

Maurice A. Deane School of Law at Hofstra University
Scholarly Commons at Hofstra Law

Hofstra Law Faculty Scholarship

2020

Local Offenses

Brenner M. Fissell

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship



Part of the [Law Commons](#)

Recommended Citation

Brenner M. Fissell, *Local Offenses*, 89 Fordham L. Rev. 837 (2020)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1343

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawlas@hofstra.edu.

ARTICLE
LOCAL OFFENSES

*Brenner M. Fissell**

Criminal law is generally thought to exist within two jurisdictional levels: federal and state. Neglected in the legal mind, and in legal scholarship, is the vast body of criminal law promulgated by local governments. While one should ask “what” is being criminalized by cities, towns, and villages, one should also ask “how” these offenses are written. The offense-drafting practices reflected in state criminal law have been extensively studied, but this has never been attempted for local offenses. This Article undertakes that task. After surveying a large number of local criminal codes, this Article concludes that local offenses routinely fail to live up to modern drafting standards—especially in that they usually lack a mens rea element (and thus impose strict liability). While this is problematic in its own right, special concern arises when there is an asymmetry between archaically written local offenses and a state criminal code that has been updated to reflect modern practice. In such a context, the home rule powers of the local government have the effect of thwarting the advances in criminal law made at the state level. This may be because of a reduced institutional competence of city councils and town boards, but it may also be a deliberate choice. While the primary aim of this Article is to unearth this phenomenon and describe its implications, these implications can be seen as relevant for two significant conversations in criminal law scholarship: the recent literature studying the misdemeanor system and also the movement to “democratize” criminal justice. In general, recognition of harmful local-state offense asymmetry should temper the prolocalist optimism of both groups.

* Associate Professor of Law, Maurice A. Deane School of Law at Hofstra University. The author wishes to thank participants at CrimFest! 2019 at Brooklyn Law School for their comments, especially Judge Stephanos Bibas, Richard Bierschbach, Carissa Byrne Hessick, Steven Koh, Wayne Logan, Gabe Mendlow, Brian Murray, William Ortman, Alice Ristroph, Jocelyn Simonson, and Sarah Swan. Thanks are also owed to the participants at the American Bar Association’s Criminal Justice Section meeting in 2019 in Washington D.C., including Jamelia Morgan, Justin Murray, and Anna Roberts. The author also thanks Daryl Brown, Matthew Cahill, Stuart Green, Matthew Shapiro, and Emily Stolzenberg, as well as Guyora Binder, for comments throughout various stages of this project.

INTRODUCTION.....	838
I. MODERN AND ARCHAIC OFFENSE DRAFTING.....	845
II. THE FORM(S) OF STATE CRIMINAL LAW	849
A. <i>Modern Codes</i>	849
B. <i>Archaic Codes</i>	852
III. THE FORM(S) OF LOCAL CRIMINAL LAW	854
A. <i>The Authority to Create Local Crimes</i>	854
B. <i>A Note on Method</i>	856
C. <i>Local Criminal Law—Observed Trends</i>	859
1. Code Organization	859
2. The Form of Specific Offenses	861
IV. HARMFUL STATE-LOCAL ASYMMETRY	867
A. <i>Description and Implications</i>	868
B. <i>Two Causal Hypotheses</i>	871
1. Hypothesis One: Reduced Institutional Competence	871
2. Hypothesis Two: Deliberate Overdeterrence	874
V. LOCAL OFFENSES AND CRIMINAL JUSTICE SCHOLARSHIP:	
MISDEMEANORLAND AND DEMOCRATIZATION.....	876
A. <i>Misdemeanorland</i>	877
B. <i>Democratization</i>	880
C. <i>Localism Reappraised</i>	886
CONCLUSION.....	888

INTRODUCTION

When most Americans think about the lawmaking powers of city councils or town boards, they probably think of “codes enforcement”—the colloquial term for the trivial rules that dictate how we must tend to our houses, lawns, and yards. At most, violation of these rules is usually thought to trigger a ticket or a small monetary fine. In reality, though, local governments—even the smallest village—possess vast powers to criminalize conduct and to punish violators with months in prison or probation. The U.S. Department of Justice’s investigation of the Ferguson Police Department in 2015 helped to shine a light on this “shadow criminal law”¹ and reported the following observation: “Ferguson’s municipal code addresses nearly every aspect of civic life for those who live in Ferguson”²

Moreover, recent scholarship regarding the misdemeanor criminal justice system (both state and local) has emphasized the significant impact that the

1. This label is from Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

2. U.S. DEP’T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 7 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/TP4R-4S5G>].

enforcement of low-level offenses has on the lives of many citizens. Alexandra Natapoff writes that, while misdemeanors have long been seen as the “chump change” of the criminal justice system, unworthy of the attention of scholars, activists, and reformers, the misdemeanor system is nevertheless “enormous, powerful, and surprisingly harsh.”³ These offenses constitute 80 percent of the criminal cases in the United States.⁴

While the effects of the misdemeanor system (both state and local) have recently received interest, scholars have yet to focus sustained attention on the substantive criminal law created by local governments—the offenses that “address[] nearly every aspect of civic life” in localities.⁵ Only one in-depth treatment exists: a 2001 study by Wayne Logan.⁶ A significant achievement of Logan’s article is to analyze the “dilemma of localism”⁷—the simultaneous opportunity and threat presented by devolution of power to smaller jurisdictions—in the specific context of criminal law. In particular, there is a well-recognized threat of parochialism in criminalization decisions: majorities become more powerful when they are more concentrated within smaller jurisdictional boundaries, and they can use this power to punish the conduct of disfavored minorities.⁸ Logan discusses various hypotheses that

3. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 2 (2018) (“Because the crimes are small and the punishments relatively light in comparison to felonies, this world of low-level offenses has not gotten much attention.”).

4. *Id.*

5. U.S. DEP’T OF JUST. C.R. DIV., *supra* note 2, at 7.

6. *See generally* Logan, *supra* note 1. Logan’s work came at a time of intense debate in local government law scholarship. The home rule movement’s trend in favor of increased local power had been defended by scholars such as Gerald Frug in the early 1980s, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1108–13 (1980), who “emphasized the progressive possibilities that local power, especially urban power, presented.” David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2331 (2003). A decade later, localism received an influential critique from Richard Briffault, who argued that localism had been hijacked by affluent suburbs to serve selfish and exclusionary ends. Richard Briffault, *Our Localism* (pt. 1), 90 COLUM. L. REV. 1, 15–16 (1990) [hereinafter Briffault, *Our Localism: Part 1*]; *see also* Richard Briffault, *Our Localism* (pt. 2), 90 COLUM. L. REV. 346, 349–56 (1990) (describing this argument for localism). Summarizing this tension around the same time that Logan was writing, Roderick Hills concluded, “lovers of local government . . . are going to have to make a tough choice between the direct political participation that local governments facilitate and the social inequality and parochialism that local governments also seem to promote.” Roderick M. Hills Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2011–12 (2000). Local power allowed for increased democratic involvement and policy experimentation, but this power could be directed towards nefarious (“parochial”) goals. *Id.*

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

8. “Localities . . . indulge in a marked tendency toward oppressive use of the criminal sanction.” Logan, *supra* note 1, at 1449. He highlights the example of local criminal laws targeting homosexual conduct and also those targeting the religious practices of minorities. *Id.* at 1449–50. Perhaps the most well-known examples are the local vagrancy offenses that were enforced against unpopular groups. *Id.*; *see also* RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s, at 2–4 (2016) (describing the variety of people who were subjected to local vagrancy laws); BERNARD HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 185 (2005) (discussing how vagrancy and disorderly conduct offenses, combined with “order

might explain this,⁹ and he also notes the implications of local offenses for criminal procedure.¹⁰

If Logan's work can be characterized as raising issues related to the *content* of local criminal laws, in this Article, I intend to address those relating to their *form*. This Article aims not to assess what conduct is made criminal by local offenses but the manner in which the offenses are drafted. Such a study has never been undertaken. With nearly 40,000 local governments,¹¹ one can understand why. The risk of erroneous generalization may have deterred many scholars in the past. Given the significant impact that local offenses have on American life, though, it is imperative that more research be done. Recognizing the limits that come with the vast sample size, I will avoid empirical or statistical claims and instead offer qualitative observations of identifiable trends.

The most important trend is this: many local jurisdictions draft criminal offenses in what we can call an *archaic* form. As will be explained, the term "archaic" is somewhat of a stand-in for pre-Model Penal Code offense-drafting methods, in which there was "a tradition of poor drafting" and confusing or absent culpability requirements.¹² This can be contrasted with *modern* offense drafting, which reflects the values of "analytical clarity" in

maintenance" policing, transformed "the 'losers' of society" such as "hoboes, bums, [and] winos" into "agents of crime and neighborhood decline").

9. Logan, *supra* note 1, at 1451 ("[L]ocal legislators' very proximity to disorder . . . might make them prone to react punitively, and to indulge their own idiosyncratic standards of decorum."). Logan also suggests that the pathologies inherent in criminal lawmaking may be exacerbated in local politics: "[T]he recognized political appeal of appearing tough on crime and disorder might suggest an even greater influence in the local political arena," he notes, "the small scale of which might create a particularly conducive environment for oppressive decisions." *Id.* at 1452. Finally, Logan posits that the knee-jerk resort to criminalization by localities might be explained as pragmatism due to their constrained lawmaking powers; given localities' "comparative paucity in available means of social control," the creation of a criminal offense is an "easily adopted and expedient (if crude) method for the control of 'dangerous classes.'" *Id.* at 1453 (quoting CHARLES LORING BRACE, *THE DANGEROUS CLASSES OF NEW YORK AND TWENTY-YEARS' WORK AMONG THEM* 28–29 (New York, Wynkoop & Hallenbeck 1872)).

10. See generally Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369 (2018). Essentially, more criminal law—even local criminal laws covering trivial offenses—justifies more police stops and more police searches. Logan, *supra* note 1, at 1439–40. This is significant not only because of the intrusion on privacy and liberty that results but also because the searches can yield evidence of far more serious crimes. *Id.* Logan writes that the arrest and search for the trivial local offense can serve as "an investigative fulcrum to increase criminal liability (sometimes radically)." *Id.* at 1442. In one case he cites, an arrest for a municipal offense prohibiting the riding of a bicycle on a sidewalk resulted in a fifteen-year prison sentence for illegal firearm possession. *Id.* at 1442 n.200 (citing *United States v. McFadden*, 238 F.3d 198 (2d Cir. 2001)). Of course, the prosecutors never pursued the municipal charge, and the defendant was never convicted of it. *United States v. McFadden*, 238 F.3d 198, 199–200 (2d Cir. 2001).

11. See *Local Governments by Type and State: 2012*, U.S. CENSUS BUREAU, https://www2.census.gov/govs/cog/2012/formatted_prelim_counts_23jul2012_2.pdf [<https://perma.cc/W3LH-UT6Q>] (last visited Nov. 3, 2020).

12. Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 287–88 (2012).

offense definitions and the rejection of strict liability.¹³ While these categories can be largely viewed as historical in origin (relating to the adoption, or not, of Model Penal Code-type practices), they contain enduring normative content as well: clarity in offense definition, especially with respect to mens rea requirements, facilitates post hoc adjudication of liability and grading, while also constraining arbitrary discretion.¹⁴

The criminal offenses of localities, I found, often fall into the archaic category. Most significantly, I observed that many—perhaps the majority—of local offenses that I studied lacked textual culpability requirements. Consider a few examples from the following localities:

Table 1: A Sampling of Archaic Local Offenses

Greenfield, Missouri	“It shall be illegal for any person to throw rocks or any other substance or material at any person in the municipality” ¹⁵
Omaha, Nebraska	“No person shall own, keep or harbor . . . any dangerous dog or other dangerous animal without said dog or other animal being confined” ¹⁶
Cincinnati, Ohio	“[I]t shall be unlawful for any person to be an employee of a sexually oriented business in the city of Cincinnati without a valid license.” ¹⁷

These offenses allow for liability even absent a culpable mental state, and their act elements are also very broad. The Greenfield offense, for example, would cover an afterschool snowball fight. This would be a ridiculous

13. *Id.*

14. Thus, clarity and culpability in offense definition enhance criminal law’s function as a “decision rule” but not necessarily a “conduct rule.” See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 656 (1984).

15. GREENFIELD, MO., CODE § 210.690 (2020).

16. *State v. Ruisi*, 616 N.W.2d 19, 24 (Neb. 2000) (quoting OMAHA, NEB., CODE § 6-105 (1980) (current version at OMAHA, NEB., CODE § 6-149 (2020))). The definition of “dangerous dog” is then described in greater detail, but there is no requirement of the owner’s mens rea with respect to the dangerousness once the dog fits the criteria. *Id.* at 26 (“Proof of prior knowledge that the dog had dangerous propensities is not required, nor is proof of any criminal intent required.”). A sentence of six months imprisonment and six months probation was affirmed by the court. *Id.* at 26–27.

17. *State v. Valentine*, No. C-070388, 2008 WL 1758081, at *1 (Ohio Ct. App. Apr. 18, 2008) (quoting CINCINNATI, OHIO, CODE § 899-5(b) (2020)). The court reversed the conviction due to erroneous instructions at the plea colloquy but also suggested in dicta that the defendant’s attack on the strict liability interpretation of the statute was not meritorious:

We recognize the necessary existence of certain criminal strict-liability statutes. It does not violate the common good or fundamental fairness to place the prohibition of operating a sexually-oriented business without a license into this category, along with a myriad of other strict-liability offenses such as speeding, driving under the influence, and violating the many other licensing requirements for conducting business in the city.

Id. at *2.

application, but substantive criminal laws like this do not guide or constrain an adjudicator so as to prevent that ridiculous application.

That local offenses are often written in the archaic form is interesting in its own right, but the greater significance of this finding is that one must consider that these archaic local offenses exist *underneath* (or alongside) state criminal codes that are usually written differently. As will be discussed, a majority of states (twenty-seven) have implemented culpability presumptions enabling code-wide element analysis; these states, therefore, have thoroughly “modern” offense-drafting practices.¹⁸ In this majority of states, though, localities can and do promulgate archaic offenses. Important concerns arise when there is this type of mismatch between local and state offense-drafting practices.

Take, for example, an offense created by Kansas City, Missouri, that was ultimately interpreted by the Supreme Court of Missouri.¹⁹ The city promulgated the following offense:

Any person who shall in any way or manner hinder, obstruct, molest, resist or otherwise interfere with . . . any member of the police force in the discharge of his official duties shall be guilty of a misdemeanor.²⁰

The offense had no textual mens rea requirement, but the analogous state offense required that the interference be “willful.”²¹ In the case reviewed by the state high court, the defendant locked the door on officers who were attempting a warrantless entry of her home in order to arrest her teenage son (for cursing at them).²² The elimination of the state’s mens rea requirement in the city’s offense foreclosed the defendant’s argument that she lacked willfulness because she believed she had a right to exclude the officers.²³

Asymmetry between archaic local offenses and modern criminal offenses should be called “harmful asymmetry” because in these circumstances, the home rule powers of local governments have allowed them to counteract the states’ advances in criminal offense drafting. Broad, strict liability offenses proliferate in these localities, and the result is that lawmaking authority is effectively delegated to law enforcement. As William Stuntz observed in another context, “[b]road criminal law . . . means that the law as enforced will differ from the law on the books. And the former will be defined by law enforcers, by prosecutors’ decisions to prosecute and police decisions to arrest.”²⁴ While efforts to modernize state criminal codes aimed to mitigate this pathology by constraining official discretion with clear adjudication rules (especially culpability requirements), local criminalization undoes this mitigation.

18. See *infra* Part II.A.

19. *Kansas City v. LaRose*, 524 S.W.2d 112 (Mo. 1975).

20. *Id.* at 116 (quoting KANSAS CITY, MO., CODE § 26.35 (1967) (current version at KANSAS CITY, MO., CODE § 50-44 (2020))).

21. *Id.*

22. *Id.* at 115.

23. *Id.* at 117–19.

24. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001).

While this Article is concerned mostly with the effects of harmful criminal law asymmetry, and not its causes, two hypotheses are worth considering. It may be that local offenses are drafted in the archaic form because of institutional *incompetence*. Smaller populations, fewer attorneys and legislative staff, and limited attention of outside experts may all contribute to an overall reduced institutional competence of city councils and town boards. In cases that cannot be explained by incompetence,²⁵ an alternative cause may be *deliberate* overbreadth. The locality aims to overdeter by producing what Dan Kahan calls a “‘prudence of obfuscation’ . . . designed to induce uncertainty and restraint among persons who seek to pursue undesirable behaviors within the literal terms of legal rules.”²⁶

As should be apparent, the primary goal of this Article is descriptive: to unearth the existence of archaic local criminal law and to mark a contrast with modern drafting practices prevalent in many state codes. A secondary goal, though, is to note the implications of this observation for two contemporary scholarly conversations.

