general-platkin-assumes-control-of-paterson-police-department [https://perma.cc/9YA9-VKYF].

130 The actual names for these organizations vary considerably across state lines, though among policing scholars and officials they often are colloquially referred to as state POSTs. *See* Rau, Buchanan, Dixon & Goff, *supra* note 70, at 1352.

131 *See id.* at 1381 & n.201 (citing that all forty-seven states, other than California, Rhode Island, and New Jersey, have decertification authority). California and New Jersey have since introduced decertification regimes. CAL. PENAL CODE § 13510.8 (West 2024); N.J. STAT. ANN. § 52:17B-66.

forms of misconduct from perjury to excessive force.[132] A number of states also authorize their POSTs to issue binding regulations on various law enforcement practices. Minnesota's POST, for example, has issued policies on a range of topics, including vehicle pursuits, confidential informants, eyewitness lineups, automated license plate readers, and drones.[133]

State legislatures also have enacted dozens of statutes regulating (one might say, "preempting") specific law enforcement practices. After the murder of George Floyd, at least twenty states imposed tighter restrictions on officer use of force—with California, Colorado, Illinois, Maryland, Massachusetts, and Washington taking a notably comprehensive approach.[134] At least two dozen states have laws on the books governing the use of various surveillance technologies, such as drones or license plate readers.[135] Eight states require officers to use body cameras—and many more set rules for how they must be used.[136] Nearly half of all states mandate data collection on traffic stops and (at least more serious) use of force incidents.[137] Virginia and

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132 *See* THE JUST. COLLABORATORY AT YALE L. SCH., POLICE OFFICER STANDARDS AND TRAINING COMMISSIONS: A STUDY IN VARIABILITY (2023), https://static1.squarespace.com/static/60a67985a6f31b7cb71aeab0/t/63f512810e34ba5115a0459e/1677005441790/POSTs+-+A+Study+in+Variability.pdf [https://perma.cc/P3KE-PM8Y] (listing Florida as one of the stronger states whose laws it reviewed). For a 2013 study reviewing the total number of officers decertified in each state and finding that on a per-officer basis, Georgia, Arizona, Idaho, and Oregon had some of the highest decertification rates, see Loren T. Atherley & Matthew J. Hickman, *Officer Decertification and the National Decertification Index*, 16 POLICE Q. 420, 431 (2013).

133 *Model Policies*, MINN. BD. OF PEACE OFFICER STANDARDS & TRAINING, https://mn.gov/post/cleosadministrators/modelpolicies [https://perma.cc/Y6G2-PUBW] (last visited Feb. 11, 2024).

134 *Law Enforcement Legislation | Significant Trends 2022*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 22, 2022), https://www.ncsl.org/civil-and-criminal-justice/law-enforcement-legislation-significant-trends-2022 [https://perma.cc/9A36-9HH3].

135 ARK. CODE ANN. § 12-12-1801 (2024); CAL. VEH. CODE § 2413 (West 2024); CAL. CIV. CODE §§ 1798.29, 1798.90.5 (West 2024); COLO. REV. STAT. § 24-72-113 (2024); GA. CODE ANN. § 35-1-22 (2024); ME. REV. STAT. ANN. tit. 29-A, § 2117-A (2024); MD. CODE ANN., PUB. SAFETY § 3-509 (West 2024); MINN. STAT. ANN. §§ 13.82, 13.824, 626.8472 (West 2024); MONT. CODE ANN. § 46-5-117-19 (West 2023); N.H. REV. STAT. ANN. §§ 236:130, 261:75-b (2023); N.C. GEN. STAT. §§ 20-183.30–.32 (2024); TENN. CODE ANN. §§ 55-10-302, 10-7-504(a)(32) (2024); UTAH CODE ANN. § 41-6a-2001-05 (West 2024); VT. STAT. ANN. tit 23, §§ 1607–08 (2024). Twenty states have so far passed legislation addressing the use of unmanned aerial vehicles (UAVs)/unmanned aircraft systems (UASs) by law enforcement: Alaska, Florida, Indiana, Illinois, Iowa, Kentucky, Maine, Minnesota, Montana, Nevada, North Carolina, North Dakota, Oregon, Tennessee, Texas, Utah, Vermont, Virginia, and Wisconsin. *Current Unmanned Aircraft State Law Landscape*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 27, 2023), https://www.ncsl.org/transportation/current-unmanned-aircraft-state-law-landscape [https:// perma.cc/K8VV-GD3E].

136 *Body-Worn Camera Laws Database*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 30, 2021), https://www.ncsl.org/civil-and-criminal-justice/body-worn-camera-laws-database [https://perma.cc/C9S9-JE9U] (noting that thirty-four states and the District of Columbia have laws regulating the use of body worn cameras).

137 *Traffic Stop Data*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 12, 2021), https://www.ncsl.org/civil-and-criminal-justice/traffic-stop-data [https://perma.cc/Y3MX-7CZU]

Oregon have taken direct aim at pretextual traffic enforcement by limiting the use of low-level equipment stops.[138] Oregon, Minnesota, and Washington preempt various provisions in local collective bargaining agreements that make it harder for agencies to hold officers accountable.[139] Indeed, Oregon went a step further by establishing a state-wide disciplinary matrix for several categories of misconduct.[140] One could go on.

To be sure, plenty of states have done precious little with the authority they have. Both I and others over the years have compiled long lists of practices that states could do more to regulate—but don't.[141]

And of course, states also have at times interfered with police discipline in less helpful ways. One set of laws that have drawn particularly stark criticism have been so-called Law Enforcement Officers Bill of Rights (or LEOBORs), which afford officers various procedural rights during disciplinary investigations and hearings.[142] Some states have shielded police records from public scrutiny (though others have adopted broad transparency laws mandating their release).[143] And, as discussed in Part I, a small number

("At least 23 states and the District of Columbia have laws related to or requiring collection of data when an individual is stopped by law enforcement."); *Use of Force Data and Transparency Database*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 12, 2021), https://www.ncsl.org/civil-and-criminal-justice/use-of-force-data-and-transparency-database [https://perma.cc/6YJE-F6XX] ("At least 21 states require data collection on some aspect of law enforcement use-of-force incidents.").

138 *See* VA. CODE ANN. § 46.2-1003 (West 2024) (outlawing the use of certain defective or unsafe equipment on highways but prohibiting law enforcement officers from stopping motor vehicles on these grounds); OR. REV. STAT. ANN. § 810.412 (West 2024) (prohibiting stops for certain equipment violations).

139 *See* 2021 Or. Laws ch. 541, §§ 2–3 (stating that the requirements imposed on matters concerning alleged misconduct by law enforcement officers are not subject to collective bargaining); 2021 Wash. Sess. Laws. 152 (requiring the inclusion of a state-defined arbitrator selection procedure in collective bargaining agreements that provide for arbitration as a means of resolving grievances for law enforcement disciplinary actions); MINN. STAT. § 626.892 (2023) (requiring the inclusion of a state-defined arbitrator selection procedure in the grievance procedures for all collective bargain agreements covering peace officers); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1198 (2017) (finding that collective bargaining agreements "unreasonably interfere with or otherwise limit the effectiveness of mechanisms designed to hold police officers accountable for their actions").

140 See 2021 Or. Laws Ch. 541 (H.B. 2930) (mandating that the disciplinary action imposed by an arbitrator for a finding of law enforcement misconduct be consistent with the state's "discipline matrix," a grid used to determine the requisite level of discipline for various forms of misconduct). The current matrix is available here: OR. COMM'N ON STATEWIDE LAW ENF'T STANDARDS OF CONDUCT & DISCIPLINE, GUIDE TO THE LESC RULES (2023), https://justice.oregon.gov/lesc/documents/LESC_2023-02_Guide_to_the_LESC_Rules.pdf [https://perma.cc/SBE8-M8XL].

141 *See, e.g.*, Ponomarenko, *supra* note 1, at 267; Harmon, *supra* note 70, at 812-14; Friedman, Harmon & Heydari, *supra* note 72, at 1541-56; Simmons, *supra* note 72, at 376-80.

142 Su, Roy & Davidson, *supra* note 8, at 670 (noting that LEOBOR laws "have drawn scrutiny in the wake of the killing of George Floyd").

143 Kallie Cox & William H. Freivogel, *Analysis of Police Misconduct Record Laws in All 50 States*, ASSOCIATED PRESS (May 12, 2021, 10:07 AM), https://apnews.com/article/business-laws-police-

of states have in recent years taken aim at civilian review boards, as well as local efforts to shift funds away from the police.[144]

Still, whether measured in terms of volume or impact, these oft-criticized measures are but a tiny slice of the "law of the police" in the fifty states—and indeed, even in the states in which these laws have gone into effect.[145] To the extent that states have used their authority, it has generally been directed at mitigating various policing harms.

3. Prosecution

The states' record on prosecution is decidedly more mixed—but it also is not limited to simply "preempting" local reform. The United States has more than 2,300 prosecutors' offices, the vast majority of which are elected at the county level.[146] As Carissa Hessick and Rick Su observe, "local prosecutor[s] straddle[] . . . the vertical divide between the state government and its local subdivisions."[147] They are state officials in some respects, local officials in other—and often a mix of the two. They operate locally but are tasked with enforcing state law. They are (often) accountable to local voters—but also are subject to various forms of supervision by the state.[148]

It helps to begin with the outliers. Three states—Alaska, Delaware, and Rhode Island—maintain a single state-wide system of prosecution.[149] In two other states, Connecticut and New Jersey, prosecutors operate at the county level, but are appointed by state officials, and are removable by state officials as well.[150] Both states have adopted a variety of measures to provide more transparency into charging practices, to minimize overcharging, and to reduce

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reform-police-government-and-politics-d1301b789461adc582ac659c3f36c03c [https://perma.cc/GKE2-9MDW].

144 *See* Su, Roy & Davidson, *supra* note 8, at 668-670 (describing Arizona's and Tennessee's laws restricting civilian review boards, as well the enactment of "anti-defunding" legislation by four states to prevent localities from reducing police funding).

145 Between 2020 and 2022, states considered more than 4,500 bills—and passed hundreds of them—on a variety of police reform topics. NAT'L CONF. OF STATE LEGISLATURES, supra note 134. For example, at least twenty states tightened up their use of force standards, at least thirty states strengthened their decertification regimes, five states gave state AGs new authority to investigate allegations of misconduct, twenty-six states imposed new data collection requirements, and much else. *Id.* By way of comparison, just four states passed "anti-defunding" bills, and just two states imposed new limits on civilian oversight of the police. Su, Roy & Davidson, *supra* note 8, at 668, 670.

146 Hessick & Morse, *supra* note 28, at 1548, 1550.

147 Hessick & Su, *supra* note 17, at 1683.

148 *Id.* at 1689.

149 ALASKA STAT. § 44.23.020(b)(4) (West 2024); DEL. CODE ANN. tit. 29, § 2504(6) (2024); 42 R.I. GEN. LAWS § 42-9-4 (2024).

150 CONN. GEN. STAT. §§ 51-278(b)(1)(B), (b)(5) (2024); N.J. STAT. ANN. §§ 2A:158-1, 52:17B-110 (West 2024).

the reliance on bail.[151] In New Jersey, for example, the state attorney general has used her near-plenary authority over county prosecutors to issue binding directives on a variety of topics—e.g., requiring prosecutors to seek waiver of mandatory minimums,[152] establishing clear rules with respect to the use of jailhouse informants,[153] and imposing uniform policies on the collection and disclosure of exculpatory or impeachment evidence to the defense before a plea offer is made.[154]

In the remaining 45 states, prosecution is far more decentralized—but state law nevertheless gives state executive officials considerable authority to step in if they believe that local prosecutors are not doing their jobs. In recent years, for example, critics of the "new preemption" have objected to various bills giving state attorneys general the authority to prosecute various crimes that local officials will not.[155] But this authority is entirely commonplace throughout the fifty states. Virtually every state, for example, gives the attorney general original jurisdiction over at least some criminal matters.[156] And at least thirty-five states authorize the state attorney general to file charges in *any* criminal case (over the objection of a local district attorney).[157]

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151 *See* 2023 Conn. Acts no. 23-26 (Reg. Sess.) (providing for the collection of detailed data on criminal cases and requiring prosecutors to appear annually before a commission to answer questions on that data); N.J. STAT. ANN. §§ 52:17B-103, -107 (West 2024) (granting the attorney general the power to consult with and—when needed, to supersede—county prosecutors); Yurick v. State, 875 A.2d 898, 903 (N.J. 2005) (describing the attorney general's supersedure power as "intended to ensure the proper and efficient handling of the county prosecutors' 'criminal business'").

152 N.J. OFF. OF THE ATT'Y GEN., LAW ENFORCEMENT DIRECTIVE NO. 2021-04 (2021), https://www.nj.gov/oag/newsreleases21/AG-Directive-2021-4_Mandatory-Minimum-Drug-Sentences.pdf [https://perma.cc/D2DL-TWUA].

153 N.J. OFF. OF THE ATT'Y GEN., LAW ENFORCEMENT DIRECTIVE 2020-11 (2020), https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-11_Jailhouse-Informants.pdf [https://perma.cc/KTG5-EPUK].

154 N.J. OFF. OF THE ATT'Y GEN., LAW ENFORCEMENT DIRECTIVE 2019-6 (2019), https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2019-6.pdf [https://perma.cc/G67X-S2KB].

155 Goldrosen, *supra* note 17, at 153.

156 This often includes public corruption, benefits fraud, voter or election fraud, consumer fraud, and environmental protection. Barkow, *supra* note 104, at 546-49.

157 In some states, attorneys general can do so on their own initiative; in other states they are only permitted to step in at the request of one or more elected officials, for example the governor, state legislators, judges, or other local officials who are unhappy with a district attorney's handling of, or declination to prosecute, a particular case. *See, e.g.*, ALA. CODE § 36-15-12 (2024); ARIZ. REV. STAT. ANN. § 41-193(A)(2) (2024); CAL. CONST. art. V, § 13; COLO. REV. STAT. § 24-31-101(1)(b) (2024); CONN. GEN. STAT. ANN. § 51-277(d)(1) (2024); GA. CONST. art. V, § 3, ¶ 4; GA. CODE ANN. § 45-15-35 (2024); IDAHO CODE § 31-2227(3) (2024); IOWA CODE § 13.2(1)(b) (2024); KAN. STAT. ANN. § 75-702(b) (2024); KY. REV. STAT. ANN. §§ 15.200, .210 (West 2024); LA. CONST. art. IV, § 8; LA. CODE CRIM. PROC. ANN. art. 62(B) (2024); ME. REV. STAT. tit. 5, § 199 (2024); MD. CONST. art. V, § 3(a)(2); MICH. COMP. LAWS § 14.101 (2024); MINN. STAT. § 8.01; MONT. CODE ANN. § 2-15-501(5)-(6) (2024); NEB. REV. STAT. §§ 84-203 to -204 (2024); N.J. REV. STAT. § 52:17B-107 (2024); N.M. STAT. ANN. §§ 8-5-2 to -3 (West 2024); N.Y. EXEC. LAW § 63(1) to (3)

In at least twenty-three states, the attorney general also is authorized to take over ("supersede") an existing criminal case from a local district attorney and prosecute it on the state's behalf.[158] State officials have traditionally used their supersession powers sparingly,[159] but there are notable exceptions on both sides of the political divide.[160]

States also have occasionally passed laws regulating specific practices within county attorneys' offices, though state oversight of prosecution is much more limited when compared to state supervision of local police. Both Minnesota and Oregon, for example, require county prosecutors to develop

(McKinney 2024); N.D. CENT. CODE § 54-12-02 (2023); OHIO REV. CODE ANN. §§ 109.02, 2939.10 (LexisNexis 2024); OKLA. STAT. tit. 74, § 18b(A)(3) (2024); OR. REV. STAT. §§ 180.060, .070 (2024); 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4) (West 2012); S.C. CONST. art. V, § 24; S.C. CODE ANN. § 1-7-40 (2024); S.D. CODIFIED LAWS § 23-3-3 (2024); State v. Robertson, 886 P.2d 85, 88-91 (Utah Ct. App. 1994), *aff'd*, 924 P.2d 889 (Utah 1996); VT. STAT. ANN. tit 3, §§ 152-153 (2024); Off. of State's Att'y Windsor Cnty. v. Off. of Att'y Gen., 409 A.2d 599, 601-02 (Vt. 1979); WASH. REV. CODE § 43.10.232 (2024); WIS. STAT. § 165.25(1m) (2024); WYO. STAT. ANN. § 9-1-603(c) (2024).

