

DEFINING “LOCAL” IN A LOCALIZED CRIMINAL JUSTICE SYSTEM

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There is an ongoing movement to democratize the criminal justice system. Providing more avenues for layperson participation, “democratizers” believe, will result in a more egalitarian system. But how to incorporate the public is an ongoing and complicated question. This Note takes a first step in disentangling important differences within the democratization movement. In doing so, it defines for the first time a sub-group of democratizers, which it terms the “localizers.” Analyzing this distinct strand of democratization serves two valuable functions. First, because democratization and localization reforms have often been lumped together, critics of the movement to democratize the criminal justice system have overlooked the unique problems that localizers’ reforms raise. This Note fills a substantial gap in the extant scholarship by providing tools for scholars to evaluate and critique some of the distinct concerns of localization. Second, and perhaps more importantly, this Note serves as a practical road map for localizers by raising questions that they must consider before advancing their reforms, many of which could, if effectuated correctly, immensely improve the current state of the criminal justice system.

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INTRODUCTION

Criminal law and procedure scholars across the country agree that the criminal justice system is in a state of crisis.¹ Most believe that there is a mass incarceration dilemma, that prison conditions are abysmal, and that the system is racially unjust.² But agreement tends to end there. Questions about what caused this failure, what solutions should be implemented, and who should be in charge of decision-making are all up for immense debate.³ In short, scholars have myriad theories and reforms but little consensus on how to tackle the seemingly impenetrable problem of our dysfunctional criminal justice system.

To make some sense of these disagreements, scholars have begun to divide themselves into two groups.⁴ On the one hand are scholars who want to “bureaucratize” the criminal justice system by taking power away from the public and putting it in the hands of objective experts.⁵ On the other hand are scholars who want to “democratize” the criminal justice system by increasing avenues of public participation and making the criminal process more responsive to laypeople.⁶ Much has been written on the differences between the two groups,

¹ See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 1 (2011) (“[T]he last half of the twentieth century saw America’s criminal justice system unravel.”); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1374 (2017) (discussing how individuals across the board have acknowledged the “crisis” of the American criminal justice system).

² See Kleinfeld, *supra* note 1, at 1370–74 (discussing the “catalogue of dysfunction” noted by many in the criminal justice system, including overcriminalization, mass incarceration, and racism).

³ See *id.* at 1375 (“[W]hen it comes to understanding *why* the system has unraveled and *how* it could be set right . . . the consensus evaporates and in its place is what can seem like a cacophony of conflicting voices.”).

⁴ *Id.* at 1376 (“The two views, *bureaucratic professionalization* versus *democratization*, represent a conflict of visions.”).

⁵ See, e.g., RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 1–3 (2019) (supporting the creation of objective administrative agencies to administer criminal law and procedure generally); Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein’s Monster?*, 126 HARV. L. REV. 1299, 1318–22 (2013) (book review) (questioning the idea that greater democratic control over the criminal justice system would make it more egalitarian).

⁶ A 2017 Symposium in the Northwestern Law Review brought together many—though not all—of the scholars who identify or have been identified as “democratizers.” See Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413 (2017); Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677 (2017); Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437 (2017); Kleinfeld, *supra* note 1; Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017); see also STUNTZ, *supra* note 1, at 7–8.

including the distinctions in their theoretical foundations and solutions to the criminal justice problems facing the United States.⁷

In comparing bureaucratizers and democratizers, scholars and other criminal justice observers tend to treat each group as monolithic, and to some extent that is accurate. Bureaucratizers generally care about insulating the criminal justice system from the public and democratizers generally want to expand the public's input in the system's decisionmaking process. Further, demarcating a clear line between bureaucratizers and democratizers makes it easier to compare their views on the system and their proposed solutions.

But setting up the debate as between two large movements has also covered up significant nuances within the movements themselves. It obscures the divisions that have formed in each group over how to address the problems they have identified and stands in the way of a robust analysis of their proposed solutions. This Note takes a first step in disentangling important differences within the democratization movement. In doing so, it defines for the first time a sub-group of democratizers, which it terms the "localizers."⁸

Unlike some democratizers, who care primarily about increasing public participation in the criminal system through a variety of means, localizers specifically want to push power down into the hands of the "local community." What exactly this means is still unclear—an important point explored in Part II of the Note—but upon close analysis, three types of localization emerge in the literature. The first set of scholars advocates for more criminal justice decisionmaking at the local level by granting the authority to neighborhood and city councils to create criminal codes and developing community-level courts and prosecutor offices.⁹ A second group proposes implementing administrative procedures in local communities, including notice-and-

⁷ See, e.g., Kleinfeld, *supra* note 1, at 1376.

⁸ To be clear, there is not a distinct group of scholars within the democratization movement who only want to localize. There are some who might be more supportive of localization than others, but I use the term to identify a category of *ideas*, not a category of *individuals*.