The first body of literature, mentioned briefly above,²⁷ aims to assess the dimensions of the misdemeanor criminal justice system. We can call it the “misdemeanorland” scholarship (after the name given to the system by a prominent book).²⁸ Commentators writing about misdemeanorland emphasize, among other things, that the misdemeanor system often acts lawlessly, with officials ignoring substantive criminal law.²⁹ For example, one scholar recounts that the South Bronx police routinely arrested individuals for trespass while ignoring the requirement in New York law that the individual be present “unlawfully.”³⁰ If one incorporates harmful local-state asymmetry into this analysis, one sees that the observations of misdemeanorland scholars are often compounded or worsened by local criminal offenses. As discussed above, archaic offenses, especially those that lack mental elements, provide textual license through their overbreadth for unconstrained official discretion.³¹ Imagine that the New York City Council created a local trespass offense lacking an “unlawfully” element or a *mens rea* element—in other words, creating strict liability for “entering” or

25. These factors cannot explain the persistence of archaic offenses in large cities, such as New York and Los Angeles, or in localities where the drafting appears to be deliberate. *See City of Dayton v. Dye*, No. 9539, 1986 WL 12353, at *2 (Ohio Ct. App. Oct. 30, 1986) (discussing a strict liability dog control ordinance and stating that “[l]ack of intent or knowledge is not a defense to violation of this section”).

26. Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1501 n.30 (2008) (quoting Dan M. Kahan, *Ignorance of Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127, 129 (1997)).

27. *See supra* notes 3–4.

28. *See generally* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018).

29. *See infra* Part V.A. I will not attempt to prove or disprove either hypothesis here and raise them only for the purpose of discussion.

30. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1359 (2012) (citing N.Y. PENAL LAW § 140.10 (McKinney 2012)).

31. *See supra* note 24 and accompanying text.

“remaining” on certain property. In this case, the lawlessness exhibited by the South Bronx police would be effectively ratified by the offense definition.

The phenomenon of archaic local offenses is also relevant for a second important scholarly conversation: the movement to “democratize” criminal justice.³² The “democratization” movement addresses the problem of racialized mass incarceration and blames the current criminal justice system’s “bureaucratic” prioritization of expertise and efficiency as creating excessively punitive outcomes.³³ This can be contrasted with the desires of the general public, whose moral viewpoints—if allowed to have efficacy—would result in greater leniency.³⁴ A latent theme in the works of the democratizers is a subsidiarity-type principle in which smaller governmental units (even down to the neighborhood level) are preferable.³⁵ Harmful asymmetry between archaic local offenses and modern state offenses, it seems, presents a counterexample to the larger claims of the democratizers. When it comes to offense drafting, it is the larger state jurisdiction, informed by expertise, that produces the superior criminal offenses. The smaller local jurisdictions, more representative of the lay public, produce offenses that allow for the harmful effects mentioned above.³⁶ And all because of either incompetence or deliberately punitive intentions.

More generally, the claims of this Article, if accepted, should serve as cautionary tales. While scholars writing about misdemeanors and those writing about democratization have different focuses, these two groups both share an optimism about localism.³⁷ The phenomenon of harmful asymmetry should concern proponents of localism; it is evidence that in the context of criminal offense drafting, the threat posed by localism is greater than the opportunity.³⁸

This Article proceeds as follows: Part I marks out and describes two categories of offense drafting forms—archaic and modern—as well as the purposes served by modern drafting methods. Drawing on past fifty-state surveys, Part II assesses the American state-level jurisdictions, placing each state into either the archaic or modern category. Part III offers the central descriptive contribution of this Article: an analysis of local criminal codes and offenses, with the conclusion that local offenses are often drafted in the archaic form. In Part IV, a troubling scenario is described—a geographic overlap, but legal mismatch, between archaic local offenses and modern state offenses that both apply in the same place at the same time. The implications

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

33. *Id.* at 1694.

34. *Id.*

35. See *infra* Part V.B.

36. See *supra* note 33 and accompanying text.

37. See *infra* notes 274–79.

38. One might wonder whether localism has resulted in examples of “beneficial asymmetry”—where a locality created modern offenses while the state remained stuck in an archaic form. I do not deny that this is possible or that this phenomenon can be discovered after a broader study of local criminal codes. However, I did search for beneficial asymmetry but was unable to find it. I leave consideration of this possibility for another day.

of this harmful local-state asymmetry are discussed, and two tentative causal hypotheses are raised: reduced local institutional competence or deliberate local overdeterrence through broad offense drafting. Finally, Part V draws out the relevant implications of archaic local offenses and harmful local-state asymmetry for important contemporary debates in criminal justice scholarship. These include the recent literature addressing the misdemeanor system, as well as the democratization movement.

I. MODERN AND ARCHAIC OFFENSE DRAFTING

Before describing the form of local criminal law, and also that of the state criminal law under which it operates, it is important to lay out two categories for future application. All efforts at categorization run the risk of generalization, but with respect to criminal offense-drafting practices, categorization is made easier by history. The development of American criminal law leads one to conclude that at the most basic level, criminal offenses have been written in two different styles, each characteristic of a different era of legislation. While the distinction is primarily historical, the history reflects a conceptual divide that still remains.

We can begin with history. Midway through the twentieth century, American criminal law was in an underdeveloped state. Consider the observation of Herbert Wechsler in 1956: “Viewing the country as a whole, our penal codes are fragmentary, old, disorganized and often accidental in their coverage, their growth largely fortuitous in origin, their form a combination of enactment and of common law that only history explains.”³⁹ As Darryl Brown writes, “[a] tradition of poor drafting plagued these [pre-War] statutes, so they commonly employed multiple mens rea terms and conduct-defining terms in the same offense” and were also “encrusted with ill-defined common-law terms such as ‘malice aforethought.’”⁴⁰ Even serious offenses such as murder were not clearly defined by statute, leaving judges to step in and fill in undefined terms with meaning drawn from older common law.⁴¹

39. Herbert Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code*, 42 A.B.A. J. 321, 321 (1956) [hereinafter Wechsler, *Some Observations*]; see also Herbert Wechsler, *American Law Institute: II A Thoughtful Code of Substantive Law*, 45 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 524, 526 (1955) [hereinafter Wechsler, *A Thoughtful Code*] (“As our statutes stand at present, they are disorganized and often accidental in their coverage, a medley of enactment and of common law, far more important in their gloss than in their text even in cases where the text is fairly full, a combination of the old and of the new that only history explains. Often a larger, integrative impulse is reflected in the traffic law than in provisions dealing with the major crimes for which the major sanctions are employed.”).

40. Brown, *supra* note 12, at 287.

41. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1100–01 (1952) (“They put an even larger challenge since we know in what large part their grounds are accidental or fortuitous—an old decision deemed to be authoritative, the mood that dominated a tribunal or a legislature at strategic moments in the past, a flurry of public excitement on some single matter, the imitative aspects of so much of our penal legislation, the absence of effective legislative reconsiderations of the problems posed.”); see Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW

Thus, in 1951, the American Law Institute (ALI), “a nongovernmental organization of highly regarded judges, lawyers, and law professors,” set out to create a new, model code, the Model Penal Code (MPC).⁴² Wechsler was chief reporter.⁴³ According to historians of the MPC, Paul Robinson and Markus Dubber, the ALI’s goals were to “simplify and rationalize the hodgepodge of common law offense definitions.”⁴⁴ This was accomplished first by creating what is now known as “element analysis”—the approach by which an offense is divided into discrete components for the purpose of proof and judicial scrutiny.⁴⁵ Moreover, the number of mental elements was reduced to four, and each had a definition that courts could use.⁴⁶ This enabled each conduct, result, or circumstance element to be assigned a mental state. Element analysis, combined with the new mens rea schema, worked to enhance the clarity of offenses and to ensure that culpability was required. Brown summarizes: the “two ambitions” of the project were “to bring analytical clarity to the definition and interpretation of criminal statutes” and to “reject[] strict liability for any element of a crime.”⁴⁷

The MPC had a significant impact on the development of criminal codes after its promulgation. Robinson and Dubber describe a “wave of state code reforms in the 1960s and 1970s, each influenced by the Model Penal Code.”⁴⁸ In total, they count thirty-four reforms influenced by it in some way.⁴⁹ Even critics of the MPC, such as George Fletcher, concede that it has had great impact: “The Model Penal Code has become the central document of American criminal justice.”⁵⁰ However, if only thirty-four states were influenced by the reforms, this means that many others ignored them. Draft reforms that were explicitly considered by certain state legislatures after the MPC were rejected in eight states,⁵¹ while other states appear to have simply done nothing. Thus, the “fragmentary, old, disorganized and often

CRIM. L. REV. 319, 323 (2007) (“A typical American criminal code at the time was less a code and more a collection of ad hoc statutory enactments, each enactment triggered by a crime or a crime problem that gained public interest for a time.”).

42. Robinson & Dubber, *supra* note 41, at 323 (“When the institute undertook its work on criminal law, however, it judged the existing law too chaotic and irrational to merit ‘restatement.’”).

43. *Id.*

44. *Id.* at 334.

45. *Id.* at 334–35.

46. *Id.* The mental states were purpose, knowledge, recklessness, and negligence. *Id.*

47. Brown, *supra* note 12, at 287 (footnote omitted).

48. Robinson & Dubber, *supra* note 41, at 320.

49. *Id.* at 326.

50. George P. Fletcher, *Dogmas of the Model Penal Code*, 2 BUFF. CRIM. L. REV. 3, 3 (1998); see also Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1201 (2017) (“And it was due in large part to the drafters’ success in addressing these problems that the second half of the twentieth century witnessed a cascade of criminal code reform projects structured around the Model Penal Code’s general mens rea provisions.”).

51. Robinson & Dubber, *supra* note 41, at 326 (“Draft criminal codes produced in other states, such as California, Massachusetts, Michigan, Oklahoma, Rhode Island, Tennessee, Vermont, and West Virginia, did not pass legislative review and may yet be revived.”).

accidental”⁵² criminal laws criticized by Wechsler in 1956 were left largely intact in many jurisdictions.⁵³ History, then, does much work in explaining how there is a rough division between two different forms of criminal law.

There is a conceptual distinction that is the product of this history, though—it is the distinction between codes with offenses that facilitate element analysis and those that impede it or render it impossible. The most important feature of an offense in this regard is the clarity of the culpability requirement for each objective offense element. The demand for an easily discernable mens rea is in part a search for clarity as to what the law requires in terms of culpability for each element, but it also has a substantive component that goes beyond mere clarity and aims to protect innocent conduct.⁵⁴ As we saw, the perceived importance of clarity in culpability requirements made culpability the centerpiece of the ALI’s reform effort.

Clear culpability requirements are most important in that they function as a guide for judges and juries to determine ex post whether conduct gives rise to criminal liability and, if so, for what grade of offense. These aspects of offense definition increase the offense’s value as a “decision rule” or “adjudication rule,” then, and not so much as a “conduct rule,” or a guide for the average citizen to act in a certain way.⁵⁵ Thus, when assessing whether a criminal code “provide[s] a comprehensive and accessible statement of its rules of adjudication,”⁵⁶ Paul Robinson, Michael Cahill, and Usman Mohammad ask first whether the offenses have clear culpability requirements.⁵⁷ These help to create robust adjudication rules that

52. Wechsler, *Some Observations*, *supra* note 39, at 3; *see also* Wechsler, *A Thoughtful Code*, *supra* note 39, at 526 (“As our statutes stand at present, they are disorganized and often accidental in their coverage, a medley of enactment and of common law, far more important in their gloss than in their text even in cases where the text is fairly full, a combination of the old and of the new that only history explains. Often a larger, integrative impulse is reflected in the traffic law than in provisions dealing with the major crimes for which the major sanctions are employed.”).

53. For this reason, near the beginning of the twenty-first century, George Fletcher did not hesitate to call California’s criminal code a “19th century state code.” Fletcher, *supra* note 50, at 3.

54. *See* *Morrisette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).

55. *See* Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 Nw. U. L. REV. 1, 3 (2000) (distinguishing between the “rule articulation function” of criminal law in which it “provide[s] ex ante direction to members of the community” and the “adjudication function” in which it “must decide whether the violation merits criminal liability and, if so, how much”); *see also* Dan-Cohen, *supra* note 14, at 630.

56. Robinson et al., *supra* note 55, at 12 (capitalization altered for readability).

57. *Id.* at 13 (“Without an exhaustive delineation of culpability requirements, the relationship between those requirements, and the manner in which the requirements will be applied to the rules of conduct, a criminal code has done only half its job: it has codified each actus reus without any explanation of the corresponding mens rea necessary for criminal punishment.”); *id.* at 14 (“The goal of uniformity in application requires that the code make clear which seemingly different offenders merit punishment in equal measure and which superficially similar offenders must be treated differently from one another. Similar cases

“increase[] uniformity” across similar cases and counteract “unguided discretion in decisionmakers, which can breed disparity in application and create the potential for abuse.”⁵⁸

In sum, historical efforts to reform the criminal law were motivated by a desire to clarify the culpability requirements of offenses, thus enabling element analysis and providing guidance for adjudicators while constraining their discretion. These efforts had great impact on actual codes, but this impact was not universal. The result is that the law today reflects a division between criminal offenses with clear culpability requirements and those without them. For this reason, we shall use the strength of a jurisdiction’s adherence to the values of clarity and culpability as the litmus test for a larger categorization—what we might think of as the general tenor of the jurisdiction’s offense-drafting practices. Going forward, if a jurisdiction reproduces the efforts of the ALI by creating a clear criminal law with culpability requirements, it will be categorized as a jurisdiction with “modern” offense-drafting practices. If it fails to do so, it will be categorized as having “archaic” practices.

Of course, the MPC hardly seems modern at this point, and many opaque, strict liability offenses may not be old at all. However, given the above history, it makes sense to categorize jurisdictions in temporal or historical terms—as those who made *substantial* efforts to reform and those who stayed stuck with their traditional codes. These terms avoid the imprecision of the labels “common-law states” and “Model Penal Code states.”⁵⁹ “Substantial” should be emphasized because no state adopted the MPC jot for jot, and the thirty-four states that did promptly reform their codes in response to the MPC fall along a spectrum in terms of adherence to its principles.⁶⁰

must be treated equally, and different cases must be distinguished according to well-defined principles Greater detail serves to confine the adjudicator’s discretion and focus her attention on relevant considerations rather than allowing her to be swayed by unimportant concerns.”).

58. *Id.* at 12.

59.

Few tropes in American legal teaching are more firmly entrenched than the criminal law division between Model Penal Code (“MPC”) and common law states. Yet even a cursory look at current state codes indicates that this bifurcation is outmoded. No state continues to cling to ancient English common law, nor does any state fully adhere to the MPC. In fact, those states that adopted portions of the MPC have since produced a substantial body of case law—what this Article terms “new common law”—transforming it.

Anders Walker, *The New Common Law: Courts, Culture, and the Localization of the Model Penal Code*, 62 HASTINGS L.J. 1633, 1634 (2011). Walker’s criticism of the “common law” label seems to be that this gives the impression that the state’s criminal law is mostly judge-made and inherited from England, but it is not clear that the term is used in this way in the casebooks he references. *Id.* at 1636–37. It may be that “common law” simply meant older American interpretations of nebulous statutes—the target of the MPC’s reforms. Walker’s criticism of the term “Model Penal Code state” is more significant, as this does give the reader or student the impression that the MPC was adopted jot for jot. *Id.* at 1648. Walker urges scholars and teachers to refer to what are normally called “common law” states as “indigenous code states.” *Id.* at 1638.

60.

II. THE FORM(S) OF STATE CRIMINAL LAW

We now have a working definition of two categories of criminal offense-drafting practices—archaic and modern—but have yet to apply these categories to any contemporary jurisdictions. Before assessing the local government jurisdictions that are the primary focus of this Article, it is first necessary to lay the groundwork for comparison and contextualization by describing practices amongst the states. Below, I classify twenty-seven state jurisdictions as having modern criminal codes and twenty-four jurisdictions (including Washington, D.C.) as having archaic criminal codes.

A. *Modern Codes*

As said above, a modern code for purposes of this Article is a code that substantially reformed its criminal code in response to the MPC—most especially by enhancing clarity with respect to culpability requirements that were previously absent or confusing. The most important advancement of the MPC in this regard was the requirement of element analysis, and the crucial sections in this regard are subsections (3) and (4) of section 2.02, which, respectively, establish a recklessness default for all material elements and the transposition of any explicit mental element to all other material elements.⁶¹ Without using the term “element analysis,” Wechsler himself later reflected on these provisions as “invit[ing] attention to the wisdom of such stark distinctions as to culpability respecting different elements of an offense.”⁶² If a code has adopted the above provisions, it has been infused with the most important advancement of the code reform movement—it can be called “modern.”

While thirty-four states adopted portions of the MPC, no state adopted all of it. Even states that adopted much of it—New York, Illinois, and Missouri are examples—tended to amend MPC definitions with new legislation. Why? A brief look at the archaeology of state codes indicates that those portions of the MPC that challenged local, cultural values tended to fail, while those sections that simply reiterated what many people already felt tended to succeed. This rendered so-called “MPC” states hybrid regimes that enjoyed some of the modern innovations provided by the MPC, yet retained distinctive aspects of older, more local law.