158 *See, e.g.*, ALA. CODE § 36-15-14 (2024); ARIZ. REV. STAT. ANN. § 41-193(A)(2) (2024); CAL. CONST. art. V, § 13; CAL. GOV'T CODE § 12550 (West 2024); KY. REV. STAT. ANN. § 15.200 (West 2024; LA. CONST. art. IV § 8; LA. CODE CRIM. PROC. ANN. art. 62(B) (2024); ME. REV. STAT. tit. 5, § 199 (2024); MASS. GEN. LAWS ch. 12, § 27 (2024); MICH. COMP. LAWS § 14.101 (2024); MONT. CODE ANN. § 2-15-501(5)-(6) (2024); NEB. REV. STAT. § 84-203 (2024); NEV. REV. STAT. § 228.120(3) (2024); N.J. REV. STAT. § 52:17B-107 (2024); N.Y. EXEC. LAW § 63(2) (McKinney 2024); N.D. CENT. CODE. § 54-12-04 (2023); OHIO REV. CODE ANN. § 109.02 (LexisNexis 2024); OKLA. STAT. tit. 74, § 18b(A)(3) (2024); OR. REV. STAT. § 180.070 (2024); 71 PA. STAT. AND. CONS. STAT. ANN. § 732-205(a)(4) (West 2012); S.C. CONST. art. V, § 24; UTAH CODE ANN. § 67-5-1 (LexisNexis 2024); State v. Robertson, 886 P.2d 85, 91 (Utah Ct. App. 1994), *aff'd*, 924 P.2d 889 (Utah 1996); VA. CODE § 2.2-511(A); WASH. REV. CODE § 43.10.090 (2024); W. VA. CODE ANN. § 5-3-2 (LexisNexis 2024). In several states, the attorney general or another state official can assign a prosecutor from a different county, or appoint a special prosecutor. *E.g.*, FLA. STAT. § 27.14 (2024). For a discussion on the authority granted to some attorneys general to supersede local prosecutors, see generally Barkow, *supra* note 104, and Tyler Q. Yeargain, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95 (2018).

159 Barkow, *supra* note 104, at 551-56 (surveying states and concluding that "[m]ost state-level prosecutors who possess broad jurisdictional grants of power" use that power sparingly).

160 The Alabama Attorney General's Office, for example, has long maintained a violent crimes division that brings cases at the request of victims "who have been turned away by local prosecutors." *Id.* at 567. At least five jurisdictions give state officials exclusive jurisdiction to prosecute certain cases involving deaths at the hands of police. CAL. GOV'T CODE § 12525.3 (West 2024); CONN. GEN. STAT. ANN. § 51-277a (West 2024); DEL. CODE. ANN. tit. 29, § 2553 (2024); ME. STAT. tit. 5, § 200-A (2024); N.Y. EXEC. LAW § 70-b (McKinney 2024). In 2023, Arizona Governor Katie Hobbs stripped local DAs of their authority to bring charges to enforce the state's 15-week abortion ban—giving exclusive jurisdiction over abortion-related prosecutions to the state's famously "pro-choice" attorney general. Ariz. Exec. Order No. 2023-11 (June 22, 2023) https://azgovernor.gov/sites/default/files/executive_order_2023_11_0.pdf [https://perma.cc/YNP5-L3XC]. Governors in both Florida and New York have yanked death penalty cases from local district attorneys who promised not to request the death penalty in any death-eligible case. *See* Johnson v. Pataki, 691 N.E.2d 1002, 1003 (N.Y. 1997); Ayala v. Scott, 224 So.3d 755, 756-57 (Fla. 2017).

and publish their policies on charging decisions and plea negotiations.[161] Colorado requires all county prosecutors to maintain "Brady lists" of police officers who have engaged in misconduct that could undermine their credibility as witnesses, and to establish procedures for sharing that information with defense attorneys.[162] More than a dozen states mandate "open-file discovery" which forces local prosecutors to share whatever evidence they have before a plea offer is made.[163]

4. The Rest of the System

Although this Article focuses primarily on policing, prosecution, and criminal lawmaking, it is useful to take a quick sweep through the other parts of the system, which also at times have been the subject of calls for more local control. The judges who oversee criminal trials, approve plea bargain agreements, and impose sentences are overwhelmingly local—as are the jurors who adjudicate guilt. State-level charges typically are brought in county courts, and in twenty-nine states, trial court judges are elected by the voters of the county in which they sit.[164] A great deal of criminal adjudication, however, is more local still. Alexandra Natapoff estimates that nearly 3.5 million misdemeanor cases are filed each year in the nation's 7,500 municipal courts.[165]

Incarceration, meanwhile, is a shared endeavor between cities, counties, and states. Pre-trial detainees typically are held in municipal or county jails, as are individuals sentenced to less than one year.[166] Prisons are exclusively under state control.[167]

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161 OR. REV. STAT. § 8.705 (2023); MINN. STAT. § 388.051 subdiv. 3 (2023).

162 COLO. REV. STAT. § 16-2.5-502 (2024).

163 *See* Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, app. B (2016) (citing open-file policies in 17 states).

164 *See Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST. (last updated Aug. 20, 2024), https://brennancenter.org/judicial-selection-map [https://perma.cc/T2YY-BGCA]. In seven additional states—Alaska, Arizona, Colorado, Iowa, Nebraska, Utah, and Wyoming—judges initially are appointed, but must then stand for reelection at the end of their term. *Id.*

165 Natapoff, *supra* note 4, at 966, 977-78. Notably, these cases are prosecuted by *local* officials—including sometimes by local police. *Id.* at 968.

166 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14. 2024), https://www.prisonpolicy.org/reports/pie2024.html [https://perma.cc/2Q5A-GNR3].

167 *See id.* ("Prisons are facilities under state or federal control . . . ."). Notably, although local and county governments pay the lion's share of the budgets for both police and prosecutors (and county-level judges assign sentences), states pay the full costs of prisons—a phenomenon that Frank Zimring and Gordon Hawkins famously dubbed the "correctional free lunch" because it allows local actors to ignore the full costs of the charges they bring and the sentences they impose. FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 140 (1991).

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Two things should be evident from this brief overview of criminal justice policymaking in the fifty states. First, the system already is *highly* decentralized. States have the exclusive authority to define felony crimes, and to fix the penalties that attach. But in most jurisdictions, city councils draft their own local criminal codes; local police decide whom to arrest; locally elected prosecutors decide whom to charge; locally empaneled juries hear the cases that proceed to trial; and locally elected judges decide what sentences to impose. Second, the structure of state oversight with respect to these local discretionary functions differs considerably from state to state. Some states have taken a decidedly hands off approach. Other states, however, have displaced local policymaking in a variety of ways—often in furtherance of what most would describe to be broadly reformist goals.

B. *The Impossibility of a Neutral Critique*

The preceding discussion raises an obvious question for proponents of criminal justice localism: exactly how much of the prevailing structure is inconsistent with their calls for more local control? Should states scrap their police licensing regimes to give local communities the option to hire whatever officers they wish? Are state regulations of police surveillance technologies simply an "undemocratic check" on local residents' ability to decide for themselves just how much privacy they are willing to forgo? Should local governments be given carte blanche to craft their own criminal codes? Should New Jersey rethink its centralized system of police and prosecutor oversight from the bottom up?

Some localism scholars likely would answer yes to some or all of these questions. Kleinfeld, Bibas, Bierschbach, and Ouziel, for example, have all argued in favor of giving local governments the power to craft their own criminal codes (including felonies) and to determine the penalties associated with those offenses.[168] Gulasekaram, Su, and Villazor acknowledge that their stance in favor of "immigration localism" would likely be used to attack statewide "pro-sanctuary" policies in states like California and Illinois.[169] For many of these scholars, their expansive embrace of localism is premised on the notion that local decisionmaking would, *on balance*, make the system more equitable and less harsh—an argument I will return to in Section C.

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168 KLEINFELD, BIBAS & BIERSCHBACH, *supra* note 35; *see also* Bierschbach, *supra* note 64, at 1452; Ouziel, *supra* note 8, at 2323-24 (noting that "local law[making]" may be preferred for "drug sales, shootings, robberies, homicides, [and] gun brandishing").

169 Gulasekaram, Su & Villazor, *supra* note 8, at 882-93.

Others, however, have tried to distinguish the "new criminal justice preemption" from what they see as more legitimate forms of state control. Recognizing that their qualified endorsements of localism could be dismissed as an "institutional flip-flop,"[170] they have offered up a variety of seemingly "neutral" principles of intrastate federalism that would preserve much of the existing state oversight structure, while condemning those state measures that appear to stand in the way of local progressive reforms.

As the remainder of this Section makes clear, however, these arguments fail to stand up to closer scrutiny. Perhaps unsurprisingly, it simply is not possible to articulate a politically neutral theory of criminal justice localism that predictably furthers politically progressive ends.[171]

Some criticisms of the new preemption are stated at a sufficiently high level of generality that they are bound to apply with equal force to a variety of existing state laws that render the carceral system less harsh. One recent law review essay, for example, criticizes "anti-sanctuary" laws and "anti-defunding" bills on the ground that they "strip[] local residents of the ability to set policing priorities for their community" or impose "divergent partisan philosophies about criminal law enforcement on local governments."[172] The problem, of course, is that the same can be said with respect to *pro-sanctuary laws*, enacted in at least eight states, which restrict local officials from cooperating in various ways with federal immigration enforcement efforts.[173] Similarly, state laws regulating pretextual traffic stops or vehicle pursuits override the views of local residents who may prefer to give officers a *freer* hand in addressing crime.[174] Even state data collection and reporting requirements invariably dictate how officers spend at least part of their time—displacing the wishes of residents who would be happy to know less so as to give officers time to police more. New York City Mayor Eric Adams

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170 Eric Posner and Cass Sunstein use the term "institutional flip-flops" to describe judgments about institutional arrangements that "shift dramatically" depending on the substantive outcomes that these arrangements are likely to produce. Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 486 (2016).

171 On this point see Davidson, *supra* note 14, at 959.

172 Su, Roy & Davidson, *supra* note 8, at 671, 666; *see also* CAMACHO, GOLDROSEN, SU & ROY, *supra* note 17, at 10 (criticizing various laws targeting progressive prosecutors as "seeking to substitute their partisan policy objectives for the will of local voters").

173 *See* LENA GRABER & KRSNA AVILA, IMMIGRANT LEGAL RES. CTR., GROWING THE RESISTANCE: HOW SANCTUARY LAWS AND POLICIES HAVE FLOURISHED DURING THE TRUMP ADMINISTRATION 14 (2019), https://www.ilrc.org/sites/default/files/resources/2019.12_sanctuary_report-final-12.17.pdf [https://perma.cc/J36P-CV89] (summarizing statutes).

174 *See, e.g.*, Dirk VanderHart, *Bill That Would Limit Minor Traffic Stops Heads to Oregon Gov. Kate Brown*, OR. PUB. BROAD. (Mar. 3, 2022, 7:55 PM), https://www.opb.org/article/2022/03/03/bill-that-would-limit-minor-traffic-stops-heads-to-oregon-gov-kate-brown [https://perma.cc/P5LH-WV7R] (describing a proposal to restrict certain traffic stops and various arguments raised in opposition).

explained his opposition to expanded data collection requirements in precisely these terms, suggesting that officers should focus on "patrolling" over "paperwork."[175] In truth, very few of the existing constraints on local criminal justice policymaking are value neutral. State laws that decriminalize marijuana possession or sharply dial back penalties for retail theft, for example, also reflect a distinct (some might say partisan) philosophy about criminal punishment and enforcement that not everyone shares.

Others have argued that states should "limit the preemption of local discretion to setting an equity floor" to protect "state-wide interests in civil rights and civil liberties," but that states "should not prevent local governments from experimenting with equitable reform initiatives beyond the floor set by the state."[176] There are two problems with this. First, the distinction between "ceilings" and "floors" is notoriously slippery.[177] Are LEOBORs an equitable floor with respect to the procedural rights that officers must be afforded in disciplinary investigations—or are they a regulatory ceiling that prevents local governments from holding officers to account?[178] The answer necessarily turns on a set of normative judgments about how police *should* be regulated, as opposed to politically neutral principles with respect to the proper role of the state.

Second, unless the "equity floor" is pegged to some external reference point—such as an existing federal or state constitutional right—the decision to enact a more "rights-protective" regime is not politically neutral, either. And, at present, constitutional law (both state and federal) imposes remarkably few constraints on local prosecutors or police.[179] Even when it comes to officer use of force, for example, the constitutional baseline is *far*

175 Chris Sommerfeldt, *New Salvo from Adams: Tells NYPD Grads Council Pushes Paperwork Over Patrolling*, N.Y. DAILY NEWS, Dec. 30, 2023, at 5.

176 Su, Roy & Davidson, *supra* note 8, at 673; PRINCIPLES, *supra* note 13, at 26 (arguing that states should have "the ability to set regulatory floors and protect individual rights" but that local governments should in turn "retain the ability to pursue local policies that . . . are rights-protective above the state baseline").

177 On the broader problem of baselines and framing constitutional transactions, see, for example, Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002).

178 Benjamin Levin makes a similar point when it comes to various attempts to distinguish police unions from other public sector unions. *See generally* Benjamin Levin, *What's Wrong With Police Unions?*, 120 COLUM. L. REV. 1333 (2020).

179 *See* Friedman & Ponomarenko, *supra* note 42, at 1855-58, 1865-77 (describing how policing has tended to avoid restraints imposed by constitutional law); Harmon, *supra* note 70, at 768-81 (claiming both that constitutional rights alone cannot protect from police overreach); H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 86-88 (2013) (describing how existing rules present ineffective safeguards against prosecutorial misconduct).

more permissive than many of the state laws that have gone into effect in recent years.[180] On most topics, constitutional law offers no guidance at all.[181]

Attempts to distinguish the new preemption (in ostensibly "neutral" terms) fare no better when they home in on the structure of the various laws. Consider, for example, Georgia's statewide Prosecuting Attorneys Qualification Commission, which the legislature established in 2023 to investigate and remove district attorneys for various forms of misconduct, including "willful and persistent failure to carry out [their] duties."[182] The state's Republican leadership was not shy about its goals—namely to rein in the "progressive" prosecutors who had pledged not to bring charges for marijuana possession and other low-level offenses.[183] What often gets lost in debates over the measure, however, is that the *original* proposal for a state oversight commission had, in fact, been introduced by state Democrats in 2020, in response to a rural district attorney's refusal to bring charges in the killing of Ahmaud Arbery, an African American jogger who had been shot by three white men who wrongly suspected him of being a burglar.[184] In fact, the Georgia commission is broadly similar in its basic structure to New York's Commission on Prosecutorial Conduct—established in 2021, with strong support from civil liberties groups—to investigate allegations of misconduct by the state's elected DAs.[185]

Some critics have focused more narrowly on the fact that the Georgia law and others like it specifically target prosecutors who enact policies that deprioritize low-level offenses, or categorically pledge not to enforce specific state laws.[186] Georgia made these prosecutors eligible for removal. Iowa and

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180 Friedman, Harmon & Heydari, *supra* note 72, at 1567-68.

181 Harmon, *supra* note 70, at 768-81.

182 GA. CODE ANN. § 15-18-32 (2024). Texas revised its DA removal statute to expressly provide for removal of district attorneys who adopt formal non-enforcement policies. TEX. LOC. GOV'T CODE ANN. § 87.011(3)-(5) (West 2023).

183 Sam Levine, *Georgia Governor Signs Bill that Allows Removal of District Attorneys*, GUARDIAN (May 5, 2023), https://www.theguardian.com/us-news/2023/may/05/georgia-brian-kemp-bill-remove-local-prosecutors [https://perma.cc/2L4Z-Y46C].

184 H.B. 1214, 155th Gen. Assemb., Reg. Sess. (Ga. 2020); Stephen Fowler, *What Do the Proposed Georgia Prosecutor Oversight Bills Do? An Explainer*, CURRENT (Mar. 13, 2023), https://thecurrentga.org/2023/03/13/what-do-the-proposed-georgia-prosecutor-oversight-bills-do-an-explainer/ [https://perma.cc/89FN-KTK7].

185 Members of both commissions are appointed by the governor as well as house and senate leadership in the respective states; both have the authority to investigate allegations of misconduct against elected county prosecutors. N.Y. JUD. LAW § 499-A, -C (Consol. 2023). One notable difference is that in New York, the ultimate authority to remove a local DA rests with the governor. N.Y. CONST. art. XIII, § 13(b). On advocacy support for the commission, see *Coalition of Exonerees and State Lawmakers Urge Gov. Cuomo to Sign Bill that Would Establish Commission on Prosecutorial Conduct*, INNOCENCE PROJECT (Aug. 13, 2018), https://innocenceproject.org/prosecutorial-conduct-commission [https://perma.cc/4T36-2P2E].