⁹ See, e.g., Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1529–33 (2016) (discussing how to establish and successfully implement community prosecution, policing, and courts); Bierschbach, *supra* note 6, at 1452 (suggesting that city councils should craft their own substantive criminal laws in order for the justice system to more adequately address the concerns of local communities); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1177 (1998) (encouraging the evaluation of police practices, such as the enforcement of anti-vagrancy and loitering laws, from the perspective of local residents); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2323–24 (2014) (encouraging localities to make more use of local criminal laws); Christopher Slobogin, *Community Control over Camera Surveillance: A Response to Bennett Capers's Crime, Surveillance, and*

comment rulemaking for prosecutorial and police policies and creating community oversight boards.¹⁰ Finally, a third set of proposed localization reforms looks beyond the current criminal justice structures and calls for outside mechanisms of participation, such as copwatching and the formation of citizen bail juries.¹¹ Such a robust and diverse group of reforms requires a more in-depth articulation of what exactly is being proposed.

Analyzing this distinct strand of democratization serves two valuable functions. First, because democratization and localization reforms have often been lumped together, critics of the movement to democratize the criminal justice system have overlooked the unique problems that localizers' reforms raise. This Note fills a substantial gap in the extant scholarship by untangling these two strands and by providing a first step for scholars to evaluate and critique some of the distinct concerns of localization. Second, and perhaps more importantly, this Note serves as a practical roadmap for localizers by raising questions that they must consider before advancing their reforms. Given the novelty of many of their ideas, these questions have gone unaddressed but will determine the potential for their solutions to improve the current state of the criminal justice system.

Part I begins with a brief overview of the views of the two main camps of criminal justice reformers—democratizers and bureaucratizers. It then complexifies the situation by distinguishing an important localism strand *within* the democratization movement. Part II raises three issues that localizers must address to turn their reforms

Communities, 40 *FORDHAM URB. L.J.* 993, 997 (2013) (arguing that neighborhood councils should have a role in approving the installation of surveillance systems).

¹⁰ See, e.g., Bibas, *supra* note 6, at 1692 (encouraging community-policing and community-prosecution meetings and partnerships); Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 *MINN. L. REV.* 1, 5, 14–15 (2012) (arguing in favor of incorporating administrative procedures into police and prosecutor policymaking in order to enhance public input and increase responsiveness to local community needs); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 *N.Y.U. L. REV.* 1827, 1885–88 (2015) (highlighting the use of informal notice-and-comment rulemaking and supervisory police boards and encouraging greater elicitation of community participation).

¹¹ See, e.g., Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 *WASH. & LEE L. REV.* 1297, 1366 (2012) [hereinafter Appleman, *Justice in the Shadowlands*] (discussing the role that bail juries could play in deciding bail eligibility); Laura I. Appleman, *The Plea Jury*, 85 *IND. L.J.* 731, 734 (2010) [hereinafter Appleman, *The Plea Jury*] (suggesting the creation of plea juries in order to involve local communities in the guilty-plea process); Jocelyn Simonson, *Bail Nullification*, 115 *MICH. L. REV.* 585, 589 (2017) [hereinafter Simonson, *Bail Nullification*] (supporting the development of community bail funds to allow “popular participation in an individual case to facilitate larger resistance to the policies and practices of state actors”); Jocelyn Simonson, *Copwatching*, 104 *CALIF. L. REV.* 391, 393 (2016) (encouraging the formation of local community copwatching groups in order to increase police accountability).

into reality. First, localizers should tackle *geographical* concerns, including defining the appropriate unit of analysis for the “local community” and determining who should be included in that unit’s decisionmaking process. Second, localizers have to confront potential *representational* problems: Is there an institution in place to carry out the reforms? And, even if there is, does this institution adequately reflect and incorporate the local community’s voice? Finally, localizers should consider how to handle the inevitable *spillover* effects of their reforms. Part III concludes by sketching out answers to the questions raised in Part II in the context of three reforms—the creation of bail juries, courtwatching programs, and the drafting of certain criminal codes on a more local level—proposed by localizers.

I THE DEBATE

Though the vast majority of Americans, including politicians, advocates, scholars, and the public, agree that that the criminal justice system is in urgent need of reform, there is no clear picture of why the system is in such bad shape and how to improve it.¹² Simply put, “[t]he crisis of criminal justice is in part a crisis of ideas.”¹³ That being said, one foundational line of disagreement recently recognized has been between those who think the public is the solution to the failing criminal justice system—the democratizers—and those who think the public is the cause of the failing criminal justice system—the bureaucratizers.¹⁴

Democratizers believe that the root of the problem is a failed experiment in which criminal justice decisionmaking power was taken away from the public and put into the hands of bureaucratic professionals, experts, and elected officials.¹⁵ According to this group,

¹² See Memorandum from Robert Blizzard, Pub. Op. Strategies, to Interested Parties 1 (Jan. 25, 2018), <https://www.politico.com/f/?id=00000161-2ccc-da2c-a963-efff82be0001> (finding that seventy-five percent of Americans feel that the country’s criminal justice system needs substantial improvements); *supra* notes 1–3 and accompanying text. *But see* Memorandum from Robert Blizzard to Interested Parties, *supra*, at 1–2 (finding near-consensus public support for certain reforms, including, for example, shifting funding to provide alternatives to incarceration for nonviolent offenders and repealing mandatory minimum sentencing statutes for those offenses); Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html> (explaining that there is a “new bipartisan consensus on criminal justice”).

¹³ Kleinfeld, *supra* note 1, at 1376.