Id. at 1646; see also Dannye Holley, *The Influence of the Model Penal Code’s Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 229 n.2 (1997) (“Herbert Wechsler . . . in 1984 . . . asserted that since the Unofficial Draft was published in 1963, some 34 states had enacted new penal codes. Wechsler concluded that all of these enactments were influenced to varying degrees by the Model Penal Code, but acknowledged that some states had gone much further than others in emulating the innovations found in the Model Penal Code.”).

61. MODEL PENAL CODE § 2.02(3) (AM. L. INST. 1985) (“Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”); *id.* § 2.02(4) (“Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.”).

62. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1437 (1968).

In choosing this as the focal point for the categorization, I begin with the 2012 study undertaken by Darryl Brown, in which he marks out a core group of twenty-four states that have an “identifiable variation” of section 2.02(3) and section 2.02(4); he uses this as the touchstone for whether or not a state can be categorized as an “MPC state” (in our terminology, a “modern” code).⁶³ Brown includes the following states⁶⁴:

Table 2: Brown’s MPC States

Alabama	Colorado	Indiana	Maine	New York	Pennsylvania
Alaska	Connecticut	Illinois	Missouri	North Dakota	Tennessee
Arizona	Delaware	Kansas	New Hampshire	Ohio	Texas
Arkansas	Hawaii	Kentucky	New Jersey	Oregon	Utah

While Brown’s survey was invaluable in finding a baseline group of modern states, I add two additional jurisdictions that he analyzed but did not include: Montana and Washington. Brown explicitly considered whether or not to include these in his typology but decided against it because the jurisdictions’ culpability provisions strayed too far from MPC rules.⁶⁵ For purposes of this Article, though, they should be considered modern because they nevertheless reflect requirements of element analysis.⁶⁶ Finally, one state must be added to Brown’s list because it reformed its code after his study was complete: Michigan added MPC-type culpability presumptions and definitions in 2015.⁶⁷

63. Brown, *supra* note 12, at 294 (“I first reviewed all state criminal codes to identify those that codify an identifiable variation of the MPC’s key interpretive rules and presumptions regarding culpability requirements for elements of criminal offenses . . .”).

64. *Id.* at 295 (citing code provisions).

65. *Id.* at 289 n.8 (“I exclude Montana’s code because it includes no version of MPC § 2.02(3) or § 2.02(4), even though it reflects MPC influence because its code requires at least negligence ‘with respect to each element described by the statute.’ This negligence requirement was adapted from MPC § 2.02(1) and § 2.05. Washington is also excluded because its code lacks any reference to the MPC’s mens rea presumptions, although its definitions of culpability terms track the MPC.” (citations omitted) (first quoting MONT. CODE ANN. §§ 45-2-103, 45-2-104 (2011); and then quoting WASH. REV. CODE ANN. § 9A.08.010 (2009))).

66. *Id.* Montana’s reduction of the default from recklessness to negligence is a significant departure from the MPC but still requires element analysis. *See* MONT. CODE ANN. § 45-2-103 (2020). Washington’s omission of any mens rea presumption is more significant, but my study of Washington’s code shows that element analysis is baked into almost all of the specific offenses. These offense definitions accomplish what the presumptions do not. *See, e.g.*, WASH. REV. CODE § 9A.08.010 (2020) (adopting mental states that very closely resemble MPC mental states); *id.* § 9A.36.011 (“A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death . . .”).

67. MICH. COMP. LAWS § 8.9 (2020).

The adoption of the key interpretive principles of element analysis, though, serves as but a proxy for the larger state of the jurisdiction’s code. When one looks at individual offenses in the above twenty-seven modern jurisdictions, they mostly conform to the good drafting practices discussed above: clear, discernible elements and a mental element somewhere to be found.⁶⁸ Consider an offense representing the core of the concerns of criminal law—physical assault (sometimes called battery)—and note how this offense is defined in a sampling of the modern states (the lowest grade of the offense is excerpted):

Table 3: A Sampling of Modern Assault Statutes

Arizona	“A person commits assault by: 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or 3. Knowingly touching another person with the intent to injure, insult or provoke such person.” ⁶⁹
Illinois	“A person commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.” ⁷⁰
New Jersey	“A person is guilty of assault if the person: (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (2) Negligently causes bodily injury to another with a deadly weapon; or (3) Attempts by physical menace to put another in fear of imminent serious bodily injury.” ⁷¹
Oregon	“A person commits the crime of assault in the fourth degree if the person: (a) Intentionally, knowingly or recklessly causes physical injury to another; (b) With criminal negligence causes physical injury to another by means of a deadly weapon; or (c) With criminal negligence causes serious physical injury to another who is a vulnerable user of a public way . . . by means of a motor vehicle.” ⁷²

68. Note that I say only that a mental element is found *somewhere*—not that it is present with respect to *every* material element. The requirement of a mental element for all material objective elements was a goal of the MPC drafters, yet Brown notes that even in his cohort of MPC states, this requirement has been undercut by judicial interpretations by state high courts. Brown, *supra* note 12, at 300. Thus, in MPC states, one can only be assured of the fact that “pure” strict liability offenses would be invalid. See Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1081 (1997) (labeling an offense without any mental elements a “pure” strict liability statute). This guarantee should not be taken lightly, though: it means that conduct that is undertaken with a wholly innocent mental state cannot be criminally punished. It would invalidate, for example, Florida’s widely criticized drug possession statute. See FLA. STAT. § 893.13 (2020); *State v. Adkins*, 96 So. 3d 412 (Fla. 2012) (holding section 893.13 to be constitutional).

69. ARIZ. REV. STAT. ANN. § 13-1203 (2020).

70. 720 ILL. COMP. STAT. 5/12-3 (2020).

71. N.J. STAT. ANN. § 2C:12-1 (West 2020).

72. OR. REV. STAT. § 163.160 (2020).

While only New Jersey's offense adopts language identical to that of the MPC's assault offense,⁷³ the other three states all bear the markings of the MPC's element analysis approach. Different objective elements are cleanly differentiated, and the mental element applicable to each is unambiguous. There is no outmoded language.

As this exercise shows, within the core offenses,⁷⁴ modern code states write their offenses using the modern form, paying attention to the values of clarity and culpability, even if they modify its exact text.

B. Archaic Codes

That we have counted only twenty-seven jurisdictions with modern offense-drafting practices, though, is a clue that the remaining states likely write criminal laws differently. As mentioned above, the code reform efforts in the twentieth century were not universally successful, leaving the old criminal law on the books in many jurisdictions.⁷⁵

For this reason, I categorize the remaining twenty-four jurisdictions as those that maintain a code with offenses drafted in the archaic form. This is partly historical, as just mentioned, but also conceptual. Since the status quo in American criminal law was an offense-drafting practice that failed to enhance the values of clarity and culpability, the failure to participate in the code reform movement during the mid-twentieth century means that these nonparticipating jurisdictions have many unclear offenses with confusing or absent culpability requirements. As Judge Gerard Lynch observed, “the

73. MODEL PENAL CODE § 211.1 (AM. L. INST. 1985).

74. This claim is less true with respect to the ad hoc creation of offenses outside of the core code. As observed by Paul Robinson and Michael Cahill in multiple articles written from 2000 to 2010, “the decades since the wave of Model Code-based codifications have seen a steady degradation of American codes brought on by a relentless and accelerating rate of criminal law amendments that ignore the style, format, and content of the existing codes.” Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 709 (2010); see also Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 170 (2003) [hereinafter Robinson & Cahill, *Model Penal Code Second*] (“This degradation process has several sources. One is special-interest-group lobbying Another engine of code degradation is the normal news-story/political-response cycle. A high-profile series of offenses, or even one particularly serious offense, upsets the community. The legislators, understandably, feel that they need to demonstrate their appreciation of the community concern and to do something in response to it.”); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 634 (2005) (“The main form of degradation is the proliferation of numerous new offenses that duplicate, but may be inconsistent with, prior existing offenses.”); Robinson et al., *supra* note 55, at 2. As new ad hoc criminal offenses are created for various reasons at various times, the MPC-based code becomes less and less representative of the state of criminal law in the jurisdiction—just as “barnacles collecting on the hull of a ship” can at some point “dwarf[] the ship.” Robinson & Cahill, *Model Penal Code Second*, *supra*, at 172. Robinson and Cahill’s observations are significant, however, for the purposes of *comparison* of codes: even the barnacle-encrusted ship of the modern states seems better than a ship entirely composed of barnacles.

75. See *supra* notes 51–53 and accompanying text.

jurisdictions that failed to adopt the MPC in its heyday have the worst and most confusing codes today.”⁷⁶ These twenty-four jurisdictions are:

Table 4: Archaic Code States

California	Maryland	New Mexico	Vermont
Florida	Massachusetts	North Carolina	Virginia
Georgia	Minnesota	Oklahoma	Washington, D.C.
Idaho	Mississippi	Rhode Island	West Virginia
Iowa	Nebraska	South Carolina	Wisconsin
Louisiana	Nevada	South Dakota	Wyoming

Repeating the exercise above, it is revealing to look at the assault or battery offense in a sampling of these jurisdictions:

Table 5: A Sampling of Archaic Assault Statutes

California	“A battery is any willful and unlawful use of force or violence upon the person of another.” ⁷⁷
Maryland	“‘Assault’ means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings.” ⁷⁸
Massachusetts	“Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment” ⁷⁹
Rhode Island	“[E]very person who shall make an assault or battery or both shall be imprisoned” ⁸⁰

In these sample states, unlike those sampled in the modern code group, very little work is done to define the offense in terms of discrete elements or to assign a culpability element. Massachusetts and Rhode Island make no effort to define the words “assault” or “battery,” presumably leaving this to judicial interpretation, while Maryland delegates this to the judiciary explicitly.⁸¹ California defines battery in more detail; however, this offense lacks the precision of the modern states mentioned earlier and uses the imprecise term “willful.”⁸² The requisite mens rea is unclear.

76. Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 224 (2003).

77. CAL. PENAL CODE § 242 (West 2020).

78. MD. CODE ANN., CRIM. LAW § 3-201(b) (LexisNexis 2020).

79. MASS. GEN. LAWS ch. 265, § 13A (2020).

80. 11 R.I. GEN. LAWS § 11-5-3 (2020).

81. Maryland is known as a state that retains a number of common-law crimes. See Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 981–82 (2019) (listing fifteen states “that recognize the common law authority of judges to convict for conduct that is not criminalized by statute”).

82. An attempt to find judicial elaboration of the “willfulness” requirement also leads one to unsatisfying results. See *People v. Pinholster*, 824 P.2d 571, 622 (Cal. 1992) (appearing to

A substantial minority of American state-level jurisdictions, then, can be said to have archaic offense-drafting practices. In these twenty-four states, the code reform effort in the mid-twentieth century was ignored or failed to achieve legislative approval after it was considered. What remained was the product of history—a criminal law whose form did not prioritize the values of clear culpability requirements.

III. THE FORM(S) OF LOCAL CRIMINAL LAW

Now that we have a better understanding of the form of offense drafting in state-level criminal codes, we may turn to the central subject of this Article: the form of local offenses. Such a study has never been done,⁸³ despite the vast reach of this law and the significance of it to the daily lives of nearly all Americans.

A. *The Authority to Create Local Crimes*

Before looking at a number of criminal codes and offenses created by localities, it is worth briefly discussing the state constitutional law that gives these localities the power to create crimes. As the U.S. Supreme Court observed in *United States v. Lopez*,⁸⁴ “[s]tates historically have been sovereign” in “areas such as criminal law enforcement.”⁸⁵ Part of this sovereignty, though, has been delegated to inferior intrastate governments—what most scholars call localities.⁸⁶ Just as “federalism” describes the devolution of political power to the state governments vis-à-vis the federal government, “localism” describes state law devolution of lawmaking power to villages, cities, towns, and counties.⁸⁷ As we will see, in the vast majority of states, this includes the power to criminalize conduct. This was not always so prevalent.

Historically, states jealously guarded their lawmaking power against localities. The predominant position in state constitutional law during the latter half of the nineteenth century was the so-called “Dillon’s Rule”: localities were mere creatures of the state and could be abolished or altered by the state at will.⁸⁸ This position was enshrined as a matter of federal constitutional law in the 1907 Supreme Court case *Hunter v. Pittsburgh*⁸⁹:

read willfulness as meaning merely harmful or offensive touching and thus rendering the requirement superfluous with the act element); *see also* *People v. Shockley*, 314 P.3d 798, 803 (Cal. 2013) (Kennard, J., concurring in part and dissenting in part) (reading *Pinholster* in the manner just described).

83. Wayne Logan’s assessment of the local criminal law focused on the substantive conduct that was criminalized and its procedural effects. *See supra* notes 8–10. Moreover, Logan’s study appears to have focused on local criminal laws that were litigated in state courts, Logan, *supra* note 1, at 1426–28, 1426 nn.87–121, but this of course misses many laws that are simply “on the books”—or do not yield appellate case law.

84. 514 U.S. 549 (1995).

85. *Id.* at 564.

86. *See, e.g.*, Briffault, *Our Localism: Part I*, *supra* note 6.

87. *Id.* at 1.

88. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1122 (2007).

89. 207 U.S. 161 (1907).

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.⁹⁰

According to this anemic view of local political power, criminal punishment was beyond the power of localities—at least unless it was expressly granted by statute.

Starting in the late nineteenth century, though, Dillon’s Rule was challenged. The emergence of so-called “home rule” by localities meant that some state constitutions granted municipal governments “permanent substantive lawmaking authority.”⁹¹ These early forms of home rule are now known as “imperio” home rule regimes, where local power is insulated from state legislative curtailment so long as it touches only local (and not statewide) matters.⁹² “[M]any early home-rule regimes established essentially separate—and exclusive—sovereigns,” writes Paul Diller, “whose areas of authority did not overlap.”⁹³ The consensus at the time, though, was that criminal law was not a local concern. As David Barron notes, a leading treatise writer and home rule advocate of the time, Howard Lee McBain, included criminal law in a list of nine powers “so obviously outside the sphere of local affairs that not even the cities themselves claimed to possess them.”⁹⁴

In the decades immediately following World War II, home rule reformers continued to successfully press for greater and greater lawmaking power for localities.⁹⁵ This next wave of laws, known as “legislative home rule,” flipped the presumption of Dillon’s Rule: they granted a presumption of general legislative authority to localities, subject to express limitations imposed by the state legislatures.⁹⁶ Localities could engage in lawmaking that was not bounded by subject matter or local concern, but in turn, they lost immunity from state law preemption in the areas they legislated in under an imperio regime. As Richard Briffault writes, “[t]he rise of the *legislative* home rule model . . . trades away all immunity in order to assure greater

90. *Id.* at 178.

91. Diller, *supra* note 88, at 1124.

92. *Id.* at 1124–25.

93. *Id.*

94. Barron, *supra* note 6, at 2306; *see also id.* at 2305 n.185 (referring to these powers as the “McBain’s Nine”). *But see* Logan, *supra* note 1, at 1414 (“The local power to criminalize is neither new nor novel; since colonial times localities have wielded considerable power to legislate against perceived forms of social disorder in tandem with, and very often independent of, state government.”). Logan’s evidence for this historical pedigree is an impressively researched list of state cases, the oldest of which was decided in 1909. *Id.* at 1425–28. It may be that the treatise writer, writing those words in 1916, was generalizing about the state of the law in past decades and that this status quo was beginning to change. In any event, the question of the precise birthdate of local crimes in American law must be put off for another day.

95. Diller, *supra* note 88, at 1125.

96. *Id.* at 1125–26.

scope to local initiative.”⁹⁷ In legislative home rule states, localities are free to punish violations of their ordinances as criminal offenses absent an explicit restriction by the legislature.

The current state of the law shows a mix of the above forms. The most recent fifty-state survey, conducted by Daniel Rodriguez and Lynn Baker in 2009, reveals the following general breakdown⁹⁸: (1) Five states have no home rule,⁹⁹ (2) Twenty-three states have imperio home rule,¹⁰⁰ and (3) Twenty-three states have legislative home rule.¹⁰¹

Local crimes can now be found in all three categories. Alabama, which is listed as a non-home rule state by Rodriguez and Baker, nevertheless contains municipalities that punish a range of offenses because state law empowers them to “adopt ordinances and resolutions not inconsistent with the laws of the state.”¹⁰² Birmingham, for example, incorporates by reference many state offenses but also created its own ordinance punishing domestic violence more specifically.¹⁰³ Baton Rouge, Louisiana, a city in an imperio home rule state, punishes disorderly conduct more severely than does the state.¹⁰⁴ In Murfreesboro, Tennessee, a city in a legislative home rule state, only a small number of offenses are punished criminally, including, for example, the failure of antique jewelry sellers to maintain a log of their items.¹⁰⁵

Local criminal law proliferates, then, but its basis in state constitutional law will depend on the jurisdiction. But what does this law look like? How are these offenses written? It is to this central question that we now turn.

B. A Note on Method

A thorough analysis of all local criminal codes is practically impossible. First, there is the primary obstacle: numerosity. The last U.S. Census in 2012 revealed 38,917 general purpose local governments in the United States.¹⁰⁶ These included 3031 county-type governments, 16,364 town-type

97. Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 28 (2006).