186 *See, e.g.*, CAMACHO, GOLDROSEN, SU & ROY, *supra* note 17, at 12.

Tennessee authorized the state attorney general to prosecute (or appoint a special prosecutor) where the local district attorney refuses to enforce state law.[187] Critics argue that these laws override the preferences of local voters who elected the "reform" DAs in the first place—and that they impermissibly interfere with local prosecutors' discretion to decide which crimes to prioritize with the limited resources they have.[188] The problem, again, is that these same arguments can easily be deployed toward politically opposite ends. For example, when dozens of county sheriffs and prosecutors signed on to "Second Amendment sanctuary" resolutions pledging not to enforce state gun laws, Democratic governors and attorneys general were uniformly dismissive of these efforts, pledging to use state resources to see that the laws are enforced.[189]

There are, of course, plenty of *other* grounds on which to criticize many of these laws. Prosecutor preemption bills, for example, ignore the fact that district attorneys simply do not have the resources to fully enforce every law, which means that someone must necessarily decide what to prioritize and how. The alternative to binding office-wide policies is not full enforcement, but rather ad hoc decisionmaking by line-level staff.[190] Similarly, LEOBOR provisions that allow officers to delay questioning in disciplinary investigations for weeks at a time accomplish nothing other than hindering agency efforts to hold officers to account. These critiques, however, have nothing to do with *localism* or the legitimate bounds of the state's authority to see that its laws are enforced.

This is not to say, of course, that there are no lines to be drawn. For example, under *any* theory of localism, states undoubtedly retain the authority to enforce constitutional rights. Similarly, even an expansive vision of local prosecutorial authority would likely leave room for state intervention in cases of actual corruption or unavoidable conflict of interest. But that is a *much* narrower role than many states currently play in overseeing the scope of local criminal justice policymaking. In short, if one wants to argue that

187 IOWA CODE § 13.2(1)(b) (2024); TENN. CODE ANN. § 8-7-106 (2023). In Tennessee, the Attorney General must petition a court to appoint a special prosecutor, but the law provides that the court "shall" make the appointment if it concludes that the district attorney has adopted a policy refusing to prosecute certain offenses. TENN. CODE ANN. § 8-7-106 (2023).

188 CAMACHO, GOLDROSEN, SU & ROY, *supra* note 17, at 9.

189 Simon Romero & Timothy Williams, *When Sheriffs Say No: Disputes Erupt Over Enforcing New Gun Laws*, N.Y. TIMES (Mar. 11, 2019), https://www.nytimes.com/2019/03/11/us/state-gun-laws.html [https://perma.cc/EJB5-9KE8].

190 *See* Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 844-46 (2020) (connecting the effect that state policymaking has on the need for prosecutors to decline to prosecute and the corresponding need to make decisions about which cases to pursue); *see also* W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 246 (2021) (assessing the limitations of prosecutorial nullification in a context of resource constraints).

states are exceeding the legitimate bounds of their authority, one should at least be prepared to acknowledge that many of the "blue state" reforms in recent years probably are illegitimate as well.[191]

C. *Localism and Reform*

To be sure, many of the proponents of "criminal justice localism" acknowledge that localism is a double-edged sword—and that arguments for local control could just as easily be deployed toward more punitive or discriminatory ends.[192] They argue, however, that a more localized system of criminal justice would, *on balance*, be quite a bit better than the system we currently have. That is, they recognize that some local communities will inevitably opt for more aggressive policing or harsher criminal punishment, but they insist that the system as a whole would be "more moderate, more egalitarian, and more effective at controlling crime."[193]

This Section offers a number of reasons to doubt that this would in fact be the case. It begins by pointing out that the vast majority of municipal and county governments look nothing like the large cities that scholars typically point to in making the case for local control. It then proceeds to highlight a number of ways in which the case for criminal justice localism starts to look much less appealing if one focuses instead on the small towns and suburbs in which most Americans live. As the discussion below makes clear, there is in fact very little reason to think that a more localized system would be any less punitive. It is, however, likely to be quite a bit messier—and more inequitable—than the already decentralized system we currently have.

1. The Geography of Criminal Justice Localism

Much of the discussion around criminal justice localism and preemption has focused on the plight of "blue dot" cities in conservative-led states—or, more broadly, on the importance of giving urban residents a greater say in how crime in their communities ought to be addressed. Stuntz focused explicitly (indeed, almost exclusively) on what localized criminal justice would mean for residents of "poor city neighborhoods."[194] Others, too, have made the case for local control primarily on the grounds that it would

191 *Cf.* RACHEL HARMON, THE LAW OF THE POLICE 539-40 (2021) (exploring the political valence of state preemption debates in the context of state attempts to regulate local police use of asset forfeiture—as well as local agency participation in federal "equitable sharing" programs).

192 *See*, *e.g.*, Kleinfeld, *supra* note 8, at 1409 (acknowledging that "[o]ccasionally, the local community might . . . be more severe" in its treatment of offenders).

193 STUNTZ, *supra* note 5, at 39.

194 *Id.* at 7.

empower "those who are most affected by aggressive policing" and prosecution—namely "residents of inner-city communities."[195]

The focus on big cities, and the majority-Black or Hispanic neighborhoods within them, is understandable given that these are the jurisdictions where the case for localism holds by far the strongest normative and rhetorical appeal. Centralization, writes Stuntz, empowers white "suburban and small-town voters" at the expense of residents in "high-crime" urban neighborhoods, who "are disproportionately poor and black."[196] Localism would reverse the trend, shifting power back to those who are most directly impacted by both policing and crime. On this telling, "localism" becomes synonymous with racial justice and community empowerment—whereas state "preemption" represents the reactionary politics of the status quo.

There are, however, a number of problems with building a theory of localism based on these examples alone. First, as Stephen Schulhofer and others have pointed out, "high-crime [urban] neighborhoods" are not autonomous political units.[197] And although a handful of scholars have called for a radically decentralized system of neighborhood-based criminal punishment,[198] most recognize that a more localized criminal system would empower cities and counties at the expense of the states.[199] Local governments may be more accessible—and at times more responsive—to residents in the poorest communities. But as Schulhofer notes, "[c]ities and counties are rarely, if ever, dominated in their politics by the poor."[200]

Perhaps more importantly, the largest cities themselves account for only a tiny fraction of local governments—and only a slightly larger fraction of the population as a whole. Nationwide, there are nearly 36,000 general purpose

195 O'Rourke, Su & Binder, *supra* note 8, at 1402; Bierschbach, *supra* note 64, at 1452.

196 STUNTZ, *supra* note 7, at 2, 287; *see also* Su, Roy & Davidson, *supra* note 8, at 673 (emphasizing the importance of "the ability of residents impacted by local law enforcement to hold officials accountable").

197 Schulhofer, *supra* note 41, at 1081.

198 *See, e.g.*, Adams & Rameau, *supra* note 65, at 532-33 (envisioning a district-based system of police governance whereby each precinct has a randomly-selected community police commission that sets policies and priorities for just that neighborhood). For a thorough discussion of the many reasons why neighborhood-based governance would be neither feasible nor desirable, see Schulhofer, *supra* note 41, at 1082-83; Janszky, *supra* note 69, at 1336-37 (discussing the challenges with defining "local community" in this context).

199 *See, e.g.*, Schulhofer, *supra* note 42, at 1080-81 (pointing out that although Stuntz motivates his call for local control by citing the experience of residents in high-crime, predominantly Black or Hispanic neighborhoods, that his ultimate policy proposals would all empower cities and counties at the expense of the states).

200 *Id.* at 1081.

municipal governments.[201] More than ninety percent of these are small towns with fewer than 25,000 residents.[202] The picture looks only marginally different if one goes by population. Just twenty percent of Americans live in the nation's hundred largest cities.[203] (And the hundred largest "cities" themselves include plenty of "suburbs" like Fremont, California and Scottsdale, Arizona.[204]) Blue-dot cities in red states account for an even smaller share of the pie. Of the 100 largest cities, for example, 63 have Democratic mayors, and of these, just 22 are in states where Republicans control both the legislature and the governor ("trifectas").[205] African American and Hispanic residents are somewhat more likely to live in large cities (thirty-three percent and thirty percent, respectively).[206] But the reality is that most people, of all races, live in suburbs and small towns.[207]

In sum, the scholars who advocate in favor of local criminal lawmaking or "community control" over prosecutors and police often invoke places like Austin and Nashville (or perhaps San Francisco and New York). The vast majority of the local governments that they would empower look nothing like them. This may be an obvious point—but it is one that often gets lost in debates over criminal justice localism. And, as the remainder of this Section makes clear, it has a number of implications for what a more localized criminal system might actually entail.

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201 The figures compiled in this paragraph are drawn from the 2022 Census of State and Local Governments. *2022 Census of Governments—Organization*, U.S. CENSUS BUREAU (July 27, 2023), https://www.census.gov/data/tables/2022/econ/gus/2022-governments.html [https://perma.cc/83AR-ZPZP].

202 *Id.*

203 *Largest Cities in the United States by Population*, BALLOTPEDIA, https://ballotpedia.org/Largest_cities_in_the_United_States_by_population# [https://perma.cc/WJN6-LFLD] (last visited Dec. 8, 2024).

204 *Id.*

205 Data drawn from *List of Current Mayors of the Top 100 Cities in the United States*, BALLOTPEDIA, https://ballotpedia.org/List_of_current_mayors_of_the_top_100_cities_in_the_United_States [https://perma.cc/EG83-TWKG] (last visited Dec. 8, 2024) and *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas [https://perma.cc/7G22-T6M5] (last visited Dec. 8, 2024).

206 Data drawn from *2020 Census Redistricting Data (Public Law 94-171)*, U.S. CENSUS BUREAU, https://data.census.gov (last visited Dec. 8, 2024).

207 KIM PARKER, JULIANA MENASCE HOROWITZ, ANNA BROWN, RICHARD FRY, D'VERA COHN & RUTH IGIELNIK, PEW RSCH. CTR., WHAT UNITES AND DIVIDES URBAN, SUBURBAN AND RURAL COMMUNITIES (2018), https://www.pewresearch.org/wp-content/uploads/sites/20/2018/05/Pew-Research-Center-Community-Type-Full-Report-FINAL.pdf [https://perma.cc/28NU-6UZQ]; *see also* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 348 (1990) (making this same point).

2. Localism and Leniency

Shifting the focus from "high-crime urban neighborhoods" to the vast majority of local governments that would in fact exercise criminal policymaking authority casts doubt on the idea that a more localized system would be markedly less harsh. Proponents of local criminal justice argue that the system would look different if the people deciding on systems of policing and punishment "recognize the offender as an intelligible part of their cultural universe," not as a "distant 'other'" but as "a son, brother, father, member."[208] And on some level of course, this observation surely rings true. But as John Rappaport and others have pointed out, there are reasons to doubt that this intuitive claim about familiarity and leniency would in fact translate into *policies and outcomes* that are any less punitive than the system we have.[209]

One problem is that the kind of granular familiarity that localism proponents envision rarely maps on to any existing jurisdictional boundaries (county, city) to which one could plausibly delegate greater authority over the machinery of criminal law.[210] For example, some of the strongest evidence for local lenience comes from recent prosecutor elections. John Pfaff demonstrates that support for "progressive" or "reform" prosecutors tends to be highest in the precincts which also have the highest levels of violent crime.[211] But again, these neighborhoods are not autonomous political units—and at the city level, the record on local lenience is decidedly mixed.

The experience of Washington D.C., which is the one major city that *does* have full criminal lawmaking authority by virtue of its quasi-independent status, is notable. As James Forman documents in *Locking Up Our Own*, policymakers and voters in the majority-Black city embraced many of the same harsh mandatory minimums in the 1980s that had proliferated in the various states.[212] D.C. rolled back its mandatory minimums for drugs in the

208 Kleinfeld, *supra* note 8, at 1409; *see also* KLEINFELD, BIBAS & BIERSCHBACH, *supra* note 35, at 41 ("[N]o system of criminal punishment can be truly . . . democratic without . . . treating convicted persons as part of social, economic, and political communities.").

209 *See* Rappaport, *supra* note 25, at 788 (arguing that familiarity with criminal offenders could cause individuals to propose harsher criminal justice laws); Schulhofer, *supra* note 41, at 1081-82 (discussing the problem of disuniformity of interests between groups even within a localist model of criminal reform); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 108 (2019) (discussing a study finding that there is no relationship between exposure to crime and punitiveness).

210 *See* Schulhofer, *supra* note 41, at 1081-83 (questioning the conceptual coherence of the localizers' concept of "community"); Rappaport, *supra* note 25, at 739-50, 757-58 (asserting that localizers' reliance on neighborhoods overlook the heterogeneity of many neighborhoods and the extent to which neighborhoods are interconnected); Janszky, *supra* note 69, at 1332-37 (arguing that localizers fail to define geographic units in defining communities, and that when they do describe what a "local community" is, that definition often doesn't apply to most places in the United States).

211 Pfaff, *supra* note 17, at 1031-33.

212 FORMAN, *supra* note 68, at 139-43.

mid-1990s—but it doubled the statutory maximums, and left mandatory penalties in place for various gun-related crimes.[213] D.C. tried to liberalize its criminal code in 2022, but was overruled by Congress, which retains veto power over the District.[214] A year later, however, the D.C. Council approved an omnibus bill that *increased* penalties for a variety of offenses above what they already had been under the un-liberalized code.[215] In short, it is far from clear that even in the largest cities localism will necessarily further less punitive ends.

Second, municipalities are no longer the self-contained communities that Kleinfeld and others imagine when they argue that local criminal policymakers would imagine potential offenders as neighbors and friends. In the urban and suburban counties in which most Americans live, dozens of municipalities are packed tightly together, one blending seamlessly into the next. Cook County, Illinois, for example, has 134 separate municipal governments—and the broader Chicago metro area has 306.[216] Many of these suburban municipalities are tiny. In Allegheny County (Pittsburgh), for example, at least thirty municipal governments cover territories of less than a square mile.[217]

People rarely spend all or even most of their time within the boundaries of any one of these jurisdictions.[218] As Schragger acknowledges, people "conduct their lives across various political and social communities . . . , working in one, playing in another, . . . [and] sleeping in another."[219] A New York resident could conceivably go months or even years without leaving the five boroughs. The vast majority of people, however, routinely pass through multiple jurisdictions in their day-to-day lives.[220]

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213 *Id.* at 205-07.

214 Susan Davis, *Congress Overturns D.C. Crime Bill with President Biden's Help*, NPR (Mar. 8, 2023, 7:30 PM), https://www.npr.org/2023/03/08/1161902691/d-c-crime-bill-biden-overturn [https://perma.cc/S3PH-PX8P].

215 Meagan Flynn & Michael Brice-Saddler, *D.C. Council Advances Massive Public Safety Bill Aimed at Crime Spike*, WASH. POST (Feb. 6, 2024), https://www.washingtonpost.com/dc-md-va/2024/02/06/dc-council-crime-bill-vote [https://perma.cc/4UEW-ZHRE].

216 Rebecca Hendrick & Yu Shi, *Macro-Level Determinants of Local Government Interaction: How Metropolitan Regions in the United States Compare*, 51 URB. AFFS. REV. 414 (2015); *Cook County Municipalities*, COOK CNTY. GOV'T OPEN DATA, https://datacatalog.cookcountyil.gov/Economic-Development/Cook-County-Municipalities/65nw-e4gp [https://perma.cc/KTX8-M65B] (last visited Oct. 24, 2024).

217 Ponomarenko, *supra* note 1, at 226.

218 *See, e.g.*, Justin Shiu, *Living and Working in the Same City: A Glimpse at the Live-Work Percentages in the Bay Area*, M GROUP (Apr. 6, 2016), https://www.m-group.us/m-lab/blog/2016/4/6/living-and-working-in-the-same-city-a-glimpse-at-the-live-work-percentages-in-the-bay-area [https://perma.cc/5LG8-VZSN] (citing live-work rates for various Bay Area towns).

219 Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 421 (2001).

220 *See, e.g.*, Shiu, *supra* note 218 (finding the median live-work percentage for Bay Area jurisdictions to be ten percent).