¹⁴ *Id.*

¹⁵ See, e.g., STUNTZ, *supra* note 1, at 287 (“[S]tate and federal officials, along with suburban and small-town voters, have more power over urban criminal justice than in the past, and residents of high-crime cities have less.”); Bibas, *supra* note 6, at 1678 (“The most

placing all the power in the hands of the non-public led to highly distorted policies that disregarded what average citizens need when it comes to their safety.¹⁶ Democratizers' primary goal is to increase avenues for citizens to participate in the criminal justice process.¹⁷ Simply put, "the democratization movement stands for the 'We the People' principle in criminal justice."¹⁸

In contrast are the bureaucratizers. For this group, the heart of the problem lies with the public, who, they believe, is generally unfit to make decisions about how to punish individuals.¹⁹ In their view, the public is too prone to biased decisionmaking, leading it to make critical decisions about criminal punishment on the basis of incomplete or inaccurate information.²⁰ By building a strong criminal administration run by experts and insulated from laypeople, these scholars argue that more rational and decent results will follow.²¹

Section I.A problematizes these movements by exploring a distinct strand of commentators in the democratization movement—

fundamental problem with bureaucratic criminal justice is that it has lost sight of why and how We the People should punish. Bureaucratization breeds an intense concern for efficiency That is a recipe for 'mass incarceration,' not moral judgment or public safety.").

¹⁶ See STUNTZ, *supra* note 1, at 283 ("The justice system suffers from the rule of too much law, and from the rule of the wrong kind of politics."); Kleinfeld, *supra* note 1, at 1397 ("[T]he movement to democratize criminal justice refers to a form of criminal law and procedure that is responsive to the laity rather than solely to officials and experts").

¹⁷ See, e.g., Bierschbach, *supra* note 6, at 1453 (arguing that police, prosecutorial, and sentencing policies should be subject to a notice-and-comment process); Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 799–800 (2016) (encouraging the improvement and continued use of community engagement provisions in DOJ consent decrees); Jonathan M. Smith, *Closing the Gap Between What Is Lawful and What Is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315, 318 (2016) (supporting the democratization of policing "through transparency and robust community oversight").

¹⁸ Kleinfeld, *supra* note 1, at 1397.

¹⁹ See, e.g., BARKOW, *supra* note 5, at 1 (arguing that the public lacks the necessary data and knowledge to make informed decisions about criminal justice policy and therefore its choices would be based on emotional preferences and best-guesses); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 173 (2001) (arguing that criminal justice policies formed in response to public opinion "often fly in the face of expert penological advice" and amount to "a kind of retaliatory law-making, acting out the punitive urges and controlling anxieties of expressive justice"); JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 532 (2009) (noting a comparison between jury trials and "an untrained crew sailing a ship, with the only skilled navigator aboard limited to stating general principles of navigation and unable to give specific orders").

²⁰ See, e.g., BARKOW, *supra* note 5, at 1 ("[C]riminal justice policy in the United States is set largely based on emotions and the gut reactions of lay-people.").

²¹ See, e.g., *id.* at 2–3 (explaining that institutionally-supported experts are better equipped to make sound evidence-based criminal justice decisions than the public).

termed localizers—and analyzing the differences between democratizers and this sub-group. Section I.B fully articulates the vision of localizers and creates a typology of their reforms.

A. *Democratizers Versus Localizers*

The current terms of the criminal justice debate situate democratizers on one side and bureaucratizers on the other side. While this distinction gives some order to the cacophony of voices suggesting reforms for the criminal justice system, it also over-simplifies the two groups. Specifically, within the democratization movement is a discrete sub-group, more appropriately labeled the localizers.

To be sure, there is overlap between democratizers and localizers. Many criminal law and procedure scholars even vacillate between proposing democratizing solutions and localizing solutions, and some of their work contains both democratizer and localizer suggestions within the same paragraph.²² Still, there are important differences between the two reform-driven critiques.

First, and most obviously, localizers place greater emphasis on the geographical entity in which their reforms must be carried out. Democratization of the criminal justice system can ostensibly happen at the state or even national level: One can imagine, for instance, democratizing the criminal justice system by carving out avenues for citizen input in state and federal clemency petitions, encouraging state legislatures to pass more laws governing law enforcement decisions, and utilizing state and national administrative procedures to oversee the criminal justice system and provide mechanisms for public participation.²³ Localization, on the other hand, requires explicitly putting more authority and autonomy into the hands of local governments and their residents.²⁴

Second, in contrast to democratizers, who think public participation, regardless of who is participating, is a net gain for the criminal

²² See, e.g., Bierschbach & Bibas, *supra* note 10, at 7 (proposing first that prosecutors' offices and police departments apply public notice-and-comment processes when adopting wholesale policies (a democratizer goal), and second that courts allow community members to voice their opinions in individual sentencing hearings in order to give more weight to their concerns (a localizer goal)).

²³ See, e.g., Bibas, *supra* note 6, at 1692 (suggesting including public input in clemency decisions); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 Nw. U. L. REV. (forthcoming 2019) (manuscript at 57–60), <https://www.ssrn.com/abstract=3333804> (suggesting that states and the federal government play a more active role in governing policing through legislative and administrative efforts).