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

99. *Id.* at 1338 n.10. However, Nevada appears to have granted a limited home rule after Baker and Rodriguez’s study. See NEV. ASS’N OF CNTYS., LIMITED FUNCTIONAL HOME RULE (2015), <http://www.nvnaco.org/wp-content/uploads/NACO-Home-Rule-White-Paper.pdf> [https://perma.cc/89M5-VNTC].

100. Baker & Rodriguez, *supra* note 98, at 1339 n.12.

101. *Id.* at 1339 n.11.

102. ALA. CODE § 11-45-1 (1975).

103. BIRMINGHAM, ALA., CODE § 11-2-8 (1999).

104. See *City of Baton Rouge v. Williams*, 661 So. 2d 445, 447 (La. 1995) (providing the language of the city ordinance and the state statute). The Louisiana Supreme Court upheld this ordinance against a preemption claim because the state constitution explicitly marked out the punishment of felonies as a matter of statewide concern but not the punishment of misdemeanors. *Id.* at 450.

105. MURFREESBORO, TENN., CODE §§ 21-82, 21-84 (2016).

106. See *Local Governments by Type and State: 2012*, *supra* note 11. This does not count “special purpose” districts such as school and water districts, which were 50,087 in number.

governments, and 19,522 municipal or city-type governments.¹⁰⁷ Even a random sampling of these approximately 40,000 governments would yield a number of codes far too large to analyze.¹⁰⁸ Moreover, since criminal codes are themselves composed of many different criminal offenses—each which may be written differently from another—the more relevant statistical observation would be the counting and categorization of individual offenses. This would then mean that the dataset to study would be many, many times more than the approximate 40,000 mentioned above.

Scholars facing such a daunting obstacle could give up and say nothing about the phenomenon. The current dearth of attention paid to local criminal law may be due to a choice on the part of many to take this path, avoiding analysis of a vast body of law for fear of making erroneous generalizations.¹⁰⁹ But this is unsatisfying. Precisely because of this law's vastness, it also affects the lives of hundreds of millions of people in important ways.

Fortunately, there is another response. Researchers can aim to say something that is not “statistical” or comprehensive but instead engage in a descriptive endeavor through the use of examples and representative cases. The scholars at the forefront of the burgeoning new literature on the misdemeanor criminal justice system (both state and local) help illustrate this approach; faced with a similar problem of numerosity and vastness, they nonetheless press on with their research. One method, taken by Issa Kohler-Hausmann (and earlier by Malcolm Feeley), is to intensely study one jurisdiction with the expectation that observations about that jurisdiction will be largely true of others like it.¹¹⁰ Another, typified by the work of Alexandra Natapoff, is to canvass a large number of examples and to identify trends and patterns that become recognizable.¹¹¹ “No one story—no one jurisdiction—is fully representative of the system as a whole,” Natapoff admits, but examples can nevertheless serve as “warning signs” of a larger system that enables them to occur with frequency.¹¹²

Id. It seems unlikely that special purpose districts would be empowered to utilize criminal sanctions, and my research has not uncovered any such power.

107. *Id.*

108. For example, to achieve the typical “confidence level” used in physical sciences (95 percent) with a population size of 38,917, the necessary sample size to study would be 7703. This would be to achieve a +/- 1 percent margin of error.

109. Natapoff makes a similar observation about the misdemeanor system that she studied: “Another reason that this book hasn’t been written before is that it is very hard to get national information about the petty-offense process.” NATAPOFF, *supra* note 3, at 13.

110. See generally MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) (studying New Haven, Connecticut); KOHLER-HAUSMANN, *supra* note 28 (studying New York City).

111. NATAPOFF, *supra* note 3, at 16–17.

112. *Id.* at 17; see also Stephanos Bibas, *Small Crimes, Big Injustices*, 117 MICH. L. REV. 1025, 1028 (2019) (“The paucity of hard data often forces Natapoff to rely on colorful anecdotes. These can be striking and illuminating, and she tells her stories well. But the stories can simultaneously be frustrating, because a cluster of well-picked anecdotes do not add up to data. Often, Natapoff has no choice and has to tell her story this way. But skeptical readers will at times wonder how representative those anecdotes are and how different

In what follows, I will aim to do the same as Natapoff—not to undertake a comprehensive study of all local criminal offenses or even a scientifically randomized sample—but to highlight a number of localities where a certain drafting pattern was observed. Like Darryl Brown’s study mentioned above, I aim only to “identify trends” observed during my encounter with the codes.¹¹³ In the next section, these trends will be discussed.

These trends were first observed in an initial group of fourteen local codes that I selected using a randomizer application.¹¹⁴ Starting with Rodriguez and Baker’s three categories of home rule,¹¹⁵ I randomly selected one Dillon’s Rule state, three imperio home rule states, and three legislative home rule states.¹¹⁶ Within each state, I chose one city or town randomly and one county randomly. For three counties, I was unable to find any information regarding the county code selected and instead read the city code of the county seat. This was the initial group:

Table 6: Initial Local Codes Group

	State	City/Town/Village	County (city if county unavailable)
Dillon’s Rule	NC	Forest City	Harnett
Imperio Home Rule	VA	Newport News	King William
Imperio Home Rule	FL	Perry	St. John’s
Imperio Home Rule	CT	Meriden	Middletown (City)
Legislative Home Rule	MN	Wyoming	Waseca
Legislative Home Rule	MO	Bowling Green	Greenfield (City)
Legislative Home Rule	NJ	Vineland	Camden (City)

After this, and to see if very large cities wrote criminal law differently, I reviewed the codes of two of the largest U.S. localities, New York City and Los Angeles. I also looked at a small number of municipal governments

anecdotes might cast misdemeanor enforcement in a better light. Regardless, her plea for better information and closer scrutiny is clearly right.”)

113. Brown, *supra* note 12, at 294.

114. RANDOM.ORG, <https://www.random.org/lists> [<https://perma.cc/A6TM-LPXT>] (last visited Nov. 3, 2020).

115. *See supra* note 98.

116. I did this because I expected, *ex ante*, that there might be some differences in the form and content of local codes depending on the state constitutional law that authorized the local criminalization.

specifically located in modern code states to find examples of the harmful asymmetry mentioned in the introduction.¹¹⁷

C. Local Criminal Law—Observed Trends

1. Code Organization

A good place to begin is the manner in which the codes are organized (if the locality has what can even be called a “code”).¹¹⁸ Some trends were observed as prevalent.

First, like in state law, many localities create separate chapters in their codes and title them “offenses” or something similar.¹¹⁹ These are the crimes that localities are creating most consciously. Within these “offense” chapters, some patterns were noticeable. Localities sometimes incorporate all state law misdemeanors by reference into their local law¹²⁰ or copy these misdemeanors word for word into their codes.¹²¹ Other localities do not engage in this wholesale copying of state law but instead, pick and choose

117. Specifically, I analyzed the code of Dodge City, Kansas. In my review of state criminal codes, I was struck by the excellent drafting methods employed by Kansas. Thus, to find an egregious example of asymmetry, I chose a random locality in that state and looked for archaic criminal offenses. Dodge City is described below. *See infra* notes 173–89.

118. Robinson and Cahill observe that disorganization in the collection of a jurisdiction’s criminal law is also a problem at the state level. Robinson et al., *supra* note 55, at 2, 5 (“Indeed, many American criminal codes are not true codes at all, in the modern sense of cohesive, well-structured, and self-contained statutory schemes. Rather, they are mere collections of statutory provisions similar to the generalized legislative ‘codes’ of the last century and before. In many instances, even states that adopted modern, systematic criminal codes—typically during the recodification wave of the 1960s and 1970s—have since altered their codes through ad hoc amendment, making them dramatically less systematic and internally consistent.”).

119. *See, e.g.*, PERRY, FLA., CODE ch. 18 (2019); WYOMING, MINN., CODE ch. 22 (2020); BOWLING GREEN, MO., CODE ch. 215 (2020); GREENFIELD, MO., CODE ch. 210 (2020); FOREST CITY, N.C., CODE ch. 13 (2019); KING WILLIAM COUNTY, VA., CODE ch. 42 (2018); NEWPORT NEWS, VA., CODE ch. 28 (2020).

120. *E.g.*, PERRY, FLA., CODE § 18-1(b) (“*Unlawful to commit state misdemeanors and criminal traffic offenses; adoption of state law.* It shall be unlawful for any person to commit, within the corporate limits of the city, any act which is or shall be recognized by the laws of the state as a misdemeanor or a criminal traffic offense, and the commission of such acts is hereby forbidden. Such laws are hereby adopted by reference and incorporated as fully as if set out at length herein.”).

121. *See generally* BOWLING GREEN, MO., CODE. Bowling Green has an extensive code that includes provisions on modes of liability, such as conspiracy and attempt, and also a vast number of substantive offenses. Compare, for example, the local ordinance definition of attempt, *id.* § 215.020 (“Guilt for an offense may be based upon an attempt to commit an offense if, with the purpose of committing the offense, a person performs any act which is a substantial step towards the commission of the offense.”), with the state law definition, MO. REV. STAT. § 562.012 (2017) (“Guilt for an offense may be based upon an attempt to commit an offense if, with the purpose of committing the offense, a person performs any act which is a substantial step towards the commission of the offense.”). Compare also the local ordinance definition of assault, BOWLING GREEN, MO., CODE § 215.120 (“The person attempts to cause or recklessly causes physical injury, physical pain or illness to another person.”), with the state law’s assault in the fourth degree, MO. REV. STAT. § 565.056 (“The person attempts to cause or recklessly causes physical injury, physical pain, or illness to another person.”). A similar pattern was observed in the other Missouri locality studied, the city of Greenfield. *See generally* GREENFIELD, MO., CODE ch. 210.

what they incorporate.¹²² Beyond these “copycat” offenses, though, one finds a variegated world of what can be called purely local “inventions” stuffed into the “offenses” chapters. These offenses may have state law analogues that cover similar conduct, but the text and elements of the offenses are not borrowed from state law. I will discuss these in depth below,¹²³ but for now consider two local inventions included in the “offenses” section by Newport News, Virginia. The city punishes “engag[ing] in the activity commonly known as ‘trick or treat’” when the participant is over the age of twelve or past seventh grade.¹²⁴ Accompanying parents are excepted, but they are forbidden from wearing masks.¹²⁵ The city also created an offense for “[d]irecting [the] beam of [a] laser pen, flashlight or similar device into the eyes of another person.”¹²⁶

Local criminal law also exists outside “offenses” chapters, though. Some localities promulgate freestanding, locally invented offenses that are placed ad hoc throughout the local code and are not delimited within the more recognizable chapter of “offenses.” These local offenses are recognizable as criminal in nature because of their sanctions, not their labelling. Like the local inventions just discussed, they are often random in content and difficult to characterize. For example, in the city of Camden, New Jersey, it is a criminal offense to “allow or permit ragweed or poison ivy to grow” on one’s land¹²⁷ and also to work as a masseur for a client of the opposite sex.¹²⁸ This

122. See, e.g., NEWPORT NEWS, VA., CODE. The city appears to have adopted many of the state-law misdemeanors but not in the same comprehensive fashion as the localities discussed immediately above. Compare the local “profanity” offense, *id.* § 28-13 (“If any person shall use obscene, vulgar, profane, lewd, lascivious or indecent language, or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act with the intent to coerce, intimidate or harass any person, over any telephone in this city, such person shall be guilty of a misdemeanor.”), with the state law profanity offense, VA. CODE ANN. § 18.2-427 (2020) (“Any person who uses obscene, vulgar, profane, lewd, lascivious, or indecent language, or makes any suggestion or proposal of an obscene nature, or threatens any illegal or immoral act with the intent to coerce, intimidate, or harass any person, over any telephone or citizens band radio, in this Commonwealth, is guilty of a Class 1 misdemeanor.”).

123. See *infra* notes 162–65 and accompanying text.

124. NEWPORT NEWS, VA., CODE § 28-5(a) (“If any person beyond the seventh grade of school or over twelve (12) years of age shall engage in the activity commonly known as ‘trick or treat’ or any other activity of similar character or nature under any name whatsoever, such person shall be guilty of a Class 4 misdemeanor. Nothing herein shall be construed as prohibiting any parent, guardian or other responsible person having lawfully in his custody a child twelve (12) years old or younger, from accompanying such child who is playing ‘trick or treat’ for the purpose of caring for, looking after or protecting such child. However, no accompanying parent or guardian shall wear a mask of any type.”).

125. *Id.*

126. *Id.* § 28-41 (“It shall be unlawful and a Class 4 misdemeanor for any person to intentionally, and without good cause, direct the beam from a laser pen, flashlight or similar device into the eyes (or eye) of another person.”).

127. “No owner, tenant or occupant of any plot of land, lot, street, highway, right-of-way or any other public or private place shall cause, allow or permit ragweed or poison ivy to grow or exist thereon.” CAMDEN, N.J., CODE § 232-2 (2019).

128. “No person engaged or employed in the business of a masseur or masseuse shall treat a person of the opposite sex.” *Id.* § 496-2.

ad hoc method is how both New York City and Los Angeles “organize” (if it can be called that) their local crimes.¹²⁹

The final organizational trend to note is the use of a “general penalty” provision that applies to violations of an ordinance when a penalty is not mentioned in a specific provision.¹³⁰ This often provides for a punishment of up to a few months imprisonment as well as probation.¹³¹ General penalties may be the source of the largest category of local crimes. Consider the general penalty’s application in the city of Perry, Florida (population 7017).¹³² An ordinance prohibits “mark[ing], defac[ing], [or] disfigur[ing]” property in a public park in the chapter entitled “Parks and Recreation Areas” but provides for no sanction.¹³³ Despite placing this rule outside of the separate “Offenses and Miscellaneous Provisions” chapter, the rule is nevertheless criminally enforced because of the general penalty provision announced at the beginning of the code: “[W]here no specific penalty is provided therefor[e], the violation of any provision of this Code shall be punished by a fine not exceeding five hundred dollars (\$500.00) or imprisonment for a term not exceeding sixty (60) days or by both such fine and imprisonment.”¹³⁴

These code organization trends are worth noting, but they are not the central object of this study. The next section will do a deeper analysis of the text of the individual offenses—whether they be found in an “offenses” chapter or are placed ad hoc in the local code or whether they become criminal in nature by way of a general penalty.

2. The Form of Specific Offenses

The most interesting thing that one notices when one analyzes a large number of local criminal offenses is that they are usually drafted in the

129. *See generally* L.A., CAL., CODE (1987); N.Y.C., N.Y., CODE (2020).

130. *See, e.g.*, WYOMING, MINN., CODE § 1-13 (2020) (general penalty of up to ninety days imprisonment); CAMDEN, N.J., CODE § 1-15 (same).

131. MERIDEN, CONN., CODE § 1-4 (2019); PERRY, FLA., CODE § 1-9 (2019); WYOMING, MINN., CODE § 1-13; BOWLING GREEN, MO., CODE § 100.220 (2020); GREENFIELD, MO., CODE § 100.220 (2020); FOREST CITY, N.C., CODE § 1-13 (2019); CAMDEN, N.J., CODE § 1-15 VINELAND, N.J., CODE § 1-15 (2020).

132. *Annual Estimates of the Resident Population for Incorporated Places in Florida: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html> [<https://perma.cc/Z5RJ-V7TF>] (last visited Nov. 3, 2020).

133. *See* PERRY, FLA., CODE § 19-52.

134. *Id.* § 1-9. As another example, in just the last year, the city of Wyoming, Minnesota, created a criminal offense by including a statutory chapter entitled “SEXUAL OFFENDERS AND SEXUAL PREDATORS,” WYOMING, MINN., CODE ch. 16, div. 6, which prohibits, among other things, registered sex offenders from “participat[ing] in a holiday event involving children under eighteen (18) years of age, such as distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, or wearing an Easter Bunny costume on or preceding Easter.” *Id.* § 16-112. The chapter includes no instruction on the specified penalty, so the general penalty (up to ninety days imprisonment) applies by default: “fine of up to \$1,000.00 or imprisonment for not more than 90 days or by both such fine and imprisonment.” *Id.* § 1-13.

archaic manner. The use of precise and detailed offense elements with corresponding mental elements is frequently eschewed, and very often a mental element is entirely absent. In other words, clarity and culpability are often lacking—especially culpability. A common form of a local offense is: “no person shall θ ” (θ meaning some given conduct). A helpful label for this offense form is a “strict liability command.”

The most significant observation that must be conveyed is the *widespread absence* of mental elements in local criminal offenses—in other words, a general disregard for the requirement of culpability. As Brown describes, “the effect of mens rea requirements for each offense element provides its normative appeal: the degree of liability and punishment will be *proportionate* to culpability and *limited* by it.”¹³⁵ A culpability requirement “ensures that one is punished only for choices one has made, not for events one did not will or anticipate.”¹³⁶ Nevertheless, local criminal law seems to very frequently dispense with mens rea. Consider these offenses from the standpoint of the culpability they require (or not), first from two large urban jurisdictions, and then from some lesser-known localities. All impose “strict liability”:

135. Brown, *supra* note 12, at 291.

136. *Id.* at 292.