This suggests that local decisions about criminal punishment and enforcement will not be based solely (or even primarily) on how residents in a particular community view one another—but also on how residents perceive the various outsiders who are likely to come through town. In many metropolitan regions, neighboring jurisdictions differ dramatically from one another when it comes to their racial composition, socioeconomic status, and levels of crime.[221] And there is lots of evidence to suggest that middle-class and affluent suburbs often go to great lengths to insulate themselves from crime problems elsewhere.[222] In short, any tendency toward local leniency would likely be counteracted by the fear of attracting more cross-border crime, especially when it comes to the many offenses, such as robbery, carjacking, and property theft, that plausibly could shift from one town to the next.

Finally, the places that arguably come closest to the cohesive "village ideal" against which localizers judge the modern carceral state—rural areas and smaller towns—do not appear to be any more lenient toward the criminal defendants in their midst. Jessica Simes points out in *Punishing Places* that "as of 2020, the majority of jail and prison admissions in the United States come from *non*metropolitan areas."[223] "Small cities, suburbs, and rural areas . . . have the highest rates of incarceration" and in some states, like "Massachusetts, this has been true" for at least twenty years.[224] Racial disparities, meanwhile, are only slightly lower than they are in urban counties—and have fallen at a much slower rate.[225] None of this should be especially surprising. Even in the smallest towns, communities often are stratified along racial and class lines.[226] And those who bear the brunt of policing and criminal punishment are not necessarily the same people who have the ear of the city council.[227] To be sure, the high rates of incarceration in rural and suburban communities reflect countless factors beyond local punitiveness, including declining economic opportunity and a loss of social

221 *See, e.g.*, Briffault, *supra* note 207, at 353-54 (noting that, despite the increasingly heterogenous nature of suburbs, "poor[], working-class, [and] black suburbanites" tend to live in different jurisdictions from "affluent or white suburbanites") .

222 Ponomarenko, *supra* note 1, at 232-33.

223 JESSICA T. SIMES, PUNISHING PLACES: THE GEOGRAPHY OF MASS IMPRISONMENT 4 (2021).

224 *Id.*; *see also Incarceration Trends*, VERA, https://trends.vera.org [https://perma.cc/U7N2-CSFW] (last visited Dec. 2, 2024) (showing that incarceration has risen sharply in small cities and rural areas).

225 *Incarceration Trends*, *supra* note 224.

226 *Cf.* Janszky, *supra* note 69, at 1333-37.

227 Ponomarenko, *supra* note 1, at 235; *see also* Schulhofer, *supra* note 41, at 1082 (noting that even at local levels those of lower socioeconomic status rarely dominate political spaces).

cohesion. But they certainly cut against the idea that "local" justice would be any more equitable or less harsh.[228]

3. Politics, Representation, and Policy Change

Much of the case for criminal justice localism rests on the assumption that residents of color—and in particular, the Black and Hispanic residents who bear the disproportionate burdens of both crime and policing—will have an easier time shaping policy at the local level.[229] And it is easy to see why. Local governments are thought to be more accessible, more informal, and more open to participation of various forms. Local councils are typically smaller, and their decisionmaking processes more streamlined, which makes it easier for residents to know whom to talk to, and whom to blame. In contrast, state houses are "further from the people" both literally and figuratively.[230] For many local residents, getting to the state capitol may require a several hour drive. State legislative processes are much harder to follow, with two chambers, dozens of committees, and often hundreds of legislators who can quietly sabotage a bill. State advocacy requires far more organization, and considerably more resources—which may put it beyond the reach of various local groups.

This account gets support most famously from Lisa Miller's *Perils of Federalism*, which used Pennsylvania as a case study to demonstrate the degree to which grassroots organizations are excluded from state-level crime policy debates.[231] Relying on several decades of legislative hearing transcripts and conversations with legislators, Miller portrayed a state-level advocacy landscape that was decidedly thin—and tilted heavily toward law enforcement

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228 As John Rappaport points out, it is not clear that the "village ideal" of early American times produced a particularly lenient or inclusive model of criminal justice, either: "Punishment in these tight-knit communities could be brutal and deeply stigmatizing: the stocks, flogging, and widely attended hangings were common. These were the days when 'men feared witches and burnt women.' Shared fates did not temper justice." Rappaport, *supra* note 25, at 740-41 (footnotes omitted).

229 *See*, *e.g.*, STUNTZ, *supra* note 5, at 7 (explaining that as criminal law became less localized, minority community members increasingly lost their ability to influence policy); Gulasekaram, Su & Villazor, *supra* note 8, at 881-82 (describing local politics as "more accessible than either state or federal decisionmaking"); Rick Su, Anthony O'Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1213 (2022) (asserting that "local officials tend to be more receptive . . . to grassroots [organizing]" than their state and federal counterparts); Su, Roy & Davidson, *supra* note 8, at 673 (suggesting that placing policing decisions in the hands of state authorities undermines democratic accountability); Bierschbach, *supra* note 64, at 1450 (discussing the consequences of "the fragmentation of power" over policing among various actors).

230 *See* Miriam Seifter, *Further From the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 147-48 (2018) (noting that in the administrative context the public is largely disengaged—or distanced—from state actions).

231 MILLER, *supra* note 8.

interests and professional groups.[232] Between 1990 and 2004, for example, just ten "citizen groups" appeared at more than one hearing, and the vast majority of these were victim advocacy groups like Mothers Against Drunk Driving and the Pennsylvania Coalition Against Rape.[233] The ACLU of Pennsylvania, the Pennsylvania Prison Society, and various public defender organizations were among the only voices counseling a more measured approach to crime.[234] In contrast, Miller found the *local* advocacy landscape to be markedly more diverse, with dozens of local groups participating in various ways.[235] Over the years, many scholars have relied on her findings to call for greater local control.[236]

However, as the remainder of this Section makes clear, this conventional account overstates some of the benefits of a local forum—and misses some of the key advantages of creating more space for policymaking in the states.

a. *State-Level Advocacy*

First, the advocacy landscape in a number of states (including Pennsylvania) looks markedly different than it did in the 1990s and early 2000s. Like Miller, I relied on hearing transcripts and lobbyist registration records to develop a snapshot of state-level advocacy around criminal justice reform. Unlike Miller, I opted for breadth over depth. I focused on three states—Pennsylvania, Minnesota, and Colorado—all of which make it easy to track who participates in various ways. My approach in each state varied depending on the information that the state legislature made available (and the way in which it was organized). In both Colorado and Minnesota, I pulled together a sample hearing summaries and witness lists on a wide range of criminal justice bills, including proposed changes to substantive criminal law, court system practices (e.g. bail, bench warrants), and policing reform.[237] In

232 *Id.* at 95-96.

233 *Id.* at 101 tbl.4.7.

234 *Id.* at 101, 106-07.

235 Miller points to dozens of local groups that either participated in a local hearing in Philadelphia or Pittsburgh, or came up in conversation with local lawmakers. *Id.* at 135.

236 *See, e.g.*, Su, O'Rourke & Binder, *supra* note 229, at 1213 & n.95 (citing Miller to support the proposition that "local officials tend to be more receptive than state or federal officials to grassroots citizen mobilization around criminal justice issues"); Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 283 & nn.25-26 (2010) (citing Miller in support of the point that "poor urban racial minorities" have a louder voice in local criminal justice discussions than those at the state level).

237 In Minnesota, I compiled a list of everyone who testified in person—or submitted testimony in writing—on any criminal justice-related bill heard during the first 23 (of 46) sessions of the House Public Safety Finance and Policy Committee. During this period, the committee heard a total of 66 bills. In Colorado, where criminal justice bills are heard by several possible committees, I picked a sample of bills over a five-year period, again on a variety of criminal-justice related topics. The list of bills is available in Appendix Table 2.

Colorado, I also was able to see which organizations registered as having lobbied legislators directly on these same measures. Finally, in Pennsylvania, I compiled a list of every individual and organization that registered as a lobbyist on a criminal justice related topic between 2021 and 2023.

What I found is that local activists and grassroots organizations are increasingly pressing their case to state legislators—and they are doing so with the support of a dramatically expanded pool of national and state-level advocacy groups. They are showing up at hearings, registering as lobbyists, and helping to shape the policy debate. State-level advocacy undoubtedly is more resource-intensive, but the challenges for reform advocates may not be quite so insurmountable as the Miller thesis suggests.

Take, for example, Colorado. Between 2019 and 2023, at least sixty-two national, state, and local advocacy organizations either testified or lobbied on one or more criminal justice bills. The organizations were a diverse mix of single-issue and broad-based advocacy groups, including faith-based groups (e.g., Interfaith Alliance); disability rights organizations (e.g., The Arc); longstanding Black-led organizations (e.g., Denver Urban League, NAACP); and a *much* expanded slate of national and state-wide civil liberties and criminal justice reform organizations (e.g., Everytown, the Justice Action Network, Colorado Freedom Fund, the Colorado Criminal Justice Reform Coalition, and of course the ACLU, just to name a few).[238] In addition, at least thirty-one individuals testified in their own personal capacity—mostly local activists, people who had been formerly incarcerated, and family members of people who had been injured or killed by the police. When Colorado legislators considered a bill to reduce penalties for various drug-related offenses,[239] they heard from a fair number of police and prosecutor groups, most of whom predictably opposed the measure. But they also heard from fifteen advocates, direct service providers, and criminal justice reform groups, all of whom supported the measure (which ultimately passed).[240] Similarly, when legislators considered sweeping police reform legislation in the summer of 2020, they heard from more than a dozen local activists and victims of police misconduct, in addition to a variety advocacy groups.[241]

In Minnesota, the list of organizations who participated at various hearings is, if anything, still more diverse. In 2023, for example, the House Public Safety Finance and Policy Committee heard from more than 90

238 The full list of organizations is available in Appendix Table 1.

239 *HB19-1263: Offense Level for Controlled Substance Possession*, COLO. GEN. ASSEMBLY, https://leg.colorado.gov/bills/hb19-1263 [https://perma.cc/7PXS-G4K6] (last visited Sept. 29, 2024).

240 *Id.*

241 *SB20-217: Enhance Law Enforcement Integrity*, COLO. GEN. ASSEMBLY, https://leg.colorado.gov/bills/sb20-217 [https://perma.cc/VD7F-NGNZ] (last visited Sept. 29, 2024).

service-providers, non-profits, and advocacy groups—more than 30 of which were local organizations from Minneapolis and St. Paul. National and statewide organizations included the ACLU of course, but also Americans for Prosperity, Gender Justice, the Second Chance Coalition, and Moms Demand Action among many others.[242]

In Pennsylvania, too, the advocacy landscape has changed substantially. Between 2021 and 2023, more than fifty advocacy organizations, faith-based groups, and service providers had registered lobbyists working on criminal justice issues. This is especially notable given that the state only requires organizations to register if they spend at least 20 hours—and more than $2,500—on lobbying activities per quarter, which necessarily excludes many organizations whose activities are more limited.[243] For this same reason the list is tilted heavily toward state-wide and national organizations.[244] But the organizations that *are* included are much more varied than what Miller describes. The twenty-one national organizations, for example, include Tides Advocacy, Pew Charitable Trusts, the Juvenile Law Center, Action for Safety and Justice, Families Against Mandatory Minimums, and Just Leadership USA.[245] Newcomers at the state level include Make the Road Pennsylvania, the Youth Sentencing and Reentry Project, and the Pennsylvania Coalition for Civil Justice Reform.[246]

To be sure, local groups still were decidedly underrepresented relative to state-wide and national organizations. But local participation may actually be quite a bit broader than what the hearing transcripts and lobbyist lists would suggest. This is because many of the state-level and national organizations themselves are deeply embedded in much broader coalitions of local advocacy groups.[247] In Minnesota, for example, the Justice for All coalition includes national organizations like the Policing Project and the Justice Action Network, along with local foundations, African American faith-based and

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242 Hearing lists are available at *Public Safety Finance and Policy*, MINN. HOUSE OF REPRESENTATIVES, https://www.house.mn.gov/Committees/Home/93020 [https://perma.cc/U2BW-ZE63]. The full list of organizations is available in Appendix Table 3.

243 65 PA. CONS. STAT. § 13A06 (2024).

244 Just three local organizations appear in the registration lists—The Philadelphia Foundation, the Urban League of Philadelphia, and Regional Housing Legal Services.

245 A list of all of the organizations registered is included in Appendix Table 4. The lists of registered organizations are available from PA. DEP'T OF STATE, https://www.palobbyingservices.pa.gov/Public/wfSearch.aspx [https://perma.cc/P2AM-WHSC] (navigate to "Export All" next to the search bar, and a list will be generated).

246 *Id.*

247 This observation stems in part from personal knowledge. My own organization, the Policing Project, works with legislators, community groups, and various advocacy organizations in more than a half-dozen states. We also work with partners like the Vera Institute, the ACLU, and the Center for Policing Equity—and through that work are familiar with the various grassroots organizations with which they collaborate.

community-based organizations, a local bail fund, and various grassroots advocacy groups.[248] In California, the bill that ultimately established the state's new decertification regime was co-sponsored by the ACLU of California and several grassroots advocacy groups, including Black Lives Matter California, STOP Coalition, Communities United for Restorative Youth Justice, and California Families United 4 Justice.[249]

Of course, participation does not necessarily translate to *influence*. Police and prosecutor groups still are likely to be better funded and more organized, and they undeniably continue to hold considerable sway. But these groups also hold a fair bit of power *locally*, as evidenced by cushy collective bargaining agreements and the decidedly halting pace of reform.[250] And importantly, there is reason to think that expanded participation, especially on the part of well-organized national and state-level advocacy groups, has evened the playing field at least to some degree.[251]

When it comes to influencing policy, presence and voice are only part of the equation. As Miller herself points out, the groups that tend to be more influential (at all levels of government) are those that come prepared with concrete solutions, draft statutory language, and examples of other jurisdictions that have successfully implemented the sought after reforms.[252] They also are the groups that have the time and resources to track bills through multiple committees, identify and push back problematic amendments, and build on progress from prior years.[253] Miller notes that during the period she studied, this put local advocacy groups at a significant disadvantage.[254] Local groups may have been clear on what they saw as the problems in their communities, but they rarely came armed with tangible solutions.[255] The dramatic increase in the number of national and state-level advocacy organizations who work on criminal justice issues (often in tandem with local groups) has put grassroots organizations in a far better position to

248 Membership list on file with author.

249 *Decertify Abusive Police and Strengthen Liability for Police Violence (SB 731)*, ACLU S. CAL., https://www.aclusocal.org/en/legislation/decertify-abusive-police [https://perma.cc/FBK6-CUQD] (last visited Sept. 30, 2024).

250 William Finnegan, *How Police Unions Fight Reform*, NEW YORKER (July 27, 2020), https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform [https://perma.cc/E7QX-SNR9].

251 *See* Ram Subramaniam & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/9ZZT-QAZL] (crediting "community-led movements" for a slew of recent reforms).

252 MILLER, *supra* note 8, at 107-08, 149.

253 *Id.*

254 *Id.*

255 *Id.*

translate their policy objectives into concrete proposals that legislatures can adopt.

b. *Local Advocacy*

Then, there is the other side of the coin—which is to say, the degree to which local residents are likely to be effective at shaping policy in their own cities and towns. Any assessment of the relative advantages and drawbacks of a policymaking forum must necessarily address the question: "As compared to what?"[256] Here, too, the comparison that scholars have drawn most often has been between states and their largest cities. And once again, the picture starts to look very different when "local" is no longer treated as synonymous with the urban core.

When Miller compared state and local policymaking forums, she focused on Philadelphia and Pittsburgh. And perhaps unsurprisingly, she found in both cities a vibrant and noisy advocacy community comprised of a mix of block organizations, service providers, non-profits, and various single-issue and broad-based advocacy groups.[257] Even in these cities, Miller raised profound concerns about these groups' effectiveness. "Many groups," she observed, "inject complaints and rage into policy debates with little sense of how to resolve them . . . . They seem to know little about the policy solutions they want and even less about how to get them."[258] This may be unduly harsh—and no longer reflective of local advocacy, either. The local advocacy space in larger cities also has become considerably more robust, with dozens of organizations articulating concrete policy proposals and launching their own programs that illustrate what reimagined justice could look like in their communities.[259]

But Miller's observation does highlight an important point: the fact that anyone can attend a town meeting does not mean that everyone can be equally effective in forcing local policy to change. And at the local level, especially outside the largest cities, there are far fewer organizations that can help translate community concerns into tangible reforms.[260] State and national

256 KLEINFELD, BIBAS & BIERSBACH, *supra* note 35, at 14.

257 MILLER, *supra* note 8, at 135.

258 *Id.* at 177.

259 *See, e.g.*, Simonson, *supra* note 24, at 813-16 (describing various grassroots movements to shift power over police policymaking to affected communities); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 701-10 (2020) (describing robust grassroots movements for police accountability in Chicago and Oakland).