²⁴ See Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 373 (2001) (“Localism depends on the creation and maintenance of smaller-than-state associations marked off in geographical space by a definable (and often, defensible) perimeter.”).

justice system, localizers especially seek to inject the voices of communities most impacted by the criminal justice system.²⁵ In their view, the “public” is more narrowly defined to include marginalized and politically powerless populations.²⁶ For instance, Professor Simonson specifically encourages “members of historically disempowered populations” to challenge institutional actors.²⁷ In an article proposing the creation of layperson bail juries, Professor Appleman explicitly incorporates representatives from minority communities, with the goal of reducing the disparity between those impacted by the criminal system and those who have a voice in how the system is run.²⁸ And Professor Friedman and Professor Ponomarenko have written in support of “opening rulemaking to local community participation” in part because it “will bring voices into the process that may have had no outlet thus far. . . . [T]hose who live in heavily-policed communities have strong views about police practices. . . . What they lack is a formal mechanism through which to make their voices heard.”²⁹

Finally, localizers’ reforms are generally targeted at making the system less punitive, something of less focus for democratizers.³⁰ Indeed, part of the reason why localizers want to give voice to minority communities is because they believe that the communities most impacted by the system will be more lenient towards criminal defendants.³¹ Professor Stuntz, for instance, uses history to illustrate that when the criminal justice system was more localized in the early

²⁵ See, e.g., Simonson, *Bail Nullification*, *supra* note 11, at 637 (“[W]hen a community bail fund with a stated mission . . . is the entity to post bail, and when the action is made by decisionmakers who are part of traditionally marginalized communities, that action constitutes a larger social and political statement.”); Simonson, *supra* note 6, at 1613 (“Indeed, it is from the voices of those who have been most harmed by the punitive nature of our criminal justice system that we can hear the most profound reimaginings of how the system might be truly responsive to local demands for justice and equality.”).

²⁶ Simonson, *supra* note 6, at 1611 (articulating a vision of public participation that explicitly focuses on increasing the voices of individuals from marginalized communities).

²⁷ Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 257 (2019).

²⁸ Appleman, *Justice in the Shadowlands*, *supra* note 11, at 1360–61.

²⁹ Friedman & Ponomarenko, *supra* note 10, at 1879–80.

³⁰ Democratizers seem to care most about increasing transparency and accountability, and democratic participation is encouraged because it makes the criminal justice system more responsive to the average citizen—not because it necessarily makes the system more just. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 917 (2006) (advocating for providing more information to the public about the criminal justice system in order to “improve [the] state of affairs by countering misinformation”).

³¹ See, e.g., William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008) (arguing that to reverse the current punitive nature of the criminal justice system, it is important to “place more power in the hands of residents of high-crime city neighborhoods”).

twentieth century, it was also more lenient and egalitarian.³² He concludes, “Make criminal justice more locally democratic, and justice will be both more moderate and more egalitarian.”³³ To be clear, this is not a consensus among all localizers—indeed, several acknowledge that localizing the system may not always favor less punitive outcomes.³⁴ Still, a general trend throughout the criminal justice localization literature is the hope that by localizing, the criminal justice system will become more just.³⁵

Therefore, while both democratizers and localizers believe that too many critical criminal justice decisions have been taken away from the public, the two groups divide over the level of government at which the decisions should be made, who exactly should be involved in criminal justice decisionmaking, and the substantive goals of their reform proposals. At the core of the localizers’ theory is the belief that placing decisionmaking power at the smallest unit of government will enable those most directly impacted to have a say in their criminal justice system and will often result in less punitive outcomes. The following Section further articulates the theoretical basis of criminal justice localization and develops a typology for localizer reforms.

B. *Defining the Localizers*

As a starting place for figuring out what, exactly, localizers support, it is important to understand the basic theory of localism. Broadly defined, localism is a preference for decentralized, small, local government structures, usually at the municipal level.³⁶ The driving force behind localism is that it encourages the “legal and political empowerment of local areas,”³⁷ ensures that local governments

³² See *id.* at 1982–97.

³³ *Id.* at 1974.

³⁴ See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 126 (2012) (“Making criminal justice more local and democratic may make it more egalitarian as well.”); Friedman & Ponomarenko, *supra* note 10, at 1863 (admitting that local policy outcomes may not expand civil liberties); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 209–10 (encouraging courts to defer to local democratic preferences, even when those preferences lead to more putative policies).

³⁵ See, e.g., Friedman & Ponomarenko, *supra* note 10, at 1879 (“The hope is that with public participation, controversial practices will be moved in a better direction.”).

³⁶ See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1988, 1992 (2000). There is also a new type of localism, called micro-localism, which encourages the decentralization of power to even smaller units, such as neighborhood councils or business improvement districts. See Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1334–35 (2014).

³⁷ Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 2 (2000).

have autonomy to decide matters of local concern,³⁸ and makes the interests of local residents the central policy consideration for decisionmakers.³⁹

Chief among the reasons provided in support of localism is the idea that it empowers citizens to participate in the political process.⁴⁰ According to Professor Wilson, “Localism purportedly increases citizen participation because the small size of local governments affords people opportunity for the exercise of genuine power and decision making. This, in turn, creates more of an incentive for citizens to participate in their own governance.”⁴¹ At the heart of localism, therefore, is its alleged capacity to tailor laws and policies to the needs and preferences of each community.⁴²

Turning to proponents of criminal justice localism, these localizers generally support returning the criminal justice system to the “village ideal”⁴³ by putting the power of the system into the hands of local community members. In their opinion, state and federal governments, as well as bureaucratic entities, are too far removed from localities to understand the specific and unique needs of each community:

To the suburban voters, state legislators, and state and federal appellate judges whose decisions shape policing and punishment on city streets, criminal justice policies are mostly political symbols or legal abstractions, not questions the answers to which define neighborhood life. Decisionmakers who neither reap the benefit of good decisions nor bear the cost of bad ones tend to make bad ones.⁴⁴

Localizers have put forth a variety of reforms tied to the concept of localism by encouraging the decentralization of criminal justice decisionmaking and the empowerment of local residents. A simple

³⁸ Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990).