Table 7: Large Urban Jurisdictions

New York City	
“Subway gratings; sweeping into”	“It shall be unlawful for any person to sweep any substance from a sidewalk or other place into a grating used for purposes of ventilating any subway railroad.” ¹³⁷
“Unauthorized operation of a recording device in a place of public performance prohibited”	“No person may engage in or cause or permit another to engage in the unauthorized operation of a recording device in a place of public performance.” ¹³⁸
“Destruction or removal of property in buildings or structures”	“No person other than the owner of a building or structure, the duly authorized agent of such owner, or an appropriate legal authority shall destroy or remove any part of such building or structure.” ¹³⁹
“Bathing in public”	“It shall be unlawful for any person to swim or bathe in any of the waters within the jurisdiction of the city, except in public or private bathing houses, unless covered with a bathing suit so as to prevent any indecent exposure of the person; and it shall be unlawful for any person to dress or undress in any place exposed to view.” ¹⁴⁰

137. N.Y.C., N.Y., CODE § 19-173 (2019).

138. *Id.* § 10-702.

139. *Id.* § 10-118.

140. *Id.* § 10-123.

Los Angeles	
“Silly String— Hollywood Division During Halloween”	“No person . . . shall possess, use, sell or distribute Silly String at, within or upon any public or private property that is either within public view or accessible to the public, including, but not limited to, public or private streets, sidewalks, parking lots, commercial or residential buildings, places of business, or parks within the Hollywood Division during Halloween.” ¹⁴¹
“Injury to Public Property”	“No person shall cut, break, destroy, remove, deface, tamper with, mar, injure, disfigure, interfere with, damage, tear, remove, change or alter any: (a) part of any building belonging to this City; (b) drinking fountain situated on any public street or sidewalk or any appliance used in or about such foundation” ¹⁴²
“Urinating or Defecating in Public”	“No person shall urinate or defecate in or upon any public street, sidewalk, alley, plaza, beach, park, public building or other publicly maintained facility or place, or in any place open to the public or exposed to the public view, except when using a urinal, toilet or commode located in a restroom, or when using a portable or temporary toilet or other facility designed for the sanitary disposal of human waste and which is enclosed from public view.” ¹⁴³
“Animals at Large”	“A person who owns or is in charge of or controls or who possesses a dog or other animal who permits, allows or causes the dog or other animal to run, stray, be uncontrolled or in any manner be in, upon, or at large upon a public street, sidewalk, park or other public property or in or upon the premises of private property of another person is guilty of a misdemeanor if said dog or other animal bites or causes injury to any human being or other animal.” ¹⁴⁴

141. LOS ANGELES, CAL., CODE § 56.02 (1987).

142. *Id.* § 41.14.

143. *Id.* § 41.47.2.

144. *Id.* § 53.34.

Table 8: Lesser Known Localities

Harnett County, North Carolina	“Firearm Restrictions”	“It shall be unlawful for any person to discharge a firearm: (A) On a parcel of property that contains 10,000 square feet or less in overall dimension” ¹⁴⁵
Waseca County, Minnesota	“Identification of Each Unit”	“The entrance door to every efficiency or rooming unit in any lodging establishment shall be plainly marked on the outside, either numerically or alphabetically. No two units may be assigned the same number or letter.” ¹⁴⁶
Wyoming, Minnesota	“Curfew . . . Established”	“It shall be unlawful for any minor of the age 15 years or 16 years to loiter, idle or be in or upon the public streets, highways, parks, playgrounds or other public grounds, public places, places of entertainment, or refreshment or any other unsupervised place within this city between the hours of 11:00 p.m. on any day and 5:00 a.m. the following day.” ¹⁴⁷
Vineland, New Jersey	“Consumption in Public Prohibited”	“It shall be unlawful for any person to consume or offer to another for consumption any alcoholic beverage in or upon any public street, road, alley, sidewalk, railroad right-of-way, parking lot which is generally open to the public, park, shopping plaza or upon any outdoor facility owned or operated by the City of Vineland.” ¹⁴⁸
Camden, New Jersey	“Owner and occupants not to permit growth”	“No owner, tenant or occupant of any plot of land, lot, street, highway, right-of-way or any other public or private place shall cause, allow or permit ragweed or poison ivy to grow or exist thereon.” ¹⁴⁹
Newport News, Virginia	“Urination or defecation in public”	“It shall be unlawful for any person to urinate or defecate in public or in a place open to public view except in public restroom facilities.” ¹⁵⁰

145. HARNETT COUNTY, N.C., CODE § 130.09 (2019).

146. Waseca County, Minn., Lodging Ordinance 100 § 12.19 (May 18, 2010), *repealed by* Waseca County, Minn., Lodging Ordinance 132 § 9 (June 18, 2019).

147. WYOMING, MINN., CODE § 22-36 (2020).

148. VINELAND, N.J., CODE § 216-32 (2020).

149. CAMDEN, N.J., CODE § 159-2 (2019).

150. NEWPORT NEWS, VA., CODE § 28-43 (2020).

King William County, Virginia	“Carnivals”	“Any person engaged in the operation of a carnival or circus show shall pay a license tax of \$1,000.00 per performance.” ¹⁵¹
Perry, Florida	“Poles, attaching posters, etc.”	“It shall be unlawful to attach posters or handbills to any telegraph, telephone, light, signal or other pole or gas post standing in the street or right-of-way.” ¹⁵²
St. John’s County, Florida	“Prohibited Presence, Loitering or Prowling at Certain Locations”	“It is prohibited for a Sex Offender to be on or within a Safety zone of a St. Johns County park and recreation center, school, daycare center, arcade, school bus stop [sic] when children are present” ¹⁵³
Meriden, Connecticut	“Use of bells and sirens”	“No bell or siren on such ambulance shall be rung, sounded or blown except in case of extreme emergency when responding to a call or transporting a patient to a hospital, clinic or doctor’s office.” ¹⁵⁴

This is the most striking observation one encounters when one reads local criminal offenses: the general disregard for the culpability requirement, and the proliferation of strict liability. As mentioned before, this is a hallmark of the archaic offense-drafting form.¹⁵⁵

Another way of demonstrating this archaic trend is to look at the codes in two Missouri localities mentioned earlier that adopted many state misdemeanors but also created their own: Bowling Green and Greenfield.¹⁵⁶ The contrast between the local and state offenses is illuminating. Here, the state law “copycat” offenses were written with mens rea elements in the modern form, but many local inventions—even the newer ones—were written without these elements. Both codes read much more like a comprehensive and modern criminal code, and both referenced a state law passed in 1997 that empowered localities to “provide for the compilation or revision and codification of the general ordinances of the municipality.”¹⁵⁷ It appears that a local code reform movement followed the passage of this law. Bowling Green, Missouri (population 5334¹⁵⁸) compiled its ordinances

151. KING WILLIAM COUNTY, VA., CODE § 18-112 (2018).

152. PERRY, FLA., CODE § 18-4 (2019).

153. St. John’s County, Fla., Ordinance 2009-36 § 4 (Sept. 1, 2009).

154. MERIDEN, CONN., CODE § 62-9 (2019).

155. *See supra* Part I.

156. *See supra* note 121.

157. MO. REV. STAT. § 71.943 (2005).

158. *Annual Estimates of the Resident Population for Incorporated Places in Missouri: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU [hereinafter *Annual Population Estimates, Missouri*], <https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html> [<https://perma.cc/S8MP-RLY4>] (last visited Nov. 3, 2020).

into a code in 2010,¹⁵⁹ while Greenfield, Missouri (population 1371¹⁶⁰), did the same in 2007.¹⁶¹ Both have criminal offenses that were remarkably more sophisticated in their composition than were most of the other localities' offenses. Consider the language of the “false imprisonment” offense created by Greenfield, which is identical (except in label) to the “kidnapping” offense created by Bowling Green:

A person commits the offense of false imprisonment if he/she knowingly restrains another unlawfully and without consent so as to interfere substantially with his/her liberty.¹⁶²

This is written in the modern form. It also appears that this language was directly copied from the state's “Kidnapping, third degree” offense.¹⁶³

But Bowling Green and Greenfield did not *always* copy from the state. In Greenfield, local officials criminalized owning more than three dogs or cats (kittens and puppies excepted) but wrote the offense in this way:

No person shall at any time keep, harbor or own at one (1) location within the City more than a total of three (3) dogs and/or cats over the age of six (6) months.¹⁶⁴

This statute is written with clarity but omits a mental element (culpability). Now consider one of Bowling Green's local inventions—the offense of abandoning a vehicle:

No person shall abandon any motor vehicle on the right-of-way of any public road or State highway or on any private real property owned by another without his consent.¹⁶⁵

Again, clear offense elements are discernable but not a mental element.

These Missouri localities demonstrate a pattern observed in many codes: in general, when a locality innovates and creates a criminal offense where there is no state law model, a mental element is left out. While exceptions can be found, these are rare. Strict liability—a telltale aspect of archaic offense drafting—seems to be the default when localities invent their own offenses and deviate from state law models.

IV. HARMFUL STATE-LOCAL ASYMMETRY

As we have seen, a comparison of offense-drafting practices in state-level jurisdictions and those of many localities broke down into two discernable types: jurisdictions that generally drafted their offenses in the modern form

159. Bowling Green, Mo., Ordinance 1646 (Jan. 4, 2010).

160. *Annual Population Estimates, Missouri*, *supra* note 158.

161. Greenfield, Mo., Ordinance 3-2007 (Sept. 4, 2007).

162. GREENFIELD, MO., CODE § 210.040 (2020); *see also* BOWLING GREEN, MO., CODE § 215.170 (2020).

163. MO. REV. STAT. § 565.130 (2017) (“Kidnapping, third degree, penalty. . . . A person commits the offense of kidnapping in the third degree if he or she knowingly restrains another unlawfully and without consent so as to interfere substantially with his or her liberty.”).

164. GREENFIELD, MO., CODE § 205.110.

165. BOWLING GREEN, MO., CODE § 225.020.

and jurisdictions that generally drafted offenses in the archaic form.¹⁶⁶ Key to the modern-archaic distinction was the presence of clear culpability requirements in modern offenses; these requirements enable the interpretive practice of element analysis, thereby constraining an adjudicator's determination of liability and preventing the attribution of liability for wholly innocent conduct. A slim majority of state-level jurisdictions (twenty-seven) have modern drafting practices, yet the majority of the localities surveyed engaged in archaic offense drafting.¹⁶⁷ Strict liability offenses proliferate at the local level, with local criminal law often appearing as a command to the citizens not to engage in certain conduct.

Since archaic offense drafting exists at the state level, the discovery of its replica at the local level is uninteresting as a discovery of some new phenomenon. The significance of archaic local offenses, rather, is that they can exist in the larger context of a state that has a modern criminal code. The significance is not the drafting practice, but the mismatch of the practice with the superior jurisdiction's practice. This mismatch can be called "harmful asymmetry," the implications of which will be discussed below in Part IV.A.

A. Description and Implications

The most important phenomenon I highlight is this: a mismatch between local offenses drafted in the archaic form and state offenses drafted in the modern form.¹⁶⁸ This harmful asymmetry results when the home rule powers of the locality have been used to undermine the drafting advances made in the criminal law in the larger jurisdiction. In cases of harmful asymmetry, localities effectively become additional engines of code "degradation" already taking place at the state level. To use Robinson and Cahill's metaphor, localities drastically increase the number of "barnacles" on the "hull" of the ship.¹⁶⁹

Consider the example of Kansas. Kansas has engaged in extensive modernization of its criminal code, updating it comprehensively in 1970 and again in 2011 after reports and recommendations by an expert commission.¹⁷⁰ Reviewing Kansas's code in 2020, one is struck by the

166. See *supra* Part III.

167. See *supra* Part III.C.2.

168. While one can imagine the inverse—a "beneficial asymmetry," in which the locality drafts modern offenses while the state retains archaic offenses—I have found no examples of this phenomenon and therefore table a consideration of its implications for a later day.

169. Robinson & Cahill, *Model Penal Code Second*, *supra* note 74, at 172.

170. 2 JOHN W. WHITE & BRETT WATSON, KAN. CRIM. CODE RECODIFICATION COMM'N, 2010 FINAL REPORT TO THE KANSAS LEGISLATURE 4 (2009), https://www.kansasjudicialcouncil.org/sites/default/files/2010%20Criminal%20Recodification%20Final%20Report%20Vol%202_0.pdf [<https://perma.cc/9L3N-3MXP>] ("The Kansas Criminal Code Recodification Commission has completed its assigned task to recodify the Kansas criminal code and in this final report to the 2010 legislature submits its proposed criminal code. . . . In K.S.A. 21-4801 the 2007 legislature created the Kansas Criminal Code Recodification Commission and provided the Commission with the mission and directive to recodify the Kansas criminal code. The Commission is composed of sixteen members appointed by the legislative, executive and judicial branches. The Commission members

scrupulous adherence to MPC principles of clear drafting and element analysis. Kansas also has imperio home rule, though, rendering localities constitutionally immune from state interference so long as their legislation relates to local affairs.¹⁷¹

If we zoom in to look at the code of one of Kansas's cities, we see a different picture. Consider Dodge City (population 27,340¹⁷²). Dodge City's Code of Ordinances appears extensive, with sixteen chapters that range in content from zoning regulations to building codes.¹⁷³ Some chapters that appear to be civil-regulatory chapters are, on closer inspection, criminal chapters, including ordinances such as the Historic Resources Preservation Ordinance,¹⁷⁴ the article governing beekeeping,¹⁷⁵ the ordinance governing pit bull ownership,¹⁷⁶ business regulations,¹⁷⁷ the noise ordinance,¹⁷⁸ and others.¹⁷⁹ Moreover, the code also has a "General Penalty" provision authorizing a fine of up to \$499 or 179 days imprisonment for offenses that do not carry a specific penalty.¹⁸⁰ But if we turn to Chapter XI—Public Offenses—we find what the city appears to intentionally view as criminal offenses.¹⁸¹ First, one notices that Dodge City incorporates by reference the "Uniform Public Offense Code" promulgated by the League of Kansas Municipalities.¹⁸² The Uniform Code is 165 pages long and is constantly updated by the league.¹⁸³ It is drafted in the modern form and makes explicit references to analogous state statutes.¹⁸⁴ Dodge City does not end its own public offense code with the article adopting the Uniform Code, though. It continues for six more articles, creating a large number of new criminal offenses.¹⁸⁵ Immediately after reading the modern Uniform Code, one is surprised to see a very different form of offense drafting in the next section:

represent a broad spectrum of experience and interest in the criminal law. . . . The present criminal law of Kansas consists basically of statutes enacted by the 1969 Legislature made effective July 1, 1970."

171. Rodriguez & Baker, *supra* note 98, at 1393.

172. *Annual Estimates of the Resident Population for Incorporated Places in Kansas: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/pepest/2010s-total-cities-and-towns.html> [<https://perma.cc/UZ74-6QGQ>] (last visited Nov. 3, 2020).

173. *See generally* DODGE CITY, KAN., CODE (2019).

174. *Id.* § 1-703.

175. *Id.* § 2-304.

176. *Id.* § 2-409.

177. *Id.* § 5-220.

178. *Id.* § 8-405.

179. *E.g., id.* § 15-407(h)(3) (water emergency rules).

180. *Id.* § 1-116.

181. *Id.* § 11-101. I say this because of the attempt to include them in one chapter and the use of the word "offense."

182. *Id.*

183. UNIF. PUB. OFFENSE CODE FOR KAN. CITIES (LEAGUE OF KAN. MUNS. 2019), <https://www.dodgecity.org/DocumentCenter/View/1128/UPOC?bidId=> [<https://perma.cc/L747-XSMC>].

184. *Id.* § 3.1 ("(a) Battery is: (1) Knowingly or recklessly causing bodily harm to another person; or (2) Knowingly causing physical contact with another person when done in a rude, insulting or angry manner. (b) Battery is a Class B violation. (K.S.A. 21-5413).").

185. DODGE CITY, KAN., CODE ch. XI, arts. 2–7.

OBSTRUCTING GUTTERS. It shall be unlawful for any person to place any obstruction in any gutter or culvert, or do any act to prevent the flow of water through any gutter, drain or culvert in the city.¹⁸⁶

When innovating in the “Local Regulations” article, the city drops mens rea almost entirely.¹⁸⁷ Another offense in this article reads, “URINATION; DEFECATION. (a) Urination and defecation at, in, within or upon any public place in the city is hereby prohibited.”¹⁸⁸ Other offenses after the Local Regulations are drafted with mental elements—including narcotics, public nudity, and juvenile curfew offenses—but one offense is not (walking on the road).¹⁸⁹

The case of Dodge City, Kansas, is illustrative. Not only does the locality resist the wholesale adoption of the modern drafting practices of the state code, it also fails to learn from the lessons imparted by the model code promulgated by the League of Kansas Municipalities.¹⁹⁰ While its provisions are adopted, they are done so uncritically; when the locality innovates on its own, the resultant offenses look completely different from those in the model. Harmful asymmetry exists in Dodge City and in an unknown, but potentially vast, number of other localities.¹⁹¹

Here, and in these other jurisdictions, home rule powers have had the effect of turning back the clock on the advances in criminal offense drafting. In these localities, the substantive criminal law does little, if anything, to prevent certain negative pathologies that the state criminal code was rewritten to fix. With no clear culpability requirements, the proliferation of local strict liability commands broadens criminal liability to the point that all violations of the ordinances cannot possibly be meant to be punished. For example, the Dodge City urination offense¹⁹² would cover an incontinent elderly person being wheeled through a park. But since no prosecutor or police officer would ever enforce the ordinances in these cases, the overbreadth built into the offense by the local legislature works (whether deliberately or not) as a delegation of lawmaking authority to law enforcement. William Stuntz describes this well:

Because criminal law is broad, prosecutors cannot possibly enforce the law as written: there are too many violators. Broad criminal law thus means that the law as enforced will differ from the law on the books. And the former will be defined by law enforcers, by prosecutors’ decisions to prosecute and police decisions to arrest.¹⁹³

186. *Id.* § 11-201.