260 *See* Ponomarenko, *supra* note 1, at 240 (noting that in the absence of local media and national organizations many small towns have few organizations that can effectively engage in advocacy).

organizations, for example, rarely operate outside the largest cities.[261] And the local advocacy and media presence often is decidedly thin.[262]

This is especially important when it comes to addressing the many problems of policing.[263] If fixing policing were a simple matter of resolving a handful of up and down votes (body cameras: yay or nay?), one could plausibly expect residents and their part-time city council members to figure it out on their own.[264] But in reality, policing outcomes are the product of dozens of policy choices, each of which comes with its own body of knowledge about best practices, common pitfalls, and legal constraints.[265] In Cleveland, for example, "the federal monitoring team spent months preparing videos, fact sheets, and discussion guides in order to facilitate informed discussion" of the department's new use of force policy—and even then the public discussions barely scratched the surface when it came to the various changes that had to be made.[266] And that was just the use of force policy. This is not to suggest that police policymaking necessarily requires the presence of technical experts with "advanced degrees."[267] But it does require sustained attention and organized advocacy—which, in smaller communities, is often in shorter supply.

The presence of more organized advocacy networks or outside experts may seem to matter less when it comes to local criminal lawmaking. After all, as Kleinfeld, Bibas, and Bierschbach point out, "criminal law . . . is not a technical undertaking. It involves a mixture of moral questions . . . questions of community self-definition . . . and prudential questions informed by community norms . . . ."[268] But advocacy and expertise may still matter quite a bit. As John Rappaport points out, the public's "wholesale" intuitions about crime and punishment, expressed through opinion polls and legislation, often are quite punitive.[269] Localizers point instead to an empirical literature, based largely on focus groups and vignette studies, which demonstrates that when voters are "educated about alternatives to, or the costs of, incarceration" they

261 *Id.*

262 *Id.*

263 *See* Ayers, *supra* note 103, at 617-32 (noting that there are "too many proposals" and "too many bodies of knowledge" for most local officials to grasp).

264 *Id.* at 615.

265 *Id.* at 624-32; *see also* Ponomarenko, *supra* note 49, at 41-43 (noting the knowledge gaps and difficulties that come with attempting to implement substantial policy changes in areas like use of force).

266 Ponomarenko, *supra* note 49, at 42-43.

267 *See* Simonson, *supra* note 24, at 852 (proposing that often those with expertise on the nature of policing and what should change are those subject to policing, rather than those accredited).

268 KLEINFELD, BIBAS & BIERSCHBACH, *supra* note 35, at 26.

269 *See, e.g.*, Rappaport, *supra* note 25, at 759-60 (noting that on topics like the death penalty and mandatory minimums there was firm support until the mid-1990s, after which point attitudes began to shift).

tend to express less punitive views.[270] But who, exactly, is going perform this function, community by community, from one town to the next? In the absence of countervailing pressure, the loudest voices in any local meeting room will almost invariably be prosecutors and police.[271]

Finally, the degree to which one could plausibly rely on local elections to hold prosecutors accountable—and dampen their punitive impulses—likewise depends a great deal on where one looks. The reform prosecutor movement is almost exclusively an urban one.[272] Reform prosecutors have prevailed in just 72 counties (or multi-county prosecutorial districts)—and have run unsuccessfully in just 38 others—out of more than 2,300 nationwide.[273] There are two ways to make sense of these numbers, neither of which is especially helpful to the localist cause. It may be, for example, that residents in the vast majority of counties are actually perfectly happy with the "tough on crime" politics that traditional prosecutors tend to espouse. But if that is the case, it is not at all clear how localism can possibly be an antidote to mass incarceration, especially now that non-metropolitan counties account for a majority of new admissions to prisons and jails.[274] Alternatively, it may be that elections do a poor job of capturing actual community preferences, and that at least some residents would vote differently if they were better informed about charging practices, sentence lengths, and the like. But that comes right back to the importance of information, organization, and advocacy—all dimensions along which state-level forums may in fact have an edge.

4. Localism in Practice

Finally, it is worth pausing to consider what a more localized system might look like in practice. When it comes to policing and prosecution, this is not a particularly difficult exercise. Indeed, it looks a lot like the status quo in states that have thus far failed to adopt the various laws detailed above regulating the conduct of local prosecutors and police.

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270 *Id.* at 760 (footnotes omitted).

271 Brenner Fissell, notes, for example, that especially in smaller jurisdictions, new criminal laws often are drafted at the behest of local police. *See generally* Brenner M. Fissell, *Police-Made Law*, 108 MINN. L. REV. 2561 (2024).

272 *See* Pfaff, *supra* note 17, at 1023 (noting that "few" reform prosecutors "have even tried to run, much less win, in counties that did not vote for Joe Biden in 2020").

273 *Id.* at 1050, tbl.A.1 (figures drawn from the table in the Appendix; several counties have had multiple progressive prosecutors run for office, but here I count each county once). The counties in which reform candidates have prevailed account for roughly twenty percent of the population, which is indeed a notable achievement. But it of course means that eighty percent of Americans live elsewhere. *Id.*

274 *See* SIMES, *supra* note 223, at 4.

When it comes to local criminal lawmaking, however, some scholars imagine a system that looks fundamentally different from the one we currently have. Lauren Ouziel, for example, argues that local criminal lawmaking would be preferrable for a variety of serious felony offenses, including "shootings, robberies, homicides, [and] gun brandishing" because these crimes "tend to be geographically confined."[275] Joshua Kleinfeld, Stephanos Bibas, and Richard Bierschbach likewise appear to argue in favor of broad lawmaking authority to include at least "minor and medium-level crimes."[276]

What would it mean to allow thousands of densely packed local governments to craft and enforce their own felony codes? One thing that is not at all clear from the various proposals is whether local criminal law would be additive—or whether states would be expected to get out of the criminal law business entirely (or something in between). Notice that in the first scenario, local criminal lawmaking would function as a one-way ratchet in favor of harsher criminal punishment because even if local officials decided to decriminalize a category of conduct or punish it less harshly, the more punitive state laws would still remain on the books.

A world in which criminal law is mostly or entirely local, on the other hand, raises a variety of additional concerns. It is probably safe to assume that all local governments would prohibit the most serious crimes (though there is nothing to guarantee that all would craft their laws with equal precision).[277] But with respect to less serious offenses on which community norms may differ substantially, such as gun and drug possession, one might expect both offenses and penalties to potentially vary quite a bit.

Given that people routinely pass from one jurisdiction to another, notice concerns would loom especially large.[278] The idea that the public is presumed to know what laws are on the books has always been a dubious proposition. But that assumption becomes altogether untenable in a world where offenses and penalties could differ wildly from one jurisdiction to the next. This already is a problem in states like Ohio, which allow local governments to punish conduct more harshly than existing state laws.[279] Marijuana possession, for example, constitutes a minor infraction under state law, and is punishable by a small fine—but in some of the state's municipalities it is a

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275 Ouziel, *supra* note 8, at 2324. The NLC *Principles* likewise advocate for giving local governments the full power of the state to impose whatever penalties—criminal or civil—they wish. *See infra* Section III.A—B.

276 KLEINFELD, BIBAS & BIERSCHBACH, *supra* note 35, at 29.

277 Fissell points out, for example, that local laws tend to be hastily drafted and often are missing critical offense elements, like mens rea requirements. Fissell, *supra* note 107, at 868.

278 *See* Logan, *supra* note 3, at 1461-64.

279 *Id.* at 1464.

Class C misdemeanor punishable by up to six months in jail.[280] As one Ohio Supreme Court Justice observed, "citizens of the state [would] be wise . . . to research the laws of each city that they intend to pass through prior to traveling along our highways" lest they be arrested for conduct "they believed to be 'decriminalized'" throughout the state.[281] Still, even in Ohio, state law caps the maximum term of incarceration for local offenses at six months, and in most states local penalties must be lower still. In a world in which local governments could enact their own felonies (which could very well be present-day misdemeanors!), the potential consequences of getting arrested while passing through a more punitive jurisdiction could potentially be catastrophic.

Then there are a variety of administrative questions that localists largely ignore. Would local felonies be tried by municipal judges in local criminal courts? Natapoff's detailed account of municipal court practices makes clear that many of these institutions—staffed by part-time judges who may or may not hold a legal degree—are unlikely to be up to the task.[282] Relying on county prosecutors (and county judges, and county juries), on the other hand, would seem to negate the very purpose of having a more localized criminal law.

There also is the question of who would pay for the costs of local prosecution, adjudication, and imprisonment. Presumably all or most of the costs would have to be borne locally in order to avoid exacerbating what Frank Zimring and Gordon Hawkins call the "correctional free lunch."[283] However, given the prevalence of sizeable inter-local wealth disparities, and the correlation between high rates of poverty and high levels of crime, this would leave some jurisdictions unable to pay for the levels of enforcement that their communities may need.[284] Localizers acknowledge these distributional concerns and propose a variety of ways through which states could redistribute resources from the most affluent jurisdictions to the poorest.[285] But thus far states have not done so for local policing, where disparities in various communities' ability to pay already are substantial.[286]

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280 *Id.* at 1463-64.

281 *Id.* (quoting City of Niles v. Howard, 466 N.E.2d 539, 544 (Ohio 1984) (Sweeney, J., dissenting)); City of Niles v. Howard, 466 N.E.2d 539, 544 (Ohio 1984) (Sweeney, J., dissenting).

282 Natapoff, *supra* note 4, at 975-90.

283 ZIMRING & HAWKINS, *supra* note 167, at 140.

284 Schulhofer, *supra* note 41, at 1083.

285 *See, e.g.*, KLEINFELD, BIBAS & BIERSCHBACH, *supra* note 35, at 31 ("If the concern is that some neighborhoods . . . might be badly under-resourced . . . the answer might be to redistribute resources through a higher-order mechanism.").

286 *See* Ponomarenko, *supra* note 1, at 277-78 (pointing to stark funding disparities in small-town and rural police departments).

Indeed, in a telling passage, Kleinfeld, Bibas, and Bierschbach acknowledge that for a more locally democratic system to work, judges would "need to interpret the Equal Protection Clause in the criminal justice context more broadly, and enforce it more vigorously, than they currently do."[287] Presumably this would be necessary to address not only the distributive concerns discussed above, but also the classic Madisonian concerns about the tendency of smaller political units to (at least sometimes) deploy local power to trample minority rights. The problem, of course, is that courts have not shown *any* interest in moving in that direction. Which raises an obvious question: What if localism is all we get?

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Although criminal justice scholars broadly expound on the benefits of local decisionmaking, their support for localism hinges in large part on the premise that a more localized criminal system would function quite a bit better than the system we have. Better means more legitimate and more effective at addressing crime. But it also invariably means fewer people behind bars and fewer racial disparities throughout the criminal process. As this Part makes clear, this localist vision *maybe* is attainable if "local" is defined narrowly to include a small number of major cities. There is, however, very little reason to think that an even more localized criminal system would work better for the vast majority of people who are brought within its reach.

III. THE UNINTENDED CONSEQUENCES OF STRENGTHENING HOME RULE

Thus far, the discussion has focused on "criminal justice localism" as a broad and at times inchoate set of proposals to shift more power to local communities. This Part now turns to the far more concrete proposals—put forward by local government scholars—to address the "new preemption" by revitalizing home rule. It focuses specifically on the *Principles of Home Rule for the 21st Century*, which propose to give local governments a powerful new set of protections from state law preemption—and it uses these *Principles* as a jumping off point to explore what revitalized home rule might mean for criminal justice reform.[288]

This Part focuses on the NLC *Principles* for two reasons. First, the *Principles* were drafted by some of the leading local government scholars of our time,[289] on behalf of an organization that traditionally has been highly

287 KLEINFELD, BIBAS & BIERSCHBACH, *supra* note 35, at 10.

288 PRINCIPLES, *supra* note 13, at 24-27.

289 *See id.* at 2 (listing authors).

influential in shaping the conversation over home rule reform. The NLC's previous set of model home rule provisions, published in 1953, became the model for home rule provisions in a majority of states.[290] Whether or not states adopt the *Principles* in their current form, the *Principles* undoubtedly will continue to serve as a reference point for ongoing debates about the balance of power between states and localities. As discussed in Part I, criminal justice scholars and advocates already are starting to cite home rule reform as a promising way to insulate local criminal justice reform from state preemption.[291] Second, unlike conventional legal scholarship which tends to articulate broad propositions regarding the proper balance between cities and states, the *Principles* actually translate the authors' ideas into specific constitutional text that states could adopt (and courts could then try to enforce). This makes the *Principles* especially useful for exploring how a more robust version of home rule might work in practice.

As this Part makes clear, embracing anything approximating the NLC *Principles* would have exactly the opposite effect from what proponents of criminal justice localism have in mind when they call for a more locally democratic carceral state.

A. *Initiative and Preemption: A Primer on Home Rule*

At its core, any system of municipal home rule must address two fundamental questions about the scope of local authority: (1) the degree to which local governments are empowered to legislate in the absence of explicit state authorization (i.e. the "initiative power"), and (2) the degree to which municipal policy choices are insulated from interference by the state (i.e. protection from preemption, also known as the "disabling" principle or "immunity").[292] As Lynn Baker and Daniel Rodriguez explain, the prevailing systems of municipal home rule in the fifty states vary widely across both dimensions.[293] Broadly speaking, "imperio" systems adopted early in the twentieth century tend to limit the scope of municipal authority to "matters of local concern" but offer at least some degree of immunity from preemption by the state.[294] States that embraced "legislative home rule" typically define the scope of municipal authority more broadly (though often still subject to various exceptions), but offer virtually *no* protection from state

290 *Id.* at 12-13 (describing the influence of the 1953 AMA model).

291 *See supra* notes 19–21.

292 PRINCIPLES, *supra* note 13, at 11; Baker & Rodriguez, *supra* note 85, at 1338.

293 Baker & Rodriguez, *supra* note 85, at 1338-39.

294 *See id.* at 1341, 1357. The term "imperio" is short for "imperium in imperio" meaning "government within a government."

preemption.[295] In practice, both systems allow states to impose significant limits on local autonomy.[296]

The NLC *Principles* propose a drastically different approach. The "Local Authority Principle" would grant local governments the full legislative power of the state within its borders.[297] The "Presumption Against State Preemption Principle" (along with various ancillary protections for local policymaking) would make it far more difficult for states to displace local policies with which they disagree.[298] Together, the two sets of principles put a heavy thumb on the scale in favor of local authority in ways that very clearly are designed to shield progressive blue-city policy wins from red-state preemption. As the remainder of this Part makes clear, however, they also would have the unintended consequence of shielding the worst excesses of local criminal lawmaking and harmful policing from state oversight.

B. *Local Authority, State Preemption, and Local Criminal Law*

As discussed in Part II, all but a handful of states authorize some degree of local criminal lawmaking.[299] But the vast majority of states also cabin that authority in various ways through statutory and constitutional limitations on home rule authority, as well as judicially crafted preemption doctrines.[300] Adopting anything like the *Principles* would eliminate virtually all of these state law controls.

1. Local Criminal Lawmaking Authority

The NLC's proposed "Local Authority Principle" rejects any presumptive limits on the scope of local lawmaking, declaring that local governments should have the full power of the state to legislate within their borders and to "use any enforcement tool available to the state," including the criminal law.[301] This is the only section of the *Principles* to address criminal policymaking directly. And in the accompanying commentary, the authors acknowledge that the power to define and punish criminal conduct may contribute to "the baleful trend of over-criminalization," and that local criminal laws have a

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295 *Id.* at 1338-39. These systems are described as "legislative home rule" because legislatures remain free to preempt local legislation as they see fit. *Id.*

296 *See* Diller, *supra* note 10, at 1127 ("[E]ven in states that are commonly considered imperio regimes, it is now widely acknowledged that there are matters of mixed 'local/statewide' concern in which both the state and city may legislate, thus raising the possibility of preemption in the mixed sphere.").

297 PRINCIPLES, *supra* note 13, at 24.

298 *Id.* at 26.

299 *See supra* Part II.A.