³⁹ Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 630–31 (2011).

⁴⁰ See Cashin, *supra* note 36, at 1998–99 (“The *sine qua non* of localism is the idea that small government best facilitates political participation and civic engagement by the public.”); Schragger, *supra* note 24, at 382 (“Indeed, neighborhoods may be our most central and resilient sites for civic involvement, the best loci of community and fellowship that we have in an increasingly fractured metropolitan area and an increasingly globalized society.”).

⁴¹ Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 182 (2016).

⁴² See Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 375 (2018) (“To advocates, a chief virtue of localism lies in its capacity to tailor constitutional norms to local needs and preferences, resulting in a possible broadening of constitutional protection.”).

⁴³ BIBAS, *supra* note 34, at 117.

⁴⁴ Stuntz, *supra* note 31, at 1974.

taxonomy of their reforms illuminates the overall agenda of localizers.⁴⁵

1. *Local Representation*

Adhering to the most classic form of localism, the first group of localizers supports expanding the authority of local political bodies, including the legislative, executive, and judicial branches, in criminal justice decisionmaking. These scholars argue that local governments better reflect local needs and preferences and are generally less likely to create bad policies because the effects of those policies are internalized by the very same community making the policies.⁴⁶

For instance, Judge Bibas and Professor Bierschbach encourage the replication of California's "Realignment" initiative, formed in response to the Supreme Court's decision in *Brown v. Plata*, which ordered California to reduce its prison population because of severe overcrowding.⁴⁷ To do this, California transferred responsibility for individuals convicted of nonviolent low-level offenses from the state prison system to local jails in California's fifty-eight counties, giving counties great discretion to determine penal policies around their "local priorities, preferences, and needs."⁴⁸

Similarly, Professors Kahan and Meares are supportive of the creation of anti-vagrancy and loitering laws, mostly adopted at the local level (the vast majority of criminal laws are enacted at the state and federal levels).⁴⁹ Spotlighting a debate over the Chicago gang-loitering ordinance, the authors explain how dozens of ordinary citizens who testified about the proposed law, including individuals from minority communities who would be most affected by it, were, in large

⁴⁵ I build off of the work of two scholars in this taxonomy. First, Professor Logan identified a group of localizers he named "New Democratists," because they advocate for "localized, small-scale participatory governance in 'little republics,' [and] judicial deference to laws and policies resulting from local democratic processes." Logan, *supra* note 42, at 370–71. Second, Professor Crespo identified a strand of localization advocacy he called the "New Administrative Turn," because it urges localization through administrative rulemaking by local governments. See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2058–59 (2016).

⁴⁶ See, e.g., Kahan & Meares, *supra* note 9, at 1172–76 (supporting the passage of local loitering laws because they were supported by local residents, thus suggesting community willingness to internalize the resulting burden); see also Appleman, *supra* note 9, at 1531 (encouraging the creation of community courts because they "use the justice system to address local problems"); Slobogin, *supra* note 9, at 997 (arguing for legislative authorization of police surveillance by city or neighborhood councils because they are "truly representative").

⁴⁷ *Brown v. Plata*, 563 U.S. 493, 544–45 (2011); Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1503 (2016).

⁴⁸ Bierschbach & Bibas, *supra* note 47, at 1503–06.

⁴⁹ See Kahan & Meares, *supra* note 9, at 1177.

part, very supportive of its passage: From the authors' perspective, the ordinance was sound because local citizens, who "know first-hand just how bad crime is in the inner-city *and* how large a toll curfews, anti-loitering laws, housing searches, and the like exact on individual liberty," had been fundamental in the decision to enact it.⁵⁰ Professor Bierschbach also encourages local communities to craft their own substantive criminal laws, including developing stricter gun control laws,⁵¹ and Professor Ouziel supports the idea of local communities becoming more involved in the creation of the criminal code.⁵² Scholarship that falls under this category, therefore, views expanding the role of local government in criminal justice decisionmaking as a promising avenue for improving the criminal system.

2. *Local Administration*

The second group of localizers advocate for the development of rules and regulations generated by local government administrative units. Termed "New Administrativist[s]" by Professor Crespo,⁵³ these scholars argue that administrative rulemaking provides both a forum for interaction between the public and criminal justice professionals and a mechanism to increase transparency and accountability.⁵⁴

Take, for instance, Professors Friedman and Ponomarenko's recommendations in *Democratic Policing*.⁵⁵ Highlighting how policing has hardly any avenues for civic engagement, they suggest a slew of proposals to improve community-police communications, including developing partnerships between police departments and community groups to help set policies and public safety priorities and opening up police rulemaking to laypeople.⁵⁶ Similarly, Professor Bierschbach and Judge Bibas argue that prosecutors' offices, sentencing commissions, and police departments should borrow from the administrative

⁵⁰ *Id.* at 1184.

⁵¹ Bierschbach, *supra* note 6, at 1452.