187. It only appears in an offense regarding the sale of spray paint to minors. *Id.* § 11-210(b).

188. *Id.* § 11-206.

189. *Id.* ch. XI, arts. 4–6; *id.* § 11-701.

190. *Id.* § 11-101.

191. The previous discussion of the drafting quality in the codes of Bowling Green and Greenfield, Missouri provides another example of harmful asymmetry. *See supra* notes 156–65.

192. *See supra* note 188.

193. Stuntz, *supra* note 24, at 519.

Without offense-drafting practices that maximize the potential of criminal law to constrain officials at the adjudication stage—most especially the absence of a culpability requirement—the result is executive lawmaking (at its best) and potentially arbitrary and discriminatory use of that discretion (at its worst).¹⁹⁴ Discretion that is constrained at the state level is set free at the local level—perhaps the place where it should be most constrained, given that objectivity of the enforcement authority may be diminished in a smaller jurisdiction. As we will see in Part V, the proliferation of misdemeanors that are easily proved (especially strict liability misdemeanors) also has other very concrete and deleterious effects on citizens' lives, even when the maximum punishment is very light.

B. Two Causal Hypotheses

While this Article is concerned mostly with the effects of harmful asymmetry and does not purport to offer an explanation of its causes, two causal hypotheses are worth considering (I will not attempt to prove or disprove either here). Such consideration may help to elucidate further the harmfulness described above. These causal hypotheses are (1) the reduced institutional competence of local governments, or (2) the deliberate broadening of liability and a resultant delegation of enforcement decisions to prosecutors and police. Of course, these are alternative hypotheses and cannot be simultaneously true. Ignorance and intentionality are in conceptual tension. Either, though, might explain archaic offense drafting in states with modern criminal codes.

1. Hypothesis One: Reduced Institutional Competence

First, consider the possibility that local lawmaking boards and councils simply do not understand how to write criminal offenses with precise culpability requirements that facilitate element analysis by an adjudicator. Perhaps they do not understand that in the inclusion of their general penalty provisions, or the inclusion of a criminal sanction at the end of a substantive chapter of codes, they are really creating criminal laws just like the criminal laws in a state penal code. And even if they did understand, they did not realize that these kinds of laws are normally written very differently from the way you would write rules for, say, the local pool or the local park. While “you shall not X” seems to make intuitive sense to a nonlawyer aiming to prohibit certain activity, it is a bad way to write a criminal offense. Recalling Brown's description of the first “ambition” of the MPC, we can see how reduced competence with respect to offense drafting undermines this goal: to “bring analytical clarity to the definition and interpretation of criminal statutes” that had suffered from a “tradition of poor drafting.”¹⁹⁵

194. Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1759–60 (2006) (“Scholars have long pointed out that law enforcement discretion is so broad, unregulated, and opaque that it weakens many precepts of rule of law and democratic accountability.”).

195. Brown, *supra* note 12, at 287.

There is some reason to support the claim that many of the local offenses drafted in the archaic form are drafted in this way because of local ignorance. First, consider the competence issues *intrinsic* to the vast majority of lawmaking bodies in localities. The most significant problem is the most obvious one: localities will usually be small in population and will therefore have fewer legislators who are likely to be trained in even the most basic understanding of criminal law. Data from the U.S. Census Bureau in 2017 indicates that of the approximately 39,000 localities,¹⁹⁶ 28,682 towns and cities have populations less than 5000 people,¹⁹⁷ and 687 counties have populations less than 10,000 people.¹⁹⁸ Most of local criminal law (about 75 percent), then, is made by comparatively small communities who may or may not have a lawyer as a resident—let alone a lawyer as a legislator. As James Madison observed in *Federalist No. 10*, “the proportion of fit characters be not less in the large than in the small republic” and therefore in a larger polity there is “a greater probability of a fit choice.”¹⁹⁹

The smaller population of localities, moreover, also results in smaller budgets and a reduced ability to fund a staff to advise the local board on ordinances it seeks to create. We do not expect members of Congress or state legislatures to understand the technical aspects of criminal offense drafting, but we do expect them to have lawyers on staff who can advise them on it. This is largely lacking in the vast majority of low-population, and therefore low-budget, localities. A common model appears to be that the “town” or “city” attorney is a private attorney with a separate practice, and the municipality acts as but one of the different “clients” of the attorney. Meriden, Connecticut, some of whose offenses are mentioned above, lists three attorneys as its “legal department,”²⁰⁰ but all three of them appear to have outside practices that are their full-time jobs—one is a criminal defense lawyer²⁰¹ and the other two are civil litigators.²⁰² It is unclear whether any of these attorneys have any role in advising the city council on legislative drafting in the manner of a professional legislative staff. Meriden, though,

196. *Government Units by State: Census Years 1942 to 2017*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> [<https://perma.cc/Q8DB-4LHH>] (last visited Nov. 3, 2020).

197. *Subcounty General-Purpose Governments by Population-Size Group and State*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> [<https://perma.cc/5FXH-NAK3>] (last visited Nov. 3, 2020).

198. *County Governments by Population-Size Group and State*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> [<https://perma.cc/JP3D-FHD4>].

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

200. City of Meriden, *Legal Department*, MERIDENCT.GOV, <https://www.meridenct.gov/staff/law> [<https://perma.cc/8FCQ-QL4W>] (last visited Nov. 3, 2020).

201. *Michael D. Quinn*, MAHON, QUINN & MAHON, P.C., <https://www.mqmlawyer.com/attorneys/michael-d-quinn> [<https://perma.cc/V3YS-X8XC>] (last visited Nov. 3, 2020).

202. *Christopher Clark*, LINKEDIN, <https://www.linkedin.com/in/christopher-clark-bb557969> [<https://perma.cc/F4BL-SQY4>] (last visited Nov. 3, 2020); *Stephanie Dellolio*, URY & MOSKOW LLC, <https://www.rymoskow.com/about/stephanie-dellolio> [<https://perma.cc/J8GT-HSMB>] (last visited Nov. 3, 2020).

has a population of around 60,000.²⁰³ Consider a smaller locality whose offenses were discussed earlier: Greenfield, Missouri (population 1371²⁰⁴). Greenfield's website lists one "city attorney," who appears to have a solo private practice in the city.²⁰⁵ Again, this attorney's involvement in advising the city council on legislative drafting is unknown (although local law dictates that the attorney *not* advise on legislation unless asked!).²⁰⁶

Another feature that may be at work in creating this competency deficit is a feature extrinsic to the local governments: the lack of outside professional groups' attention to local criminal laws. Indifference or lack of resources on the part of the groups that are competent to assist in drafting offenses or to scrutinize existing ones, therefore, compounds the intrinsic competence shortfall of the local boards. By "outside groups" I mean the various organizations and institutes in which lawyers associate for the betterment of the legal system. These include, most universally, the bar associations of the various jurisdictions. While state bars are large enough to form commissions and committees to study existing and proposed criminal laws, the same is not true for most localities. Of the approximately 75 percent of local governments covering populations of less than 5000, there may be only a single attorney in each—or none. Returning to Greenfield, Missouri, an internet search reveals only four active attorneys.²⁰⁷ These jurisdictions will not have bar associations.

Beyond the practicing bar, legal academia has, of course, an important role in monitoring and commenting on the development of criminal codes. Most localities, though, are unlikely to have a local law school; if they do, the criminal law professor may be the only specialist in the state and is more likely to focus on state law. Academia seems to be poorly suited to the task of advising local boards on criminal legislation.

Nationally, the ALI took the lead in creating an MPC and pointing out the problems in many states' criminal laws. The ALI is composed of respected lawyers, judges, and law professors, all with deep expertise in their respective fields.²⁰⁸ But given its scope, the ALI cannot turn its attention to localities.

203. See *Annual Estimates of the Resident Population for Incorporated Places in Connecticut: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html> [<https://perma.cc/47UT-LM5J>] (last visited Nov. 3, 2020).

204. *Annual Population Estimates, Missouri*, *supra* note 158.

205. *City Council*, GREENFIELD, MO., <https://greenfieldmo.org/city-council.php?The-Page-1> [<https://perma.cc/J9LR-4VJF>] (last visited Nov. 3, 2020).

206. GREENFIELD, MO., CODE § 115.280 (2020) ("The City Attorney shall, in addition to his/her other duties which are or may be required by this Code or other ordinance, when ordered by the Mayor or Board of Aldermen to do so, prosecute or defend all suits and actions originating or pending in any court of this State to which the City is a party or in which the City is interested The City Attorney shall give his/her opinion to City Officials only after being so requested by the Board of Aldermen.")

207. *The Official Missouri Directory of Lawyers*, THE MO. BAR, https://mobar.org/site/content/For-the-Public/Lawyer_Directory.aspx [<https://perma.cc/2PN7-AARC>] (last visited Nov. 3, 2020) (type "Greenfield" in "City Contains" field and select "Find").

208. See *Membership*, AM. L. INST., <https://www.ali.org/members/> [<https://perma.cc/GR4B-RAUV>] (last visited Nov. 3, 2020) ("Our membership consists of eminent judges,

All of the traditional outside groups that assist in the creation and monitoring²⁰⁹ of criminal offenses are of no avail to the vast majority of localities.

2. Hypothesis Two: Deliberate Overdeterrence

While competency issues due to low population and reduced legal expertise likely account for many local offenses written in the archaic form, this cannot explain similar offenses in large city codes or where there is evidence of careful and deliberate offense drafting that nevertheless rejects modern drafting paradigms. With these offenses, an alternative hypothesis to consider is that the city council intends to overdeter, and hopes that law enforcement authorities will wisely exercise their discretion to avoid punishing outlier cases. As discussed above, this form of overbreadth in the archaic offense-drafting form usually means that the offense omits any mention of a mental element.²¹⁰ If use of strict liability is intentional, then what Brown calls the “second ambition” of the MPC is similarly undermined: the “substantive” goal of “a criminal law committed to a pervasive requirement of subjective culpability with respect to every significant element of every offense.”²¹¹

Samuel Buell describes this possible explanation of intentional overbreadth well: “[A]nnouncing that sanctions may apply not only to undesirable behaviors but also to behaviors akin or proximate to undesirable ones pushes actors back from the boundaries of the law”²¹² The idea is that “lawmakers mean to overdeter.”²¹³ Buell cites Dan Kahan, arguing that “a ‘prudence of obfuscation’ . . . is designed to induce uncertainty and restraint among persons who seek to pursue undesirable behaviors within the literal terms of legal rules.”²¹⁴ I would add to this that the obfuscation intended against the bad actors may often be coupled with a presumption of the enforcement authorities’ wise discretion to ameliorate unjust application of the literal offense in outlier cases. Judge J. Harvie Wilkinson III channels this argument, writing, “[b]ecause elected officials recognize that inflexible

lawyers, and law professors . . . selected on the basis of professional achievement and demonstrated interest in improving the law.”).

209. A bit more should be said about the special role such groups can play in the period *after* an offense is created—what I call the “monitoring role.” When a locality adopts state offenses as its own, this obviates the drafting issues discussed above but creates other problems of desuetude. For example, Newport News, Virginia, has copied—and retains—the offense of “cohabitation” directly from the state code, but this offense was later repealed at the state level in 2013. VA. CODE ANN. § 18.2-345 (repealed Mar. 30, 2013); NEWPORT NEWS, VA., CODE § 28-16 (2020). Without the resources and attention of outside expert groups to monitor a code of offenses, even initial reliance by a locality on the model statutes of the state can, through time, result in strange relics remaining on the books.

210. *See supra* Part II.B.

211. Brown, *supra* note 12, at 287–88.

212. Buell, *supra* note 26, at 1501.

213. *Id.*

214. *Id.* (citing Dan M. Kahan, *Ignorance of Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127,129 (1997)).

rules can lead to unjust results and an unwise allocation of prosecutorial time and energy, these officials properly delegate substantial enforcement discretion to prosecutors and other actors.”²¹⁵

The case of a Dayton, Ohio, dog control ordinance illustrates a potential example of this phenomenon. The offense provided that “[n]o person shall own, keep, possess, harbor, maintain, or have the care, custody, or control of a vicious dog within the city.”²¹⁶ When a pit bull broke free from its owner and subsequently attacked another dog, the owner was charged with a violation of the ordinance.²¹⁷ The owner challenged the offense as invalidly imposing strict liability, but this was rejected by a state appellate court.²¹⁸ The local legislature wrote in the “Defenses” section to the ordinance that “[l]ack of intent or knowledge is not a defense to a violation of this section,” and therefore the court held that legislative intent for strict liability was manifest.²¹⁹ Interestingly, the court then went out of its way to take judicial notice of the MPC’s prohibition on strict liability for offenses, like the Dayton dog ordinance, that carried a potential sentence of incarceration.²²⁰ Clear legislative intent, though, trumped the MPC’s aspirational guidelines.²²¹ Moreover, the court ended its discussion by stating that strict liability and even incarceration was a rational response by the legislature to this social problem: “While the potential penalty [of six months imprisonment] embodied in the vicious dog statute is eminently harsh, when viewed against the public safety, these sections are legitimate police power enactments.”²²² The Dayton ordinance may show an intentional overdeterrence by the use of strict liability due to the dangerousness of vicious dogs.

Consider also a similar law recently enacted in my hometown—Cobleskill, New York (population 4678²²³). The town board created a criminal offense prohibiting dogs “Running at Large” and wrote it in the archaic form as a strict liability offense:

Running at Large

- A. It shall be unlawful . . . for any person owning or having charge, care, custody or control of any dog to permit such dog to be upon any private

215. Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1132 (2014).

216. *City of Dayton v. Dye*, No. 9539, 1986 WL 12353, at *1 (Ohio Ct. App. Oct. 30, 1986) (quoting DAYTON, OHIO, CODE § 91.50(B) (2004)). For a later case reapplying *Dye* to another provision of the ordinance, see *Ohio v. Thaler*, No. 22579, 2008 WL 4684367, at *4–5 (Ohio Ct. App. Oct. 24, 2008).

217. *Dye*, 1986 WL 12353, at *1.

218. *Id.*

219. *Id.*

220. *Id.* at *2.

221. *Id.*

222. *Id.*

223. *Annual Estimates of the Resident Population for Incorporated Places in New York: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html> [<https://perma.cc/7Q23-LWF4>] (last visited Nov. 3, 2020).

property without the permission of the occupant of such private property²²⁴

A local news article reporting on the debate over the ordinance is revealing. First, the genesis of the offense appears to be a personal experience of the town supervisor.²²⁵ A dog bit him while he was on a run, he reported this to the state police, and the police asked if he had provoked the dog.²²⁶ This response by the state police, seemingly blaming him for the bite, “bothered” him (the New York Penal Code indicates no applicable state offenses relating to dogs, and therefore it is likely that the state police had no probable cause to address the issue as a criminal matter).²²⁷ One citizen at the meeting expressed concern that the offense would seem to apply to cases in which his dogs went onto his neighbor’s property with the neighbor’s permission.²²⁸ While this would plainly be excluded by the terms of the offense, the town supervisor’s response was revealing. Instead of noting the textual exception for the property occupant’s consent, the supervisor reassured the citizen with an allusion to selective enforcement: “Let’s be frank. This is for people who don’t take care of their dogs.”²²⁹ Here, an intentionally broad, strict liability offense is created to redress a gap in state law (also, because of a legislator’s personal experience), and concerns of overbreadth are assuaged by what must be an expectation of wise enforcement discretion. The law on the books does not matter; the textual exception for an owner’s consent does not matter. The “frank” meaning of the law is the way in which it is expected to be applied on the street and that is only against bad people—the people who “don’t take care of their dogs.”

V. LOCAL OFFENSES AND CRIMINAL JUSTICE SCHOLARSHIP: MISDEMEANORLAND AND DEMOCRATIZATION

While the primary aim of this Article is to unearth and analyze the phenomenon of harmful asymmetry between state and local criminal law drafting practices, a secondary aim is to assess the consequences of this for some influential contemporary debates in criminal law scholarship. Two bodies of literature are most implicated: (1) the newly burgeoning body of work addressing the misdemeanor criminal justice system and (2) the movement to “democratize” criminal justice. Scholarship regarding so-called “misdemeanorland” highlights the impact of low-level offenses on citizens’ lives and critiques the system’s departure from the traditional

224. COBLESKILL, N.Y., CODE § 52-5 (2019).

225. Patsy Nicosia, *Cobleskill Goes with Dog Law*, TIMES-J. (July 10, 2019), <https://www.timesjournalonline.com/article.asp?id=104550> [https://perma.cc/GR4B-RAUV].