300 *Id.*

301 PRINCIPLES, *supra* note 13, at 40.

tendency to "ensnare uninformed persons, especially nonresidents passing through."[302] But they ultimately conclude that "[f]or maximum flexibility and logical consistency," home rule counties and municipalities ought to be afforded "the same extent of criminal lawmaking [power] as the state."[303]

If adopted, the "Local Authority Principle" would constitutionalize an expansive version of criminal law localism along the lines proposed by Ouziel, Kleinfeld, Bibas, and Bierschbach.[304] It would override the prevailing regime in all fifty states, none of which allow municipal or county governments to create new felonies.[305] And it would at least presumptively eliminate the various other restrictions that states currently impose in defining the scope of municipal power: No more bans on local criminal lawmaking.[306] No more uniformity requirements.[307] And no more limits on the penalties that local governments can impose.[308]

For all of the reasons discussed in Part II, this alone would be problematic. When combined with the *Principles'* "Presumption Against State Preemption" discussed in the following Section, it would create a regime that would only be capable of *expanding* the scope of criminal liability. It would, in short, have exactly the opposite effect of what scholars have in mind when they call for more local democratic control over the criminal law.

2. Preemption and Criminal Lawmaking

The "Presumption Against State Preemption" contains several provisions that, together, impose strict limits on a state's ability to cabin the scope of local lawmaking authority. Unlike the "Local Authority Principle," which speaks to criminal lawmaking directly, the preemption principles clearly were drafted with other concerns in mind. The authors explain that the purpose behind these provisions is to enable localities to push back aggressively against the "new preemption."[309] Throughout the *Principles*, the authors explain how these various protections could have shielded localities from state bans on "local minimum wage laws, plastic bag bans, and antidiscrimination ordinances."[310] They also would make it extremely difficult—if not outright impossible—for states to preempt local criminal laws.

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302 *Id.* at 47-48.
303 *Id.* at 49.
304 *See supra* notes 168, 275–276 and accompanying text.
305 *See supra* note 105.
306 *See supra* note 110 and accompanying text.
307 *See supra* note 111–112 and accompanying text.
308 *See supra* note 109 and accompanying text.
309 PRINCIPLES, *supra* note 13, at 53.
310 *Id.*

a. *Concurrent Authority and Implied Preemption*

Under traditional preemption principles, whenever a local government adopts an ordinance that differs from an analogous state statute, a litigant who is unhappy with the ordinance can go to court and argue that it is invalid because it conflicts with state law. If the legislature had "explicitly declare[d] that local laws are preempted," that is the end of the inquiry (unless the state adopts one of the limits on "express" preemption discussed below).[311] In most states, however, courts also are empowered to strike down local ordinances even if the statutes at issue are silent on the question of preemption, by applying one of several doctrines of "implied" preemption.[312] For example, a local ordinance might be deemed invalid if it "stands as an impediment" to a state regulatory scheme (i.e., "conflict" or "obstacle" preemption),[313] or if the state scheme is "so pervasive" that it leaves no room for local governments to supplement (i.e., "field" preemption).[314] Federal preemption law works the same way.[315]

The *Principles* propose to do away with all of this. The "Concurrent Authority" principle would presumptively allow local governments to regulate *more stringently* than the state in any domain.[316] The ban on implied preemption would require state legislatures to *expressly* indicate that they intend to preempt local law.[317] Together, the *Principles* would establish a "one-way ratchet" that would permit local governments to "broaden[] labor benefits" or "strengthen[] environmental protections," while blocking "local governments from acting to weaken state regulatory standards."[318]

As David Schleicher points out, the two provisions reflect a clear pro-regulatory bias.[319] Although the *Principles* emphasize the core localism values of "experimentation, policy responsiveness, political accountability, and genuine diversity," in practice they only protect these values when localities want to regulate *more* rather than less.[320]

This thumb on the scale makes sense in light of the *Principles'* overall focus on red-state efforts to overturn blue-city regulations. But the provisions take

311 Diller, *supra* note 10, at 1115.

312 *Id.* at 1141.

313 *Id.* at 1141-42 (citing Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983)).

314 *Id.* at 1141 (quoting Pac. Gas & Elec. Co., 461 U.S. at 204).

315 *Id.* at 1140-41.

316 PRINCIPLES, *supra* note 13, at 60.

317 *Id.* at 54.

318 *Id.* at 60 (internal quotation marks omitted).

319 David Schleicher, *Constitutional Law for NIMBYs: A Review of "Principles of Home Rule for the 21st Century" by the National League of Cities*, 81 OHIO ST. L.J. 883, 897 (2020) ("The bias towards more regulation rather than less is clear.").

320 PRINCIPLES, *supra* note 13, at 5; Schleicher, *supra* note 319, at 897.

on a very different tenor when it comes to local criminal lawmaking, where the dominant concern is not that governments will regulate too little but rather that they will regulate *too much*.

As applied to the criminal law context, the *Principles* would presumptively allow local governments to *expand* (but not contract) criminal liability and punishment above the state-law baseline—a "one-way ratchet" in favor of an ever-expanding carceral state.[321] This would reverse many of the aforementioned limits on local criminal lawmaking, which often are the product of judicial rulings that use implied preemption to strike down local efforts to expand the scope of the criminal law.[322] A number of courts, for example, have struck down local ordinances that increase criminal penalties above the state-law baseline as inherently conflicting with the state's decision to take a less punitive approach.[323] State courts also routinely strike down local ordinances that loosen *mens rea* requirements for criminal violations or eliminate critical offense elements that state legislatures had included to cabin the scope of criminal liability.[324]

The ban on implied preemption also would have the added effect of undermining state efforts to pursue more balanced criminal justice policies by forcing legislators to play a perpetual game of whack-a-mole to override local ordinances that take a more punitive approach.

The various preemption battles over the validity of local sex offender ordinances illustrate the problem well. Every state requires sex offenders to register, and most states also impose at least some restrictions on where sex offenders can live.[325] But notably, at least a dozen states—including New York, New Jersey, Michigan, Pennsylvania, Colorado, and New Mexico—do not impose any residency limits.[326] And many of the states that do apply residency restrictions apply them only to a subset of offenders (e.g., those

321 PRINCIPLES, *supra* note 13, at 60 (internal quotation marks omitted).

322 *See supra* notes 306–308.

323 *See supra* note 110 (summarizing cases).

324 *See, e.g.*, O'Connell v. City of Stockton, 162 P.3d 583, 589—90 (Cal. 2007) (finding that state law regulating use of controlled substances implicitly preempted a city ordinance allowing a similar penalty at a lower evidentiary standard); Holt's Cigar Co. v. City of Phila., 10 A.3d 902, 913 (Pa. 2011) ("The presence of a *mens rea* element in the statute and the absence of a *mens rea* element in the ordinance for the same proscribed conduct . . . constitute an irreconcilable conflict between the two enactments."); City of Corvallis v. Pi Kappa Phi, 428 P.3d 905, 912 (Or. App. 2018) (holding that a state law which only imposes penalties on owners who *knowingly* permit minors to drink on their premises preempts a local ordinance which imposes *strict criminal liability* on people who host parties where minors consume alcohol).

325 *See generally* John C. Navarro, Kate E. Knudsen & Christina L. Richardson, *A Statutory Analysis of State-Level Sex Offender Residency, Loitering, Presence, and Entry Restrictions*, 69 CRIME & DELINQ. 392 (2023) (summarizing the current state of the law).

326 *Id.* at 406 fig.3.

presently on parole or those convicted of the most serious crimes).[327] State registration laws typically are silent on the question of preemption, likely because many of them went into effect well before local governments got into the game. But get into the game they did. Beginning in the early-to-mid 2000s, hundreds of cities large and small used their zoning authority to impose harsh new restriction—many of which had the effect of declaring entire cities or counties as "no go" zones.[328]

The fate of these local ordinances often turned on the structure of the respective states' preemption regimes. In states with relatively broad preemption doctrines, state courts had little trouble concluding that these various measures significantly undermined the states' efforts to strike a balance between safeguarding the public and giving formerly incarcerated individuals a meaningful opportunity to rejoin society.[329] In contrast, courts in Colorado and Florida, where implied preemption is highly disfavored, allowed the local laws to remain in effect.[330] In *Ryals v. City of Englewood*, the Colorado Supreme Court acknowledged the extraterritorial impacts of the exclusionary ordinances and the ways in which local restrictions impeded state efforts to find suitable housing for sex offenders upon release.[331] But ultimately the court held that home rule municipalities could continue to exclude sex offenders until the state expressly said otherwise.[332] Perhaps

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327 *Id.* at 404.

328 *See, e.g.*, Fross v. Cnty. of Allegheny, 20 A.3d 1193, 1207 (Pa. 2011) (striking down an Allegheny County ordinance that excluded certain categories of sex offenders from all but a handful of distant suburbs within the county); Beth Schwartzapfel & Emily Kassie, *Banished: Miami Dade County's Homeless Sex Offender Problem*, MARSHALL PROJECT (Oct. 3, 2018, 7:00 AM), https://www.themarshallproject.org/2018/10/03/banished?ref=hp-1-100 [https://perma.cc/9U5U-QVLP] (describing the effects of Miami-Dade's ordinance which, when combined with state and federal law, excluded many sex offenders from virtually every part of the County); G.H. v. Twp. of Galloway, 951 A.2d 221, 223-25 (N.J. Super. Ct. App. Div. 2008), *aff'd per curiam*, 971 A.2d 401 (N.J. 2009) (noting that more than 100 municipalities in New Jersey had enacted residency requirements, many of which had the effect of excluding sex offenders entirely).

329 *See, e.g.*, *Fross*, 20 A.3d at 1207 (holding that a county ordinance was an "obstacle" to the legislature's goal and was therefore preempted); *G.H.*, 951 A.2d at 225 (holding ordinances were invalid because they conflicted with legislative intent "to exclusively regulate this field"); People v. Diack, 26 N.E.3d 1151, 1156, 1158 (N.Y. 2015) (holding that local law regulating sex offender residency limitations was invalid because it was "the State's intent to occupy the field"); *see also* People v. Nguyen, 222 Cal. App. 4th 1168, 1181-82 (Cal. Ct. App. 2014) (applying a similar logic to strike down an Irvine ordinance that prohibited sex offenders from stepping foot in a public park). To this date, none of these states have moved to restore the local authority that courts implicitly took away—despite the fact that convicted sex offenders are probably the *easiest* group to legislate against.

330 *See* Ryals v. City of Englewood, 364 P.3d 900, 910 (Colo. 2016) (upholding Englewood's ordinance, which had the effect of excluding sex offenders from the Denver suburb); Exile v. Miami-Dade Cnty., 35 So. 3d 118, 118-19 (Fla. Dist. Ct. App. 2010) (upholding Miami-Dade's ordinance which excluded sex offenders from virtually every part of the County because the legislature had not invoked the "strongly disfavored doctrine of 'implied preemption'").

331 *Ryals*, 364 P.3d at 907.

332 *Id.* at 910.

unsurprisingly, the legislature has not taken the court up on its offer. No one wins reelection by making it easier for a convicted sex offender to move in next door.

The Colorado example illustrates two important insights about the role that implied preemption plays in the criminal law space. First, the absence of an express preemption regime often reflects the difficulty of imagining in advance precisely *how* a local government might try to supplement a state law regime. Colorado, for example, had enacted its registration law in 1992, almost a decade before local governments had jumped into the fray.[333] Legislators may have been reluctant to preemptively bar *all* future local legislation. But they also clearly failed to anticipate all of the *specific* ways that local governments would eventually try to undermine the state's policy goals.

Second, the political process dynamics around criminal lawmaking differ in important ways from those found in more traditional regulatory fields. As Einer Elhauge, Rick Hills, and Paul Diller have argued, the main problem with implied preemption in the context of ordinary economic regulations is that it tends to privilege the same organized business interests that already are in the best position to get what they want from the state.[334] The logic is simple and straightforward: faced with an ambiguous statute that only arguably preempts a local ordinance, a court should generally adopt whichever interpretation the political process will be most likely to correct if the court gets it wrong.[335] When it comes to ordinary business or environmental regulations, such an approach would typically counsel *against* using the doctrine of implied preemption because the business interests that typically favor preemption are better positioned to motivate the state legislature to step in.[336]

But, as Diller acknowledges, this same intuition would generally counsel *in favor* of using implied preemption in the criminal law space because the individuals who are disproportionately burdened by local overcriminalization are also the least likely to successfully prompt state legislatures to act.[337] When it comes to criminal lawmaking, some of the most powerful voices (at

333 *Id.* at 905.

334 *See* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 32-33 (2007) (citing interest group dynamics as an argument against implied preemption); Diller, *supra* note 10, at 1133 (noting that implied preemption allows interest groups to use courts to "seek relief from local laws they dislike" rather than pursuing other options like lobbying); *see also* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2257–58 (2002) (arguing that when a statute is ambiguous, a court should generally adopt the interpretation that is most likely to be overturned through the political process if it turns out to be incorrect).

335 Elhauge, *supra* note 334, at 2165-66.

336 Hills, *supra* note 334, at 22.

337 Diller, *supra* note 10, at 1137.

all levels of government) are the police officers, prosecutors, and victim advocacy organizations who typically favor expanded criminal liability.[338] And as Rachel Barkow and others point out, legislators are perpetually terrified of being labeled "soft on crime."[339] They sometimes may be willing to expend political capital by taking a more lenient approach toward a particular category of activity or offender. But they are unlikely to do so *repeatedly* in response to various local efforts to impose more restrictive regimes.

b. *Express Preemption and Narrow Tailoring*

The *Principles* also would make it harder for states to *expressly* preempt local criminal laws by requiring that any state law that preempts local authority be "narrowly tailored" to a "substantial state interest"—an intentionally demanding standard that is meant to shield broad swaths of local policymaking from state override.[340] The *Principles* make clear that the test requires close judicial scrutiny and, importantly, that policy disagreement alone would never suffice as a basis for displacing local law.[341] This means that a state's belief that certain activities should remain lawful or be punished more leniently would not be enough to override a local government's decision to take a more punitive approach. (But recall that the "concurrent authority" principle would prevent local governments from *legalizing* conduct that is unlawful under state law.[342]) Nor could a state simply assert that it has an interest in establishing a uniform, state-wide regime.[343] Rather, a state would have to point to a pattern of "[d]isuniformity . . . so pervasive as to cause substantial and demonstrable harm."[344] Similarly, the *Principles* note that "claim[s] that a given local law has external effects" should also be treated "skeptically" because all local laws have at least *some* impact outside the jurisdiction.[345] Under the *Principles*, a state would need to establish that "those effects are both demonstrable and substantial" before local law would have to give way.[346]

338 BARKOW, *supra* note 209, at 112.
339 *Id.* at 111.
340 PRINCIPLES, *supra* note 13, at 26.
341 *Id.* at 21.
342 *Id.* at 60.
343 *Id.* at 26.
344 *Id.* at 56 (internal quotation marks omitted).
345 *Id.* at 57.
346 *Id.*

None of this bodes well for the states' ability to preempt local criminal law.[347] Perhaps the best examples of how a robust tailoring requirement might work in practice come from Colorado and Ohio—two states that are generally quite permissive toward local criminal lawmaking, and which have had occasion to grapple with arguments about uniformity and extraterritorial impacts in the criminal justice space. As discussed above, one of the strongest arguments in favor of statewide uniformity in criminal lawmaking is that local criminal ordinances provide insufficient notice to the many out-of-town residents who happen to be passing through.[348] But these are precisely the sorts of arguments that both Ohio and Colorado courts have rejected in upholding the power of local governments to expand criminal liability or impose harsher punishment well above what is provided under state law. In *Niles v. Howard* for example, the Ohio Supreme Court upheld a local ordinance that made low-level marijuana possession punishable by up to 6 months in jail, a far harsher penalty than the $100 non-criminal fine imposed by state law.[349] As Justice Sweeney pointed out in dissent, a person from outside the jurisdiction would have no way of knowing that the same conduct that ordinarily would result in a ticket could, in Niles, subject them to a lengthy jail term.[350] The majority opinion did not even bother responding to this concern in upholding the local law.[351] Colorado courts have been similarly dismissive of uniformity claims. As discussed above, the Colorado Supreme Court expressly rejected disuniformity concerns in upholding local sex offender ordinances.[352] Similarly, in *People v. Hizhniak*, the court upheld a local ordinance that imposed up to 90 days in jail for low-level traffic infractions (in that particular case, for going 35 miles per hour in a 25 mile per hour zone).[353] Under state law, speeding was a non-criminal infraction

347 The only state that embraces some version of this requirement is California, but California courts have *also* been deeply skeptical of local criminal lawmaking in ways that have allowed them to largely sidestep the narrow tailoring inquiry in this context. *Fiscal v. City and County of San Francisco* is the rare case in which a California court considered the validity of a state law that expressly preempted a local criminal ordinance that banned firearm possession within city limits. 158 Cal. App. 4th 895, 910-11 (Cal. Ct. App. 2008). The court devoted a scant paragraph to explaining that the state very obviously had an (unspecified) interest in a "comprehensive" and "uniform" regime that would be undermined by a local ban. *Id.* at 918-19. This is not the sort of cursory analysis that the *Principles* authors have in mind.