⁵² See Ouziel, *supra* note 9, at 2319.

⁵³ Crespo, *supra* note 45, at 2058–59.

⁵⁴ See, e.g., Eric J. Miller, *Challenging Police Discretion*, 58 How. L.J. 521, 525 (2015) (encouraging giving "local communities . . . a more meaningful voice in evaluating and checking local police policy" through mechanisms like rulemaking and consultation); Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1771 (2014) [hereinafter Slobogin, *Panvasive Surveillance*] (arguing that law enforcement be subjected to "the rigors of administrative regulation"); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 149 (2016) (arguing that applying administrative law principles to the criminal justice system would "improve democratic accountability and counter the usual law enforcement orientation of legislative bodies by requiring public input prior to implementation").

⁵⁵ See Friedman & Ponomarenko, *supra* note 10, at 1879–81.

⁵⁶ See *id.*

law principle of notice-and-comment rulemaking when considering new policies for their institutions.⁵⁷ In Kitsap County, Washington, for example, the prosecutor's office asked citizens and representatives to provide input in developing the office's guidelines, which the authors concluded increased prosecutorial accountability.⁵⁸ While the policies could be non-binding, the authors argue, they would "still set benchmarks against which the public could evaluate police and prosecutors."⁵⁹ Thus, proponents of local administration urge the development of criminal justice rules and regulations generated by local administrative units and with the input of local citizens.

3. *Local Democratization*

The most recent wave of localizers expands the concept of criminal justice localization beyond existing administrative and governance structures by exploring forms of grassroots participation in criminal justice policymaking.⁶⁰ Proponents of this type of local democratization advocate for taking the decisionmaking power "outside of formal, state-driven processes" and giving it to "bottom-up communal actions."⁶¹ They tend to be more skeptical of both the law and existing legal institutions, and urge "critical resistance from below" to alter the criminal justice status quo.⁶²

Undoubtedly the most vocal scholar in this category is Professor Simonson, who has advocated for reforms she believes would empower communities to reshape the criminal justice system.⁶³ For instance, she suggests that local community groups should engage in courtwatching—a practice in which individuals watch and document

⁵⁷ See Bierschbach & Bibas, *supra* note 10, at 5.

⁵⁸ *Id.* at 40.

⁵⁹ *Id.* at 42.

⁶⁰ See, e.g., Simonson, *supra* note 6, at 1612 ("In this Essay I argue that bottom-up forms of participation are not only powerful and important, but also crucial for *democratic* criminal justice.").

⁶¹ Simonson, *Bail Nullification*, *supra* note 11, at 637.

⁶² See Simonson, *supra* note 6, at 1612; see also Simonson, *supra* note 27, at 256 (explaining the author's vision "of the importance of leaving the sphere of criminal law open to communal resistance and to agonistic participation—forms of direct participation that engage with powerful state institutions in a respectful but adversarial manner"); Raj Jayadev, "Participatory Defense" – *Transforming the Courts Through Family and Community Organizing*, ALBERT COBARRUBIAS JUST. PROJECT (Oct. 17, 2014), <https://acjusticeproject.org/2014/10/17/participatory-defense-transforming-the-courts-through-family-and-community-organizing-by-raj-jayadev> (explaining that the "participatory defense" movement requires a vision in which "the millions who face prison or jail and their communities, those waiting in line at court everyday . . . shift from being fodder of the criminal justice system, to those fated to bring the era of mass incarceration to its rightful end").

⁶³ See Simonson, *supra* note 6, at 1617.

local court proceedings and serve as “self-appointed watchdogs” who can relay what they learned “in their own words, on their own terms.”⁶⁴ Similarly, Professor Simonson encourages the creation of community bail funds, where a community chooses to pay for the pre-trial release of indigent defendants who meet the fund’s criteria.⁶⁵ Community bail funds, in her opinion, are opportunities for the community to inject their opinions into a judicial function that normally excludes public input.⁶⁶

Professor Appleman has also written extensively on injecting local community input into areas normally reserved for the executive and judicial branches through bail hearings, guilty pleas, and sentencing decisions. For example, she proposes incorporating the local community into pretrial detention hearings via “bail juries” that would sit for one to two weeks and help decide whether the defendant would be eligible for bail.⁶⁷ She has also suggested the creation of “plea juries,” which would function as semi-grand, semi-petit juries that would, “with some limited judicial oversight . . . accept or reject the plea[s].”⁶⁸

Proponents of local democratization advocate a vision of the criminal justice system that shifts power outside of government institutions and puts it *directly* into the local community.

What follows from localizers’ ideal criminal justice system, therefore, is not only a distinct strand of democratization but also a number of questions that have not been explored in the extant literature. These questions are introduced in Part II.

II

CONCEPTUALIZING CRIMINAL JUSTICE LOCALIZATION

This Part discusses three fundamental, threshold considerations that reformers focused on localizing the criminal justice system must grapple with before they can operationalize their movement. It demonstrates that localizing is not as simple as pushing decisionmaking down into the hands of the local community. Indeed, there are other factors localizers must address before advancing their reforms.

Section II.A explores the *geographical* question of what units of analysis localizers are referring to in their proposals. It also questions whether the traditional insider-outsider definition for local participation—residency—is the best way to determine who should be included

⁶⁴ *Id.* at 1617–18.