226. *Id.*

227. *Id.* This is understandable given New York’s substantial adherence to the MPC (and the MPC’s avoidance of public welfare offenses). *See supra* Part II.A.

228. Nicosia, *supra* note 225 (“Also speaking at Monday’s public hearing, Jerry Coons asked if he’d be ticketed or fined if his dogs went on his neighbor’s property with their permission.”).

229. *Id.*

“adjudicative,” rule-bound criminal justice model concerned with factual guilt for blameworthy conduct. The replacement is a “managerial” model, concerned with social control through procedural hurdles, in which officials often act lawlessly.²³⁰ The democratization movement in criminal justice, on the other hand, addresses the problem of racially skewed mass incarceration and blames the current system’s bureaucratic approach that prioritizes expertise and efficiency over just outcomes that accord with community moral views.²³¹ The antidote to bureaucratization, these scholars claim, is democratization—a reorientation toward lay values.

Harmful asymmetry caused by archaically drafted local criminal law is relevant to both scholarly conversations. For misdemeanorland, harmful asymmetry can be seen as compounding the problem of lawlessness by creating poorly written law; it is bad enough when officials ignore the existence of an offense element, but it is arguably worse when an element that serves an important limiting function is absent textually. For democratization, the phenomenon of harmful asymmetry pushes back against the attack on expertise and the defense of lay values. At the level of a local government—normally a more “democratic” level of government—criminal law is drafted in a manner that ignores modern methods and has harmful effects. Meanwhile, the states, influenced by experts such as the ALI and the professoriate, draft offenses in a superior manner.

A. Misdemeanorland

First, consider the burgeoning literature of the last two years that has addressed the misdemeanor criminal justice system, led largely by the contributions of Alexandra Natapoff and Issa Kohler-Hausmann.²³² How is the phenomenon of harmful asymmetry relevant here? Scholars studying the misdemeanor system are primarily concerned with the effects of the misdemeanor investigation and adjudication process, and therefore, the level of government that creates the misdemeanor offense is rarely mentioned. However, since in most states, localities can only create misdemeanor-level offenses, local criminal law is surely part of the story Natapoff and Kohler-Hausmann are telling.²³³

230. See *infra* Part V.A.

231. See *infra* Part V.B.

232. See Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 *YALE L.J.* 1648, 1651–52 (2019) (reviewing KOHLER-HAUSMANN, *supra* note 28, and citing other recent scholarship regarding misdemeanors).

233. One caveat is worth mentioning, though: many of the observations noted above have limited relevance once one looks outside of large, urban misdemeanor court systems. Kohler-Hausmann, for example, studied the misdemeanor system in New York City, while Natapoff frequently draws on her experience working in Baltimore. See KOHLER-HAUSMANN, *supra* note 28; Natapoff, *supra* note 30, at 1333–34, 1359. In a smaller jurisdiction with fewer police officers and fewer misdemeanor cases, it may be that “misdemeanorland” more resembles the adjudicative model of “felonyland.” However, in smaller systems, the problems of lawlessness may also be exacerbated. Rural New York, for example, is notorious for permitting nonlawyers to sit as local magistrates. See, e.g., William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, *N.Y. TIMES* (Sept. 25, 2006), <https://www.nytimes.com/>

Some background is necessary. The issues raised by the misdemeanorland literature can largely be summed up in the phrase first coined by Malcolm Feeley: “the process is the punishment.”²³⁴ In other words, with misdemeanor offenses, the real systemic aim of the endeavor is putting the defendant through the investigation and adjudication process—not that the prescribed sentence be meted out after an authoritative determination of guilt. In the case of a large urban misdemeanor court system, such as New York City, Kohler-Hausmann identified a system that had a goal of establishing a “managerial model” of “social control”—not an “adjudicative” model, like with felonies, which focused on determining guilt and an appropriate sentence.²³⁵ Natapoff emphasizes an even more sinister goal of the system—revenue generation by payment of fees and fines—as well as the more mundane use of misdemeanors as a measure of police “productivity.”²³⁶

While the unstated goals of the misdemeanor system seem foreign to the traditional vision of criminal justice, so too do other aspects of the process. Most significant are Natapoff’s observations that the system often acts in a lawless manner without concern for the requirement of evidence of guilt.²³⁷ With respect to lawlessness, she notes a “cultural disregard for the rule of law” in a system that “quietly tolerat[es] abuses of power by unaccountable local officials” who simply ignore legal constraints.²³⁸ One example she uses is a practice of the Baltimore police department to routinely arrest individuals for “loitering” despite knowing that the conduct leading to the arrest cannot satisfy all the elements of the offense.²³⁹ Often, unrepresented defendants will plead guilty even if their conduct would not meet the elements, thereby avoiding the provocation of the prosecution and the costs of litigation.²⁴⁰

Since the “*process is the punishment*” in misdemeanorland, one might think that observations about the form of substantive criminal law have little

2006/09/25/nyregion/25courts.html [https://perma.cc/ELQ6-QHP2]; Lauren Rosenthal, *How Does NY Go About Turning a Regular Person into a Judge?*, N. COUNTRY PUB. RADIO (Apr. 12, 2018), <https://www.northcountrypublicradio.org/news/story/35988/2018412/how-does-ny-go-about-turning-a-regular-person-into-a-judge> [https://perma.cc/W6GA-X76R]. The availability of legal representation is also undoubtedly diminished in smaller communities. One of Natapoff’s claims seems to hold true no matter the jurisdiction: the excessive use of the criminal sanction to address all societal problems, no matter the blameworthiness or harmfulness.

234. See generally FEELEY, *supra* note 110.

235. The three most significant characteristics of the managerial model were: (1) its aim of “marking” defendants by putting arrests and convictions on their records so that they could be tracked and later controlled; (2) putting up “procedure hassles” to test the “rule-abiding propensities” of the marked individuals (e.g., appearing in court); and (3) “performance” in place of a sentence, meaning “the set of activities the defendant is instructed by the court or prosecution to undertake,” such as drug treatment (also aimed at testing rule-abidingness). KOHLER-HAUSMANN, *supra* note 28, at 21.

236. NATAPOFF, *supra* note 3, at 9, 17.

237. *Id.* at 191.

238. *Id.* at 206–07.

239. Natapoff, *supra* note 30, at 1359 (discussing that Baltimore police often ignore the statutory element of obstructing another person’s movement).

240. *Id.* at 1359–60; see also NATAPOFF, *supra* note 3, at 5 (calling this “meet em and plead em”).

(or at least greatly diminished) relevance for the study of that system.²⁴¹ Moreover, if lawlessness is one of the central features²⁴² of this system, then an improvement in the way the laws are written would seem to be a waste of time. However, even if one claims that rampant lawlessness and disregard of the substantive criminal law is an endemic feature of the misdemeanor system, there is still something *worse* than lawlessness. This is *de facto* lawlessness with the technical veneer of lawfulness—textually sanctioned *ad hoc* decision-making by officials. In such a state of affairs, one cannot even appeal to a higher adjudicative body with a claim of lawlessness; substantive criminal law that is overly broad and which lacks minimal constraints on adjudicators (especially culpability requirements) comes close to this.

Thus, Natapoff accepts that one aspect of the pathologies of misdemeanorland is indeed directly related to offense definition practices:

[T]he specific content of codes do not meaningfully constrain law enforcement, and [] resulting convictions therefore lack the legal legitimacy that codified law provides. Police are not strongly bound by codified requirements in loitering, trespassing, and disturbing the peace statutes . . . because those statutes cover wide swaths of innocuous behavior²⁴³

Here, she expressly relies on the work of William Stuntz mentioned earlier, in which he claims that overly broad offense definitions effectively

241. One detects that Kohler-Hausmann and Natapoff diverge on this point. Kohler-Hausmann, a sociologist as well as a legal scholar, appears more strongly committed to the claim that law in general—both substantive *and* procedural—is a distraction. As she concludes, the “most important lesson” to draw from her study of New York City’s misdemeanor system is that “approaches that tinker with legal process, or even substantive criminal law reforms, are only capable of reaching a limited set of issues.” Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 *STAN. L. REV.* 611, 618 (2014). Both substantive and procedural rules are “simply the tools available in the contested and always-underspecified endeavor of social control,” and therefore, the solution must be a political decision to rethink the use of criminal law as a mechanism of social control with respect to misdemeanor-type conduct. *Id.* at 653, 692. In her book that followed the previous article, Kohler-Hausmann continues this theme, stating that constitutional prohibitions on vague offenses and status offenses “do not in practice seriously constrain the power of the police and prosecutors to control people.” KOHLER-HAUSMANN, *supra* note 28, at 259–60; *see also* Charlie Gerstein & J. J. Prescott, *Process Costs and Police Discretion*, 128 *HARV. L. REV.* F. 268, 270 (2015) (“[C]riminal law process costs essentially decouple statutory discretion from actual police behavior, rendering the debate about statutory language largely moot.”). As we will see below, Natapoff believes that substantive criminal law plays more of an important role. *See infra* notes 243–45 and accompanying text.

242. In misdemeanorland, Natapoff claims that “legal rules are openly ignored,” as “speed and informality are the norm.” NATAPOFF, *supra* note 3, at 191–92. She uses as examples the chief judge of South Carolina openly instructing state magistrates to ignore Sixth Amendment law due to lack of “resources,” as well as a New York defendant’s conviction (seven times) for violating a loitering offense that had been declared unconstitutional. *Id.* at 192. “Such lawlessness,” she concludes, is “a key characteristic of the petty-offense process.” *Id.*

243. Natapoff, *supra* note 30, at 1360. She does think substantive criminal law can work as a limiter: “By contrast, when codes work properly, statutory constraints have outcome-determinative force. For example, and in better keeping with the legality ideal, the statutory definition of ‘honest services’ has become an important limitation on the government’s ability to use the mail fraud statute to prosecute corruption.” *Id.* at 1359.

“delegate[] power to law enforcement to define how the law is applied in practice,” especially in the context of plea bargaining “against [a] backdrop of unlimited potential liability.”²⁴⁴ And part of the overbreadth problem, Natapoff notes, is “weak culpability requirements.”²⁴⁵

Now one can begin to see how the form of local criminal law described earlier has relevance for the misdemeanor literature. Archaic local criminal law, with its panoply of strict liability offenses, works to add to overbreadth and to increase the size of the “menu” of options for prosecutors to use when extracting pleas.²⁴⁶ If lawlessness is a problem in misdemeanorland, then local criminal misdemeanors compound the problem. They effectively authorize through offense definition what a lawless official would seek to do via illegal means. Police, prosecutors, and judges need not ignore a mental element in *defiance* of the law if it is absent from the ordinance’s text. In that case, they are just playing by the rules.

B. Democratization

The phenomenon of harmful asymmetry between state and local criminal offense drafting helps to inform a second scholarly conversation: the recent movement to democratize criminal justice. In a 2017 symposium held by *Northwestern University Law Review*, nineteen scholars signed on to a white paper with recommendations for criminal justice reform to address the contemporary crisis of racialized mass incarceration.²⁴⁷ Joshua Kleinfeld, writing a “manifesto” for the entire group, draws a contrast between “two visions of criminal justice”:

On one side are those who think the root of the present crisis is the outsized influence of the American public—a violent, vengeful, stupid, uninformed, racist, indifferent, or otherwise wrongheaded American public—and the solution is to place control over criminal justice in the hands of officials and experts. On the other side are those who think the root of the present crisis is a set of bureaucratic attitudes, structures, and incentives divorced from the American public’s concerns and sense of justice, and the solution is to make criminal justice more community focused and responsive to lay influences.²⁴⁸

244. *Id.* at 1358 (citing Stuntz, *supra* note 24, at 506).

245. *Id.* at 1359. She also notes that localities contribute to overcriminalization in general (in terms of the punishment of too much conduct). NATAPOFF, *supra* note 3, at 193 (arguing that many misdemeanors punish conduct that is not sufficiently “bad, dangerous, or blameworthy”).

246. William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548 (2004) (“Most bodies of substantive law define citizens’ obligations. Criminal law is different. Its primary role is not to define obligations, but to create a menu of options for prosecutors.”).

247. *See generally* Kleinfeld et al., *supra* note 32, at 1693.

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

This is the “conflict of visions,” a conflict between “bureaucratic professionalization” and “democratization”; the democratizers’ position is obviously the latter.²⁴⁹

The phenomenon unearthed by this Article, harmful asymmetry, represents a mismatch between the superior product of a large state legislature informed by the expertise of the ALI and the inferior product of a smaller local board or council potentially because of incompetence or the deliberate overbroadening of criminal law. If one accepts that localities are understood to better capture “lay influences” than states and that archaic offense drafting is inferior to modern offense drafting, then the tension with Kleinfeld’s statement should be clear: harmful asymmetry shows that when the lay public is left to its own devices, uninformed or unrestrained by expert influence, it is either “stupid” and “uninformed” (if archaic local offenses are the result of incompetence), or it is “violent” and “vengeful” (if they are the result of deliberate overbroadening).²⁵⁰ Harmful asymmetry is evidence in favor of the claims about the public that the democratizers reject. But is it true that the democratizers would accept that localities are more democratic (or at least better capture lay values) than states? And would they accept that the advances of modern offense drafting are actually an “advance”?

If we turn back to Kleinfeld’s description of the two camps in his manifesto, there is no explicit reference to local governments;²⁵¹ moreover, these entities are largely absent from the discussion of the policy proposals that follow.²⁵² However, there are hints throughout the democratization volume that a “community-focused” criminal justice system incorporates an implicit subsidiarity-type principle that smaller governmental entities are preferable.²⁵³ Most significant is Kleinfeld’s description of the “democracy” that the democratizers aim to maximize.²⁵⁴ This conception of democracy

249. All nineteen authors at the symposium signed on to a similarly phrased claim: “[T]he root of the crisis is a set of bureaucratic attitudes, structures, and incentives divorced from the American public’s concerns and sense of justice, and the solution is to make criminal justice more community-focused and responsive to lay influences.” Kleinfeld et al., *supra* note 32, at 1694.

250. Kleinfeld, *supra* note 248, at 1376; *see also id.* at 1397–98 (“[James] Whitman views the American public as, above all, *violent*; [John] Langbein views the American public as, above all, *stupid*; and [David] Garland views the American public as, above all, *racist*. Each traces the American criminal system’s dysfunctions to the toxic combination of popular rule with a bad populace, and each turns to bureaucratic governance as a solution. They are far from alone in this: versions of their views can be heard in the work of Michelle Alexander, Michael Tonry, Nicola Lacey, and many, many others, both scholarly and popular. The view is so often and so casually repeated that it has become the dominant narrative of the criminal justice crisis in American intellectual life.” (footnotes omitted)).

251. *See generally id.*

252. Notable exceptions are the discussion of prosecutorial elections, civilian review boards to control the police, and the size of the jury venire. *See generally* Kleinfeld et al., *supra* note 32.

253. Consider the favorable reference to William Stuntz’s claim that “criminal justice should generally be in the hands of local neighborhoods.” Kleinfeld, *supra* note 248, at 1403 n.122 (citing Stuntz, *supra* note 24, at 520–23).

254. *Id.* at 1390.

seeks to enhance citizen participation (among other values as well),²⁵⁵ with participation, meaning self-government through majoritarian decision-making.²⁵⁶ Whether or not smaller, local governments will further these aims is a central question of political theory that may never be resolved. Kleinfeld, though, suggests that at least the participatory aspect of his theory of democracy is enhanced by smaller entities. He states approvingly that “participatory democracy captures core elements of democratic practice . . . [including] direct rule in local settings (both governmental and nongovernmental).”²⁵⁷

Consider also Rick Bierschbach’s piece in the same symposium volume.²⁵⁸ Like the other democratizers, Bierschbach’s preference for local control over criminal law *enforcement* is explicit,²⁵⁹ as is increased local control of *adjudication* by jury participation.²⁶⁰ Less clear is the place of local legislatures and the substantive criminal law they create. However, Bierschbach does mention approvingly that just as localities have the bulk of enforcement responsibilities, they also “pass and enforce their own codes.”²⁶¹ Local criminal law, then, appears to be included within his larger endorsement of the benefits of a fragmented system:

The benefits of this structure are not only—or even primarily—in guarding against governmental abuse. They also rest on broadly democratic concepts like representativeness, deliberation, and self-determination. . . . [F]ragmentation provides multiple nodes of input that allow communities and neighborhoods to tailor on-the-ground criminal justice to their unique

255. *Id.* at 1390–95 (noting other values, like government responsiveness to lay values over those of bureaucratic experts, deliberation (meaning a communicative process by which culture is formed), and freedom as nondomination (through the rule of law and constitutionalism)).