348 *See* Logan, *supra* note 3, at 1461-65.

349 466 N.E.2d 539, 541-42 (Ohio 1984). Ohio law classified possession of less than 100 grams (3.5 ounces) of marijuana as a "minor misdemeanor" punishable by a $100 fine. *Id.* at 542 (Sweeney, J., dissenting). A conviction would not lead to a criminal record, and officers would typically not be able to make an arrest. *Id.*

350 *Id.* at 542-44.

351 *Id.* at 540-41.

352 *Supra* notes 330–332 and accompanying text.

353 People v. Hizhniak, 579 P.2d 1131, 1132-33 (Colo. 1978) (en banc).

punishable by a small fine.[354] Although local traffic enforcement almost invariably sweeps in a significant percentage of people from outside the jurisdiction,[355] the court declared that traffic regulation on city streets was "a matter of *local* . . . concern" such that the state could not preempt the local ordinance even if it wanted to.[356] In another case, the court similarly dismissed concerns over sentence disparities, noting that municipalities were under no obligation to subscribe to the state's "philosophy in sentencing."[357] Under the Colorado courts' logic, it is not clear that a state could *ever* establish that it has an interest in imposing a less punitive regime.

C. *"Preempting" Local Police*

The *Principles* also would limit dramatically the ability of states to regulate local policing. This too appears to be an unintended byproduct of the authors' efforts to shield blue-city economic and social welfare regulations from the "new preemption." When David Schleicher pointed out that the *Principles* could potentially undermine state efforts to address abusive policing,[358] two of the *Principles* authors responded that "it is not at all clear what policing abuse has to do with home rule."[359] As it turns out, however, home rule has quite a bit to do with the state's authority to regulate local police.

1. "Negative Preemption" and "General Law"

When it comes to policing, one of the more troubling provisions in the NLC *Principles* is the requirement that preemptive legislation constitute "general law."[360] As traditionally understood, the general law standard simply requires that laws apply uniformly throughout the state—preventing state legislatures from singling out specific municipalities without a strong reason to do so.[361] But the *Principles* use the phrase to describe a much more expansive set of requirements set down by the Ohio Supreme Court in *Canton v. State*.[362] In Ohio, it is not enough for a state to regulate evenhandedly.

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354 *Id.*

355 *See, e.g.*, Ponomarenko, *supra* note 1, at 229 (noting the high percentage of tickets issued to people from outside the jurisdiction).

356 *Hizhniak*, 579 P.2d at 1133 (emphasis added).

357 People v. Wade, 757 P.2d 1074, 1076-77 (Colo. 1988) (internal quotation marks omitted).

358 Schleicher, *supra* note 321, at 912-13.

359 Davidson & Schragger, *supra* note 85, at 1411.

360 PRINCIPLES, *supra* note 13, at 35.

361 *Id.* at 58-59 (describing the more traditional understanding of the "general law" requirement).

362 The Principles specifically invoke the *Canton* test and cite several cases applying it in describing how the "general law" test is supposed to work. *Id.* at 59-60 (citing Canton v. State, 766 N.E.2d 963 (2002)).

Under the so-called "third prong" of the *Canton* test, a state can only preempt a local ordinance if it enacts a state-wide rule of conduct to replace it.[363] Meanwhile, the fourth prong requires that state law "prescribe a rule of conduct upon citizens generally"[364]—a poorly defined requirement that courts have at times interpreted to prohibit states from regulating local governments *qua* local governments, without imposing some affirmative obligation on the public as well.

The *Principles* authors embrace the *Canton* standard because it offers a way to curb the use of so-called "negative" (or "deregulatory") preemption—laws that exclude local governments from regulating in a particular domain without adopting a superseding state-law regime.[365] The targets of the negative preemption ban are state laws that prohibit local governments from enacting various regulatory measures, from Styrofoam bans, to rent control measures, to rideshare platform regulations.[366] As critics explain, it is one thing for a state to displace conflicting regulations—but it is quite another to simply shield a particular industry or practice from being regulated at all.[367] When applied to ordinary economic or environmental regulations, the *Canton* test furthers decidedly progressive, pro-regulatory goals by preventing states from simply disabling local action in a particular domain.

In what should now be a familiar pattern, the *Canton* test takes on a decidedly different political valence when applied to the conduct of local police. Over the years, Ohio courts have relied on one or both of these "general law" requirements to strike down various state efforts to regulate local policing.[368] For example, in *City of Dayton v. State*, the Ohio Supreme Court applied both prongs of the *Canton* test to strike down a state law regulating the use of automated traffic enforcement systems (e.g., speed

363 *Id.* at 59.

364 *Id.*

365 *See* Briffault, *supra* note 9, at 2014 (noting that "Ohio's substantive approach to 'general law' would be useful to local governments in other states fighting state displacement").

366 *See id.* at 1999-2002 (summarizing the various measures).

367 *Id.* at 2013-14.

368 In *Vill. of Linndale v. State*, the Ohio Supreme Court struck down a rare effort on the part of the state legislature to address a widespread pattern of profit-driven traffic enforcement on the part of small-town and rural police. 706 N.E.2d 1227, 1229-30 (Ohio 1999). At issue in the case was a state law that prohibited local police officers from issuing speeding tickets on interstate highways in towns that had less than a half-mile stretch of the highway within their jurisdiction. *Id.* The obvious target of the law were places like Linndale—a village with a population of under 200, whose officers had issued more than 5,000 traffic citations per year along its tiny stretch of I-71. *Id.* at 1230. The Ohio Supreme Court declared that the statute violated the third prong of the *Canton* test because it purported "only to limit" a "municipal corporation's authority to regulate traffic" without announcing a rule of conduct to regulate the public at large. *Id.*

cameras, red light cameras) by local police.[369] The concern with cameras is that they make it too easy to use traffic enforcement to raise local revenue. Whereas a busy officer could potentially write a few tickets per hour, a camera could potentially issue thousands of tickets per day. Ohio has hundreds of small-town departments, and there was evidence that some of these agencies were putting cameras along major throughways to issue thousands of tickets to unsuspecting (out-of-town) motorists who happened to be passing through.[370] Legislators had hoped to ban the use of these systems entirely, but they were concerned that a complete ban would be struck down as unlawful negative preemption under the *Canton* test.[371] So instead, legislators imposed a variety of restrictions designed to reduce the profit incentive that drives automated enforcement, and to mitigate some of the attendant harms. The provisions at issue in *Dayton* required that an officer be present at the camera location whenever the system was operational; prohibited the use of cameras to issue tickets to drivers going just a few miles over the speed limit; and required municipalities to conduct a traffic safety study before placing a camera at any particular location.[372] The Court struck down all three provisions under the *Canton* test for dictating how local departments should go about using their traffic enforcement authority in ways that did not sufficiently further an overriding state concern.[373]

Two years later, a lower court applied *Dayton* to strike down five additional provisions in the speed camera statute in a sweeping opinion that—to the extent it accurately reflects the "general law" standard—would doom many, if not most, state efforts to regulate the conduct of local police.[374] For example, one of the provisions at issue required an officer to examine the camera photo or footage to confirm that a violation had occurred, and to ensure that the license plate numbers actually match, before issuing a

369 City of Dayton v. State, 87 N.E.3d 176, 179 (Ohio 2017). The *Principles* cite *Dayton* favorably as an example of the "general law" requirement in action. PRINCIPLES, *supra* note 13, at 59.

370 *See* Kimball Berry, *New Traffic Camera Law Requires a Cop, Too,* CINCINNATI.COM ENQUIRER (Mar. 20, 2015, 8:30 PM), https://www.cincinnati.com/story/news/2015/03/20/new-ohio-traffic-camera-bill-starts-march/24858977 [https://perma.cc/6NBN-6P5Q].

371 *See* Mark Gillispie, *Ohio Traffic-Camera Law Takes Enforcement to Busy Freeways*, PHYS.ORG (Nov. 8, 2015), https://phys.org/news/2015-11-ohio-traffic-camera-law-busy-freeways.html [https://perma.cc/A6NJ-2ZA6] ("The Legislature couldn't enact an outright ban because of two Ohio Supreme Court decisions that said cities can use enforcement cameras.").

372 *City of Dayton*, 87 N.E.3d at 184-86.

373 *Id.* at 183-85; *see also id.* at 188 (French, J., concurring).

374 City of Toledo v. State, 130 N.E.3d 341, 349-55 (Ohio Ct. App. 2019). To the extent the court gets it wrong (though it seems entirely consistent with *Dayton*), that is only marginally less troubling. As discussed below, courts in general have a tendency to bend over backwards to uphold the interests of local law enforcement—so to the extent that the *Canton* test is susceptible to being misconstrued, one would expect it to be misconstrued in precisely these sorts of ways.

citation.[375] The court declared that this was little more than an "attempt[] to control and dictate to the municipality the way in which it must act with regard to citing citizens."[376] A separate provision required any camera manufacturer who contracts with a local government to provide the locality with "a certificate of proper operation that attests to [the] accuracy" of the device.[377] Despite the fact that the law in question was actually aimed at *manufacturers*, the court deemed it an impermissible intrusion on municipal home rule because it "mandate[ed] that the municipality contract for a service from the manufacturer for which the municipality may or may not have otherwise contracted."[378]

The Court's reasoning in *Toledo* and *Dayton* would foreclose any number of state law reforms. First, it would eliminate virtually all state-level regulation of police surveillance technologies, such as license plate readers, drones, and facial recognition, which currently are in place in more than a dozen states.[379] All of these statutes use a mix of regulatory strategies—ranging from statewide moratoria to access restrictions and auditing requirements—that the *Toledo* and *Dayton* courts ruled out of bounds.[380] The Court's logic would similarly apply to state laws governing specific law enforcement tactics, such as custodial interrogation or vehicle pursuits. And it could potentially extend further still to prohibit states from requiring local agencies to collect data on stops, arrests, use of force incidents, and complaints—all of which impose duties on law enforcement without simultaneously regulating the public as a whole.

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375 *Id.* at 350-51.

376 *Id.* at 351.

377 *Id.* at 354.

378 *Id.* at 355. Another provision required jurisdictions to issue automated citations within thirty days of the incident, a modest procedural requirement designed to make it easier for the vehicle owner to raise an affirmative defense. *Id.* at 351. The court struck down this requirement as "unreasonably dictating the minutia of municipality process" in violation of the general law test. *Id.* at 352.

379 *See supra* notes 135–140 and accompanying text.

380 *See, e.g.*, 2020 Vt. Acts & Resolves No. 166, https://legislature.vermont.gov/Documents/2020/Docs/BILLS/S-0124/S-0124%20As%20Passed%20by%20Both%20House%20and%20Senate%20Unofficial.pdf [https://perma.cc/CGC7-JUGK] (prohibiting law enforcement use of facial recognition technology unless otherwise permitted by law); *SB 741 Facial Recognition Technology; Authorized Uses*, VIRGINIA'S LEGISLATIVE INFORMATION SYSTEM (2022), https://lis.virginia.gov/cgi-bin/legp604.exe?221+sum+SB741 [https://perma.cc/5WU4-S7X5] (permitting use of facial recognition technology by law enforcement but with statewide technology, purchasing, and policy standards); MASS. GEN. LAWS. ch. 6, § 220(c) (2021) (creating documentation and reporting requirements for use of facial recognition technology by law enforcement).

2. "Narrowly Tailoring" Police Reform

Even in the absence of the "general law" standard, the *Principles'* requirement that preemptive legislation be "narrowly tailored" to a "substantial state interest" could potentially limit the permissible scope of state regulation.[381] Indeed, it is likely that laws governing local policing would actually be subject to the *even more* demanding preemption standard that applies to state laws that interfere with local governments' power to set the "terms and conditions of its employees."[382] A number of criminal justice scholars have favorably cited this more demanding standard as a way to push back against state-law LEOBORs and other provisions that impede accountability.[383] As the remainder of this Section makes clear, however, this turns out to be a classic case in which the medicine is worse than the disease.

State courts have generally upheld state regulations of policing on the ground that policing *necessarily* has extra-local effects because local police officers interact with the many out-of-town residents who happen to be passing through.[384] But these appear to be the sorts of vague arguments about extraterritorial impacts that the *Principles* authors urge courts to treat skeptically—and these are *precisely* the sorts of arguments that more skeptical courts have rejected in other contexts. In *Linndale v. State*, for example, the Ohio Supreme Court was not concerned with the obvious extraterritorial impacts of extractive small-town policing when it struck down a state law that tried to limit the ability of small-town officers to aggressively police the tiny stretches of interstate highway that fell within their jurisdiction.[385] One would expect these same justices to be equally skeptical of arguments that the state has an *inherent* interest in regulating the conduct of local police.

Judged on a case-by-case basis, it is virtually impossible to predict which state laws regulating local policing would be permitted to stand. Do states

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381 PRINCIPLES, *supra* note 13, at 35-36.

382 *Id.* at 36. These laws would have to be "narrowly tailored" to an "*overriding*" (not simply "substantial") local interest, a standard that the *Principles* authors make clear would impose an even higher burden of proof on the state. *See id.* at 36, 63-64 (noting that "the presumption against preemption is likely to be especially strong" in this area of regulation).

383 *See, e.g.*, O'Rourke, Su, & Binder, *supra* note 8, at 1403 (asserting that the arguments successfully raised in Ohio could be used in other states to limit interference over local police departments); Shoked, *supra* note 99, at 1312-14 (noting that preemption over policing is sometimes used to require localities to "employ their police forces more aggressively"); Gulasekaram, Su, & Villazor, *supra* note 8, at 861 (raising an anti-commandeering argument in the context of home rule).

384 *See, e.g.*, City of Huntington Beach v. Becerra, 44 Cal. App. 5th 243, 276 (Cal. Ct. App. 2020) ("Cities in . . . metropolitan areas flow seamlessly into one another and millions of people pass through them daily . . . ."; L.A. Cnty. Safety Police Ass'n v. Cnty of L.A., 192 Cal. App. 3d 1378, 1387 (Cal. Ct. App. 1987) (acknowledging that the services provided in a county also benefit the "innumerable nonresident citizens who visit, work, or own property in the county").

385 *See supra* note 368 (describing the facts and holding in *Linndale*).

have an overriding interest in regulating how local officers use force against the public? Given the constitutional dimensions of police violence, one would hope that they do.[386] Then again, the Colorado Supreme Court held that the state *did not* have an overriding interest in the training and qualifications of Denver's deputy sheriffs, who did not exercise general arrest powers throughout the county—but who *were* authorized to carry firearms and maintain custody of individuals confined at county hospitals or jails.[387] The FOP had argued that the state has an overriding interest in the safety of persons incarcerated at county facilities, at least some of whom would inevitably be nonresidents.[388] The Court rejected this argument on the ground that the extraterritorial impact of the deputies' conduct "is, at best, *de minimis*."[389] The Colorado court emphasized that the state *does* have an interest in the training of ordinary police officers who are more likely to encounter residents from outside the jurisdiction.[390] But that is no guarantee that other state courts would see the issue in quite the same way. (Again, recall Ohio.)

To date, state courts have largely managed to sidestep these sorts of inquiries because only a handful of states afford local governments any degree of protection from state preemption—and in none of these states are the protections *nearly* as robust as what the *Principles* propose. What we do have, however, are countless examples of state courts bending over backwards to bless often-egregious police (mis)behavior.[391] One can easily imagine that at least some of these same justices would happily use the robust new set of anti-

386 But recall that the constitutional standard is far more permissive than some of the laws that states have enacted in recent years.

387 Fraternal Ord. of Police v. City of Denver, 926 P.2d 582, 590-91 (Colo. 1996) (en banc).

388 *Id.* at 590.

389 *Id.* at 591.

390 *Id.* at 590.