⁶⁵ Simonson, *Bail Nullification*, *supra* note 11, at 619.

⁶⁶ *Id.* at 622.

⁶⁷ Appleman, *Justice in the Shadowlands*, *supra* note 11, at 1366.

⁶⁸ Appleman, *The Plea Jury*, *supra* note 11, at 734.

in local criminal justice decisionmaking. Section II.B considers the *representational* issues associated with localizing, looking both at whether the requisite institutions are in place to push reforms forward and whether those institutions actually reflect the local community. Section II.C addresses the *spillover* effects of a more localized criminal justice system. These three issues are not the only ones that localizers will need to address, but they are the most pressing ones. Indeed, without understanding the geographical, representational, and spillover effects of their solutions, it is impossible to begin to imagine how they could be operationalized.

A. *Defining the Unit of Analysis*

What precisely is the “local community” to which localizers refer? For all the talk about localizing the criminal justice system, localizers rarely define either the geographic scope of, or who is to be included in, this community.⁶⁹ But how the community is defined is integral to carrying out localizers’ reforms. As Professor Schragger aptly states, “[c]ommunity describes an act of demarcation, involving the complex social, legal, political, and psychological activities of joining, leaving, belonging, exiling, excommunicating, embracing, defining—the whole range of social practices of inclusion and exclusion. The shape of localism is contingent on how the walls between [communities] are built and conceived.”⁷⁰

Let’s begin with the more easily answered question—what are the geographic boundaries of the local community? Determining the answer to this question is fundamental from both a practical and normative standpoint. Practically, it is impossible to start even thinking about how to implement these reforms unless localizers determine *where* they should be implemented. Normatively, the chosen geographical unit of analysis will have significant consequences for localizers’ overarching goal of ensuring minority voices are heard.⁷¹

Based on what localizers critique in their scholarship, we know what “local community” is not—it is not bureaucracies, state governments, or the federal government—but aside from that, it is unclear

⁶⁹ I did a search for the number of times some localizers use the terms “local” or “community” in their work: over 120 times in Stuntz’s piece, *supra* note 31; more than 160 times in *What’s Wrong with Sentencing Equality?* by Bierschbach and Bibas, *supra* note 47; and Simonson takes the cake with almost 500 mentions of these two words in *Bail Nullification*, *supra* note 11. None of these scholars provide a definition of what they mean by the terms.

⁷⁰ Schragger, *supra* note 24, at 404.

⁷¹ See Section II.B for details on how different levels of representation are better or worse suited for ensuring minority participation and deliberation.

whether localizers are referring to neighborhoods, precincts, cities, or counties.

The most precise definition of local, found in an extensive review of the literature, often references the structure of American communities before the mid-twentieth century.⁷² Judge Bibas begins his book, *The Machinery of Criminal Justice*, with a description of American life during the colonial era:

Communities in the early American colonies were close-knit. Everyone knew everyone else. Villages were small, so word-of-mouth spread quickly. They were also fairly homogenous. For the most part, people knew and agreed on what acts were right and wrong, which ones were permitted and forbidden. Consensus was especially strong in colonies like Massachusetts, which the Pilgrims and Puritans had founded for religious reasons—to establish a godly society.⁷³

This type of criminal justice system, Judge Bibas argues, resulted in more room for mercy. Executions for certain types of crimes were quite rare, executive clemency was used relatively often, and punishments for criminal offenses were often coupled with reintegration efforts for the wrongdoers.⁷⁴ Similarly, Professor Stuntz places his attention on the American justice system of the Gilded Age, and explains that, at least in some regions, local citizens controlled the system, and local governments played a much more active role in criminal adjudication than did state or national governments.⁷⁵ According to Professor Stuntz, poor individuals and immigrants in cities had much more of a say in how the system was administered, whereas small towns and the countryside dominated at the state and national levels.⁷⁶ This localized system of justice apparently also produced much better results—prison populations were small, punishment was distributed equally among the majority and minority classes, and there were relatively low levels of violent crime.⁷⁷

Both these descriptions seem to envision a community that is (1) close-knit, (2) run generally by laypeople, and specifically by those

⁷² See, e.g., Bibas, *supra* note 6, at 1680 (“Lay involvement and control were crucial to colonial criminal justice’s efficacy.”); Stuntz, *supra* note 31, at 1975 (“Outside the South, the Gilded Age—the era of *Lochner* and *laissez-faire*—saw the rise of the most egalitarian criminal justice in American history. That more egalitarian justice system was both more localized and more democratic than our own.”).

⁷³ BIBAS, *supra* note 34, at 2.

⁷⁴ See *id.* at 2–13.

⁷⁵ See STUNTZ, *supra* note 1, at 130–31.

⁷⁶ *Id.* at 132.