256. *Id.*

257. *Id.* at 1390. Later he writes that in the democratizers’ democracy, “criminal law and procedure . . . is substantially given into the hands of local communities as an instrument of collective self-determination and cultural self-creation.” *Id.* at 1397.

258. See generally Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437 (2017).

259. *Id.* at 1446. Note the emphasis on enforcement and adjudication. The legislature is not mentioned but police, judges, prosecutors, and jurors are. *Id.* at 1446–47 (“That enforcement apparatus includes thousands of counties and municipalities, several thousand prosecutors’ offices employing tens of thousands of prosecutors, and more than twelve thousand police departments employing hundreds of thousands of officers. It also includes thousands of local courts, judges, jails and prisons, parole and probation officers, and everyday citizens who interact (as jurors or otherwise) with the system on a daily basis.”); see also Kleinfeld et al., *supra* note 32, at 1700 (calling for civilian review boards to “advise police departments and liaise between police departments and local communities”); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612 (2017) (stating that cop-watching is an example of “contestation [which] display[s] a faith in local democracy as a tool of responsive criminal justice”).

260. Kleinfeld et al., *supra* note 32, at 1697 (“All juries . . . should be drawn from within the immediate, local community in which the crime was committed . . .”).

261. Bierschbach, *supra* note 258, at 1446.

needs and reconcile competing values and priorities in their own ways²⁶²

This defense of localism is a combination of a number of different arguments, all of which would appear to justify devolution of control over substantive criminal law to smaller and smaller governmental entities.²⁶³ Overall, it would not be a stretch to posit that the democratizers have, at least in principle, a fondness for local criminal law.

But what about the second assumption: would democratizers accept that modern offense drafting is superior to archaic offense drafting? I believe the answer is a qualified yes. The yes must be qualified because, while the democratizers say little about offense definitions, they explicitly incorporate the views of someone who said quite a bit: William Stuntz.²⁶⁴ In saying that Stuntz would have been “one of us,” for example, Kleinfeld cites to one of his claims about offense definitions: “common law *mens rea* standards, because of their moralistic and open-ended character, open up a necessary space for nontechnical argumentation about culpability and equity in criminal justice trials.”²⁶⁵ Stuntz’s basic point was that the jury should be able to consider moral blameworthiness when it considered culpability and not simply intentionality with respect to bodily movements and risk

262. *Id.* He calls this the “optimist’s vision” of fragmentation, but one should conclude that he himself shares that vision with respect to local criminalization. Later, in the section on “Reforms,” Biersbach writes that “[g]reater attention to the values (but not the doctrine) of federalism and its close cousin localism could likewise help,” and he explicitly references local legislative power. *Id.* at 1452.

263. Here we see a concern for liberty, political participation, and experimentation by different jurisdictions. These arguments are also commonly used to justify federalism. See Brenner M. Fissell, *Federalism and Constitutional Criminal Law*, 46 HOFSTRA L. REV. 489, 521 (2017) (listing “generally accepted values of federalism,” as described by the Supreme Court and academic commentators, to be “(1) maximization of individual liberty through checks on government power (the ‘principal benefit’); (2) experimentation and innovation across jurisdictions; (3) responsiveness to geographic diversity; (4) democratic participation; (5) competition for citizens; and (6) inherent sovereignty”).

264. Kleinfeld, *supra* note 248, at 1403 (“Missing from this constitutional conversation, a founding father of the democratization point of view, is Bill Stuntz. He would have been among us had he lived.”). This invocation of Stuntz further supports the claim made above regarding democratizers’ preference for localism. Kleinfeld, in citing to Stuntz, approvingly notes the latter’s arguments “that criminal justice should generally be in the hands of local neighborhoods; that, in particular, prosecutors should be elected from highly local community units like neighborhoods rather than from large counties.” *Id.* at 1403 n.122.

265. *Id.*

taking.²⁶⁶ He blamed the efforts of the ALI and its product, the MPC, for a regime that foreclosed this consideration.²⁶⁷

It is not clear how much of this the democratizers would sign on to, and it is unfair to impute to them everything Stuntz wrote in his final book about mental elements (especially given its contestability).²⁶⁸ One does not find in the democratization literature a criticism of the efforts undertaken by the MPC drafters or of the use of precise, but thin, conceptions of mental states such as intent. Instead, it appears that the insights of Stuntz are to be applied

266. In his last book, Stuntz made the novel claim that “[t]he law professors who wrote the Model Penal Code helped to replace a system of legal doctrine that worked with one that didn’t” and that “[t]he most important change” made by the drafters was a change in the conception of mens rea. WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 194, 260 (2011). In the pre-MPC world, Stuntz argued, mens rea meant “a state of mind that was worthy of moral blame.” *Id.* at 260. An example of this type of mens rea that is still in force, he says, is “depraved heart” murder. *Id.* at 381 n.30. A case that, for Stuntz, exemplified this halcyon past era is Justice Robert Jackson’s famous opinion in *Morissette*, where a strict liability federal theft statute was interpreted to have an implicit knowledge mens rea with respect to the claim of right to the stolen property. *Id.* at 261–62. The MPC drafters, as we saw, aimed at eliminating mental elements like “depraved heart” (or “malice aforethought”) because they were confusing. *See supra* Part II.A. Their replacement—the requirement of “intent” for most criminal laws—is the rather thin requirement that the defendant “intended his physical acts,” which for Stuntz does insufficient work in delineating between conduct that is worthy of criminal punishment and that which is not. STUNTZ, *supra*, at 260, 262.

267. STUNTZ, *supra* note 266, at 260.

268. Two important book reviews written immediately following the publication of *The Collapse of American Criminal Justice* both take Stuntz to task for his observations about the MPC’s efforts to reform the concept of culpability. Robert Weisberg observes:

[O]ne target of Stuntz’s wrath is the professionalized expert wisdom of the academics who created the Model Penal Code (MPC) Although the MPC purports to disdain strict liability crimes, it enables the creation of proxies for them by its hypertechnical, cognitively based definition of mens rea, which drains criminal law of its authority to condemn. There is thus a non sequitur in Stuntz’s reading of *Morissette*, because the evil denounced in Justice Jackson’s opinion—strict liability—is rejected in Stuntz’s enemy, the MPC. Requiring knowledge in a theft case is hardly inconsistent with the MPC’s use of arguably technical mens rea terms.

Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1444 (2012) (citation and footnote omitted). Here is Stephen J. Schulhofer:

As part of his skepticism toward elitist reform, Stuntz argues in *The Collapse* that “[t]he law professors who wrote the Model Penal Code helped to replace a system of legal doctrine that worked with one that didn’t.”

. . . .
In any case, there can be no doubt about the work of “[t]he law professors who wrote the Model Penal Code.” The Code launched “a frontal attack on absolute or strict liability” and replaced loose concepts like “general intent”—often read to require no moral blame—with carefully defined mental elements. It also created a robust presumption that we must, if possible, interpret penal statutes to require a mental state with clear-cut moral content—at a minimum a “conscious[] disregard[] [of] a substantial and unjustified risk [of harm] involv[ing] a gross deviation from the standard of conduct [of] a law-abiding person.”

Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1061–62 (2013) (alteration in original) (citations and footnotes omitted) (first quoting Stuntz, *supra* note 266, at 194; then quoting MODEL PENAL CODE § 2.05 cmt. 1 (AM. L. INST. 1985); and then quoting MODEL PENAL CODE § 2.02(2)(c), (3) (AM. L. INST. 1962)).

as a *supplement* to, not a replacement of, MPC drafting methods. Thus, a proposal in the democratization white paper is that “[a]ll crimes carrying a maximum sentence of more than six months should require a showing of moral blameworthiness, where ‘moral blameworthiness’ entails, at a minimum, disregard for the rights or welfare of others or intent to violate the law.”²⁶⁹

Because of all this, I return to my conclusion that the democratization movement is not opposed to modern offense-drafting practices; there is nothing that scholars in the movement would find objectionable about element analysis or about precise culpability standards working to determine liability *in conjunction with* the new “blameworthiness” element.

This, then, is why I believe harmful asymmetry is an example of one phenomenon in American criminal justice that cuts against claims of the democratization movement. The movement appears to claim, both explicitly and through its implicit subsidiarity principle, that local governments will be better sources of lay values by which criminal justice can be guided. But local governments, as we have seen, often produce substantive criminal law that is drafted more poorly than is state criminal law.²⁷⁰ Expert bureaucrats can be credited with the improvements made in the latter, while their absence may be blamed for the problems of the former. And if it is not a lack of expertise that results in the condition of local criminal law (incompetence), then it may be deliberate broadening. The lay public, at the smaller institutional level where lay influences are most influential, seems to be “stupid” or “vengeful”—claims rejected by the democratizers.²⁷¹ Ironically, it may also be that, using the doctrinal tools of *mens rea* presumptions and state-law preemption, expert bureaucrats in the judiciary are best situated to ameliorate the problems created by archaic local offenses promulgated within a modern code state.²⁷²

269. Kleinfeld et al., *supra* note 32, at 1698. This could be incorporated either “as a component of *mens rea*, a separate element of the offense, an affirmative defense, or in some other fashion,” so long as it is a jury question. *Id.*

270. *See supra* Part III.C.

271. This claim about “lay leniency” has come under a broader attack. In an important new article, John Rappaport marshals social science data to rebut the argument that the American public “hold[s] relatively lenient attitudes toward criminal punishment.” John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 732 (2020); *id.* at 767 (“As it turns out, all three of the national studies suggest the public is at least slightly more punitive than the courts.”).

272. Consider how this doctrine of *mens rea* presumption interacts with a harmful asymmetry between local and state law. This doctrine, when it applies, is ameliorative of the harm: it results in a judicial rewriting of an archaic local offense to look more like a modern state offense analogue by the grafting on of a *mens rea* requirement. *See, e.g.*, *City of Englewood v. Hammes*, 671 P.2d 947, 948 & n.1, 952 (Colo. 1983) (interpreting the local offense of “interfer[ing] with or hinder[ing] [a police officer] in the discharge of his duty” to require *mens rea* despite the textual absence of a mental element (quoting a city of Englewood ordinance)). Preemption—the doctrine that displaces local laws with state laws—can be similarly ameliorative. *See, e.g.*, *State v. Crawley*, 447 A.2d 565, 570 & n.4 (N.J. 1982) (holding that an archaic-type local loitering ordinance punishing “remaining idle in essentially one place . . . spending time idly, loafing or walking about aimlessly, [or] . . . ‘hanging around’” was field preempted by state law, which required culpability, noting the goal of a

C. Localism Reappraised

As we come to the end of our analysis of the implications of the phenomenon of harmful local-state offense-drafting asymmetry for the misdemeanor and democratization literatures, we come full circle and return to the dilemma of localism—the joint opportunity and threat presented by devolution of power. Recall the summary of the dilemma given by Roderick Hills: “lovers of local government . . . are going to have to make a tough choice between direct political participation that local governments facilitate and the social inequality and parochialism that local governments also seem to promote.”²⁷³ Indeed, the dilemma seems most consequential when the local power being exercised is the power to criminalize conduct. Natapoff and the democratizers, though, fall squarely on the prolocalism side.

Natapoff writes of reform such that “many misdemeanor changes will of necessity be bottom-up, driven by local residents, advocates, and public officials.”²⁷⁴ This is a cause for hope, though, and not concern: “The beauty of localism, however, is that it offers enormous room for creativity and experimentation; each jurisdiction can implement change in its own ways, given its own population, history, needs, and resources.”²⁷⁵ In reviewing Natapoff’s claims discussing this experimentation approvingly, Judge Stephanos Bibas adds that localism also allows for “room for variation” between different communities that may have different views about criminal justice and “social order.”²⁷⁶ Additionally, recall Rick Bierschbach’s conclusion that “[t]he benefits of this [localist] structure . . . rest on broadly democratic concepts like representativeness, deliberation, and self-determination.”²⁷⁷ Similarly, he writes, “[g]reater attention to the values . . .

“comprehensive system of criminal law” in the state (alteration in original) (quoting Newark, N.J., REV. ORDINANCES tit. 17, ch. 2, § 14 (1966), *repealed by* Newark, N.J., Rev. Ordinance Repealing in Its Entirety Revised Ordinances of the City of Newark, County of Essex, Title XX, Chapter 2, Section 14, Loitering (June 3, 2009)). The ameliorative effects of the doctrines of mens rea presumption and preemption are the product of judicial experts, not lay values.

273. Hills Jr., *supra* note 6, at 2011–12. For an excellent summary of this debate, to which I am indebted, see Barron, *supra* note 6, at 2330–32.

274. NATAPOFF, *supra* note 3, at 226.

275. *Id.* at 226–27 (“In the misdemeanor world, every . . . municipality can launch its own experiment.”); *see also id.* at 245 (“Municipalities can unilaterally improve their practices whenever they choose, with immediate effect on the lives of local residents.”); *id.* (“Seen through this lens, the misdemeanor system is a place of hope.”); Bibas, *supra* note 112, at 1041 (“Natapoff recognizes the need for localism and in places comes close to embracing it. Our country is vast, and our criminal-justice systems are many, fragmented, and varied. Though many scholars instinctively distrust localities, Natapoff sees their bottom-up role as both inevitable and desirable, letting them try out creative experiments . . .”).

276. Bibas, *supra* note 112, at 1041 (“Some communities prize orderly public spaces and are willing to trade away more liberty. Others are more relaxed about social disorder and disruption. The genius of American federalism (and localism) is that the police and prosecutors in each community can calibrate the level of enforcement to their communities. Communities can govern themselves, deliberating on and making their own tradeoffs. There is not a single Platonic ideal, but a range of approaches. And democracy is not static, but adapts these approaches over time to each community’s needs and in light of what it learns from experimenting.”).

277. Bierschbach, *supra* note 258, at 1446.

[of] localism could . . . help,” and suggests that devolution of legislative power could “enhance representativeness.”²⁷⁸ “City councils,” Bierschbach argues, “could be given real power to craft their own substantive criminal codes in response to community concerns . . . even if far-flung state legislators disagree.”²⁷⁹

Scholars of federalism will recognize a number of familiar arguments in the above claims (localist and federalist arguments usually mirror each other).²⁸⁰ Natapoff is explicitly invoking the famous vision of smaller governmental units as “laboratories of experimentation,”²⁸¹ while Bibas adds an often used argument that devolution enables different lawmaking jurisdictions to have their own moral viewpoints instantiated in law.²⁸² The thrust of Bierschbach’s localist argument is, like the others, a well-known claim that power devolution enhances democratic values (especially political participation).²⁸³

The phenomenon of harmful asymmetry should concern proponents of localism; it is evidence that in the context of criminal offense drafting, the threat posed by localism is greater than the opportunity.²⁸⁴ Perhaps it could be true that localities could act as experimental laboratories in the benefits of different ways of writing criminal laws; but harmful asymmetry shows that without skilled “scientists” to help localities set up and learn from their experiments, the laboratory is likely to learn nothing or to harm. Perhaps it is true that different localities should be able to reflect different visions of morality in their criminal law; harmful asymmetry, though, shows that this allows for localities to deliberately broaden offenses through the widespread use of strict liability. And finally, perhaps it is true that smaller governmental

278. *Id.* at 1452.

279. *Id.*

280. Since federalism is now “discussed in terms of normative concerns, but federalism’s values are not distinctively associated with the states,” the result is that “the case for federalism tends to resemble the case for localism.” Richard Briffault, “What About the ‘Ism’?”: *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1311–12 (1994).

281. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

282. For elaborations of the experimentation rationale, see, for example, Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 404–05 (1997); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1541–42 (2002). For discussion of the value of smaller jurisdictional boundaries in order to allow for concentrated groups of people with similar moral viewpoints to create their own law, see Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8 (1988) (arguing that federalism allows for the “type of social and political climate [citizens] prefer”); *see also* Friedman, *supra*, at 401–02 (calling this a “cultural diversity” argument).

283. *See, e.g.*, Roderick M. Hills Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 889 (2006) (arguing that “federalism itself is an individual right because it provides an accessible mechanism by which laypeople can influence the scope of their rights”); Merritt, *supra* note 282, at 7–8 (arguing that political involvement engendered by smaller jurisdictions “trains citizens in the techniques of democracy, fosters accountability among elected representatives, and enhances voter confidence in the democratic process”).

284. Again, this Article does not consider a context in which a locality drafted modern offenses in an archaic code state, as such an example has not yet been found.

units allow for greater democratic participation in the creation of criminal law; but harmful asymmetry suggests that such participation, when unmediated by expertise, results in a retrograde form of criminal law.

CONCLUSION

More scholarly attention must be paid to the vast body of criminal law that local governments create. This Article has assessed one important dimension of this local criminalization: the form in which localities draft their offenses. As illustrated above, offense drafting at this governmental level often employs an archaic model, with little concern given to culpability requirements or the facilitation of element analysis. The advances of modern drafting are either ignored or deliberately rejected. This seems to be especially problematic when the locality is promulgating offenses in a state that has consciously reformed its code in light of the ALI's recommendations—here, home rule creates an asymmetry between local and state criminal law and thwarts modernization efforts. These claims weigh against accepting the optimism, stated by many scholars and reformers, that increased localism will mitigate problems in the criminal justice system more than it will aggravate them.