391 *See, e.g.*, Russ Bynum, *The Georgia Supreme Court Has Thrown Out an Indictment Charging an Ex-Police Chief with Misconduct*, AP NEWS (Apr. 30, 2024), https://apnews.com/article/supreme-court-indictment-glynn-county-police-chief-8cda81b00c99a35b802253f95e284082 [https://perma.cc/6ASY-BTSK] (describing the Georgia Supreme Court's decision to dismiss a felony indictment charging an ex-police chief and his top aide for failure to investigate misconduct allegations); Hurubie Meko, *Man Freed After 18 Years in Prison Caused by Deceptive Photo ID*, N.Y. TIMES (Mar. 9, 2023), https://www.nytimes.com/2023/03/09/nyregion/brooklyn-exoneration-sheldon-thomas.html [https://perma.cc/Z6DN-73H5] (quoting a New York judge who stated it was "of no legal consequence" that police used a deceptive photo lineup which led to the wrongful murder conviction of an innocent man); Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html [https://perma.cc/757E-EKJR] (providing several examples of police officers lying while testifying in state proceedings).

preemption doctrines to strike down state laws that they perceive as being unduly restrictive of local police.[392]

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The preceding discussion once again illustrates what Nestor Davidson describes as the central dilemma of localism. Localism, he writes, is a "double-edged sword." It "can advance economic fairness, social justice, and policy innovation." But it also can become "a tool of exclusion, reinforcing racial and socioeconomic inequality."[393] Written to combat the proliferation of red state preemption of local economic and environmental policymaking, the *Principles* are designed to unleash the positive, innovative aspects of local self-governance. But these benefits come at a steep cost, by hindering the ability of states to rein in the more punitive, exclusionary tendencies that also tend to follow from local control.

To be sure, it could very well be the case that the benefits that accrue from the *Principles'* expansive version of localism in *other* policymaking contexts would ultimately outweigh the criminal justice costs. After all, the low-income residents and residents of color who are most likely to feel the disproportionate burdens of local policing and incarceration are also the ones who would most likely benefit from the greater labor and economic protections that (some) local governments would be able to provide. That question may ultimately be unanswerable, and is certainly beyond the scope of this paper to take up. But it is essential to put these criminal justice costs front and center, and to acknowledge that when it comes to *criminal justice policymaking*, reinvigorated home rule would do considerably more harm than good. At the very least, this Part offers a strong note of caution to the criminal justice scholars who have embraced the language of home rule as a means to insulate blue city criminal justice reforms from preemption by the state. If the goal is to reduce mass incarceration and promote more equitable enforcement, strengthening home rule is decidedly not the way to go.

CONCLUSION: BEYOND LOCALISM

Localism is deeply engrained in American democracy, and criminal justice policymaking is no exception. Indeed, what often gets lost in the literature is just how much authority local communities *already* have to shape the boundaries of the carceral state. With more than 17,500 local police

392 Again, Ohio here is indicative. The *Toledo* court's opinion, discussed above, is positively dripping with disdain for what the court sees as a misguided attempt to "micromanage" local policing. *See* City of *Toledo v. State*, 130 N.E.3d 341, 351-52, 355 (Ohio Ct. App. 2019).

393 Davidson, *supra* note 14, at 958.

departments, and more than 3,000 locally-elected prosecutors—not to mention the thousands of local governments with criminal lawmaking authority—many critical policy choices about the criminal law and its enforcement are and will inevitably continue to be made locally. The goal here is not to suggest that it should be otherwise. (Though there certainly is a great deal more that states could do to regulate local prosecutors and police, and Part II offers a number of reasons to think that criminal *lawmaking* should perhaps be the exclusive purview of the states.)

What the preceding discussion makes clear, however, is that there simply is no reason to think that the criminal system would work any better—or be any less punitive—if states were to get out of the way. The problem with the new wave of local criminal justice scholarship is the exact same one that Richard Briffault identified in his seminal two-part essay on *Our Localism*: local governments vary tremendously in "size, wealth, and function," and a theory of localism that imagines only a subset of local government units is almost by definition destined to fall short when applied to them all.[394] In the criminal justice context, the tendency has been to equate "local" with big city. But the case for criminal justice localism starts to look quite a bit less appealing when one considers the actual structure of criminal justice policymaking in the small towns and suburbs in which most Americans live.

The same observation, of course, holds true for states as well. States likewise vary considerably when it comes to their size, their capacity to govern, the degree of geographic diversity within their borders, and perhaps most importantly, their politics. State law can sometimes stand in the way of local reform efforts. But it also can be a powerful force that prods local institutions to change. And it simply is not possible to craft a theory of localism—or criminal justice localism for that matter—that would protect local decisionmaking only when it favors less punitive ends.

So where does one go from here? At the end of the day, preemption—much like over-criminalization and over-policing—is a *political* problem. And the solutions must necessarily be political as well. Indeed, as others have pointed out, the broad constitutional reforms that the *Principles* authors envision would themselves face tremendous (likely insurmountable) political headwinds in precisely those states where state preemption poses the greatest threat to the progressive cause.[395] Just as importantly, the state courts that would be tasked with enforcing these new constitutional provisions would themselves be the product of their states' political systems—and would thus be likely to view state-local preemption conflicts through their state's partisan slant. In Ohio, for example, the same courts that struck down one state-level

394 Briffault, *supra* note 38, at 2.

395 *See* Schleicher, *supra* note 319, at 898 (making this point).

police reform after another had no trouble upholding a state statute that broadly preempted all local firearm laws.[396] It is politics through and through.

That is not necessarily such a bad thing. State-level advocacy may be a heavier lift for reform groups, but it is not an insurmountable one. The proliferation of new criminal justice reform organizations, both national and local, that have been successfully pressing their case to state legislators in recent years suggests that it may have been a bit premature to write off statehouse politics as the exclusive purview of prosecutors and police.

To be sure, some states, at least at present, are deeply inhospitable to reform, which means that efforts to scale back our bloated system of criminal punishment must necessarily begin locally. And yes, state preemption will sometimes stand in the way. Even in these states, however, the solution to the "new preemption" is not going to be found in the courts. And at least when it comes to the "new criminal justice preemption," it certainly is not going to come from revitalized home rule.

396 See City of Cleveland v. State, 942 N.E.2d 370, 372, 378 (Ohio 2010) (reasoning that the statute—which broadly preempted all local firearm legislation—was nevertheless consistent with the "general law" requirement).

APPENDIX

Table 1: Colorado Advocacy Groups

ORGANIZATION	SCOPE
Denver Black Male Initiative	Local
Denver Homeless Out Loud	Local
Independence Institute	Local
Justice Reskill	Local
NAACP Denver	Local
Shorter Community AME Church	Local
United for a New Economy	Local
A Little Help Ministry	State/National
Above Waters Project (AWP)	State/National
ACLU of Colorado	State/National
Americans for Prosperity (AFP)	State/National
Archdiocese of Denver	State/National
Coloradans for Responsible Wildlife Management (CRWM)	State/National
Colorado Catholic Conference	State/National
Colorado Center on Law & Policy (CCLP)	State/National
Colorado Children's Campaign	State/National
Colorado Coalition Against Sexual Assault (CCASA)	State/National
Colorado Coalition for the Homeless	State/National
Colorado Common Cause	State/National
Colorado Criminal Defense Bar (CCDB)	State/National
Colorado Criminal Justice Reform Coalition (CCJRC)	State/National
Colorado Cross-Disability Coalition (CCDC)	State/National
Colorado Education Association	State/National
Colorado Fiscal Institute	State/National
Colorado Freedom Fund	State/National
Colorado Freedom of Information Coalition	State/National
Colorado Justice Advocacy Network	State/National
Colorado Moms Demand Action	State/National
Colorado Nonprofit Association (CNA)	State/National

Colorado Nonprofit Development Center (CNDC)	State/National
Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR)	State/National
Colorado Organization for Victim Assistance (COVA)	State/National
Colorado Sierra Club	State/National
Colorado State Grange	State/National
Conscious Consulting Co.	State/National
Conservation Colorado	State/National
Disability Law Colorado (DLC)	State/National
Driving Under the Influence of Drugs (DUID) Victim Voices	State/National
Drug Policy Alliance	State/National
Enterprise Community Partners	State/National
Everytown for Gun Safety Action Fund	State/National
Interfaith Alliance of Colorado	State/National
Interfaith Power and Light	State/National
Justice Action Network	State/National
League of Women Voters of Colorado	State/National
Mothers Against Drunk Driving Colorado	State/National
NAACP	State/National
Natural Resources Defense Council Inc. and its Affiliates	State/National
Office of the State Public Defender	State/National
ProgressNow Colorado	State/National
Rocky Mountain Gun Owners	State/National
Safe Access Colorado	State/National
Second Chance Center	State/National
Service Employees International Union	State/National
Southern Colorado Cannabis Council (SCCC)	State/National
The Arc of Colorado	State/National
The Brady Campaign to Prevent Gun Violence	State/National
Together Colorado	State/National

Violence Free Colorado	State/National
Western Colorado Alliance (for Community Action)	State/National
Women's Lobby	State/National

Table 2: Colorado Bills

YEAR	BILL NUMBER	NAME
2019	HB19-1119	Peace Officer Internal Investigation Open Records
2019	HB19-1142	Eyewitness Identification Showup Regulations
2019	HB19-1225	No Monetary Bail for Certain Low-level Offenses
2019	HB19-1263	Offense Level for Controlled Substance Possession
2020	SB20-217	Enhance Law Enforcements Integrity
2021	SB21-124	Changes to Felony Murder
2021	SB21-174	Policies for Peace Officer Credibility Disclosures
2021	SB21-271	Misdemeanor Reform
2022	SB22-001	Crime Prevention Through Safer Streets
2023	SB23-254	Search Warrant Procedures

Table 3: Minnesota Advocacy Groups

ORGANIZATION	SCOPE
8212 Truce Center	Local
Abijah's on the Backside	Local
African American Women and Men in Need	Local
Alexandria Technical and Community College	Local
Banyan Community	Local
Beltrami Area Service Collaborative Community Service Center	Local
Bolder Options	Local
Chisolm Kids Plus	Local
Cultural Wellness Center	Local
Dispute Resolution Center	Local
Eastside Neighborhood Services	Local
Elpis Enterprises	Local
Ely Community Resource	Local
Face to Face Health and Counseling Service	Local
First Unitarian Society of Minneapolis	Local
Generation 2 Generation	Local
Girl Scouts River Valleys	Local
Girls Taking Action	Local
Hennepin Healthcare	Local
Hennepin Technical College	Local
Hmong American Partnership	Local
Kids n' Kinship	Local
Lee Carlson Center	Local
Legal Rights Center Minneapolis	Local
Minneapolis American Indian Center	Local
Neighborhood House	Local
Northwest Community Action	Local
Program for Aid to Victims of Sexual Assault	Local
Queerspace Collective	Local
Rivers of Hope	Local
St. James Lutheran Church	Local
Teamsters Local #320	Local
The Link	Local

Turning Point Inc.	Local
Twin Cities Incarcerated Workers Organizing Committee	Local
Until We Are All Free	Local
Women's Initiative for Self-empowerment	Local
ACLU Minnesota	State/National
African American Leadership Forum	State/National
AFSCME	State/National
Allina Health	State/National
Americans for Prosperity	State/National
Arrowhead Economic Opportunity Agency	State/National
Bold North Recovery	State/National
Center for the American Experiment	State/National
Center for Victims of Torture	State/National
Children's Defense Fund Minnesota	State/National
Coalition to End Wage Theft	State/National
Common Cause Minnesota	State/National
Commonbond Communities	State/National
Community Mediation Minnesota	State/National
Cornerstone	State/National
EdAllies	State/National
Evangelical and Lutheran Church of America	State/National
Faith in Minnesota	State/National
Fortune Relief and Youth Empowerment Organization	State/National
Frayeo	State/National
Gender Justice	State/National
Gobi	State/National
Grassroots Legalize Cannabis Party	State/National
Harvard Kennedy School	State/National
Hope for the Brave	State/National
Immigration Law Center of MN	State/National
Indigenous Peoples Task Force	State/National
ISAIAH	State/National
Justice Action Network	State/National
Lakes Area Restorative Justice Project	State/National
Law Enforcement Action Partnership	State/National
Legal Marijuana Now Party	State/National

Lutheran Social Service of Minnesota	State/National
Metropolitan State University	State/National
Mid-Minnesota Legal Aid	State/National
Minnesota Alliance on Crime	State/National
Minnesota American Indian Center	State/National
Minnesota Association for County Social Services Administrators	State/National
Minnesota Association of African American Physicians	State/National
Minnesota Association of Black Lawyers	State/National
Minnesota Association of Criminal Defense Lawyers	State/National
Minnesota Association of Professional Employees	State/National
Minnesota Catholic Conference	State/National
Minnesota Children's Alliance	State/National
Minnesota Coalition Against Sexual Assault	State/National
Minnesota Council of Nonprofits	State/National
Minnesota Driving While Impaired Task Force	State/National
Minnesota Family Council	State/National
Minnesota Gun Owners Caucus	State/National
Minnesota Hospital Association	State/National
Minnesota Justice Research Center	State/National
Minnesota Moms Demand Action	State/National
Minnesota Public Health Association	State/National
Minnesota School of Public Health Student Senate	State/National
Minnesota State Bar Association	State/National
Minnesota Youth Intervention Programs Association	State/National
MN Association of Criminal Defense Lawyers	State/National
MN Catholic Conference	State/National
MN Citizens Concerned for Life	State/National
MN Coalition Against Sexual Assault	State/National
MN School of Public Health	State/National
Mothers Against Community Gun Violence	State/National
NAMI Minnesota	State/National

National Association of Social Workers-MN	State/National
National Council of Jewish Women	State/National
North Central States Regional Council of Carpenters	State/National
Northeast Youth and Family Services	State/National
Pro-Life Action Ministries	State/National
Red River Women's Clinic	State/National
Second Chance Coalition	State/National
Smart Approaches to Marijuana Minnesota	State/National
St. Thomas University School of Law, Pro-Life Center	State/National
The Advocates for Human Rights	State/National
The Center for Victims of Torture	State/National
The People's Canvass Coop	State/National
The Violence prevention Project	State/National
True North Legal	State/National
United Black Legislative Agenda	State/National
University of Minnesota	State/National
Violence Free Minnesota	State/National
World to Win	State/National
YMCA of the North Youth Intervention Program	State/National

Table 4: Pennsylvania Advocacy Groups

ORGANIZATION	SCOPE
Chester County Bar Association	Local
City of Philadelphia	Local
Delaware County	Local
Glen Mills Schools	Local
Greater Pittsburgh Chamber of Commerce	Local
Philadelphia Foundation	Local
Philadelphia Trial Lawyers Association	Local
Regional Housing Legal Services	Local
Trinity Health Mid-Atlantic	Local
Urban League of Philadelphia	Local
ACLU of Pennsylvania	State/National

Action for Safety and Justice	State/National
Action Now Initiative	State/National
After Innocence	State/National
Allegheny Conference on Community Development	State/National
American Conservative Union Foundation	State/National
American Federation of State, County, and Municipal Employees (AFSCME) Council 13	State/National
American Federation of Teachers Pennsylvania	State/National
Americans for Prosperity	State/National
Anti-Human Trafficking Initiative	State/National
CeaseFirePA	State/National
CHILD USAdvocacy	State/National
Common Cause Pennsylvania	State/National
Commonwealth Foundation for Public Policy Alternatives	State/National
Community Legal Services, Inc	State/National
DreamCorps	State/National
Emergency Response Training and Certification Association	State/National
Evangelical Lutheran Church in America	State/National
Families Against Mandatory Minimums	State/National
Institute for Justice	State/National
Justice Action Network	State/National
JustLeadershipUSA	State/National
Juvenile Law Center	State/National
Keystone Research Center	State/National
Knife Rights, Inc.	State/National
League of Women Voters of Pennsylvania	State/National
Make the Road Pennsylvania	State/National
National Association of Social Workers, Pennsylvania Chapter	State/National
National Safety Council	State/National
Orthodox Union - Teach PA	State/National
Pennsylvania AFL-CIO	State/National
Pennsylvania Alliance of Boys & Girls Clubs	State/National
Pennsylvania Association for Justice	State/National

Pennsylvania Association of Criminal Defense Lawyers	State/National
Pennsylvania Bar Association	State/National
Pennsylvania Catholic Conference	State/National
Pennsylvania Chamber of Business and Industry	State/National
Pennsylvania Coalition for Civil Justice Reform	State/National
Pennsylvania Council of Children, Youth, and Family Services	State/National
Pennsylvania Downtown Center	State/National
Pennsylvania Legal Aid Network, Inc.	State/National
Pennsylvania Pretrial Partnership	State/National
Pennsylvania Prison Society	State/National
Pennsylvania Psychiatric Society	State/National
Pennsylvania State Association of Township Supervisors	State/National
Pennsylvania State Grange	State/National
Pennsylvanians for Modern Courts	State/National
Prison Fellowship Ministries	State/National
Public Defender Association of Pennsylvania	State/National
Reform Action Fund	State/National
Service Employees International Union Pennsylvania State Council	State/National
SiX Action	State/National
State Freedom Caucus Network	State/National
Straight Ahead Organization	State/National
The Pew Charitable Trusts	State/National
Tides Advocacy	State/National
Women Against Abuse, Inc.	State/National
Youth Sentencing & Reentry Project	State/National