⁷⁷ See *id.* at 131–38 (discussing the low-crime, low-punishment, and low-discrimination justice system in the Northern cities during the Gilded Age).

most impacted by crime, and (3) perhaps relatively homogenous. An obvious problem with these criteria is that the vast majority of the United States no longer looks like the picture envisioned by these descriptions.⁷⁸ The closest contemporary parallel appears to be the neighborhood, which has some similarities to the small, clannish communities of the colonial and Gilded days.⁷⁹

In general, however, localizers rarely define the geographic unit that encapsulates the “local community.” Rather than grapple with this issue, localizers tend to ignore it. Professor Stuntz’s book, *The Collapse of American Criminal Justice*,⁸⁰ illustrates this problem. Though he argues throughout the book to restore criminal justice decisionmaking to local communities, he never tells us how authority should actually be given back to the “community.”⁸¹ As Professor Schulhofer notes in his review of the book, Stuntz’s criticism of decisions that took power away from communities would suggest that his proposals would “aim to restore each neighborhood’s authority to decide how its streets are patrolled, how arrests are made there, and how offenses committed there are prosecuted.”⁸² Yet, the only recommendation he makes that comes close is to encourage that jury rolls be drawn from neighborhoods.⁸³ His other solutions leave decision-making power where it currently rests—in the hands of police, district attorneys, and countywide or statewide elected officials.⁸⁴ There is, therefore, a clear disconnect between localizers’ vision of a localized criminal justice system and the local community to which they refer. Without a precise definition of what unit localizers are referring to when it comes to the “local community,” it is impossible to under-

⁷⁸ Even explicit attempts to make life “resemble the close-knit neighborhoods where some of our grandparents were raised” have utterly failed. Alex Marshall, *Putting Some ‘City’ Back in the Suburbs*, WASH. POST (Sept. 1, 1996), <https://www.washingtonpost.com/wp-srv/local/longterm/library/growth/solutions/nokent.htm> (describing how New Urbanism, a town-planning movement that proposed to recreate close-knit, homogenous communities, did not work).

⁷⁹ Professor Ellickson described a close-knit community as “a social network whose members have credible and reciprocal prospects for the application of power against one another and a good supply of information on past and present internal events.” ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 181 (1991). One can imagine that this definition is a somewhat realistic vision of what some communities look like in more rural areas of the United States.

⁸⁰ STUNTZ, *supra* note 1.

⁸¹ See Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1080–81 (2013) (explaining how Professor Stuntz’s conception of local varies from the neighborhood level to the city and county level).

⁸² *Id.* at 1080.

⁸³ *Id.*

⁸⁴ *Id.* at 1080–81.

stand how their proposals to localize the criminal justice system would work in practice.

Even trickier than determining geographic boundary is determining who is included in the chosen unit of analysis. Localizers, to the extent they discuss this question, seem to think that residency should determine who should get a voice in community decisions. For instance, Professor Simonson discusses how a public defender's duty to her client may not always represent the interests of the community in which the client lives, implying that the community she is referring to is one defined by residency.⁸⁵ And Christopher Slobogin advocates for policing surveillance decisions to be made by the city or neighborhood councils, again suggesting that people who live in the area should be the ones who get a say in criminal justice decisionmaking.⁸⁶

The emphasis these scholars place on residency requirements may be flawed from both a descriptive and theoretical perspective. First, basing inclusion on residency is no longer as justified as it used to be when people lived, worked, socialized, and shopped all within one area.⁸⁷ Many individuals, such as students, active military personnel, and business people who are sent abroad, no longer live at their place of residence.⁸⁸ Further, people today often don't live, work, and socialize in one community—they “conduct their lives across various political and social communities everyday, working in one, playing in another, going to school in another, sleeping in another, and voting in another.”⁸⁹ Even if they do, they may not feel the same type of connection to which localizers refer in their descriptions of the community.⁹⁰

Similarly related, if the decisionmaking process is limited only to residents of a certain jurisdiction, the voices of those most impacted by the criminal justice system in that neighborhood may not actually be heard. Consider an area that has a large number of minority individuals who commute to work there every day. Because of certain policing practices that may tend to target minority individuals more

⁸⁵ See Simonson, *supra* note 27, at 293 n.180.

⁸⁶ Slobogin, *supra* note 9, at 997.

⁸⁷ See Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 320 (1993) (analyzing decentralized metropolitan governance and advocating for the creation of regional legislatures to increase local participation in government).

⁸⁸ *Id.*

⁸⁹ Schragger, *supra* note 24, at 421.

⁹⁰ Frug, *supra* note 87, at 320 (“By locating people in their houses or apartments, local government law romanticizes the home as a haven in a heartless world.”).

often than non-minority individuals (stop-and-frisk, for instance),⁹¹ these workers are the individuals who primarily experience the criminal justice system in that neighborhood, yet they have no say in how they are policed or prosecuted there.

Second, assuming that a primary goal of criminal justice localization is to create a system responsive to the needs of the “local community,” there is a theoretical problem with establishing that community by zip code. How community is defined is a difficult and rarely addressed issue, but there appear to be three primary definitions of community.⁹² First, there is the “contractarian” account, in which members agree to be a part of the community—this account includes things like documentary clubs and housing associations because members can leave the community if they so choose.⁹³ Second, the “deep” account posits that communities are engendered through connectedness among their members and a sense of “linked fate.”⁹⁴ Finally, under a “dualist” account, “community does not just happen; it has to be fostered by appropriate policies in particular public environments.”⁹⁵ In contrast to the more defensive and neutral roles taken by citizens in the “contractarian” and “deep” theories, the “dualist” model requires citizens to take a more active role in nurturing its community through open and honest deliberations.⁹⁶

Residency is often at odds with these three theories of community. Consider incorporating localizers’ reforms at the smallest unit of analysis—the neighborhood. Even at this most localized level, residence does not imply a social contract, as is required by the “contractarian” theory, because exit costs may prohibit people from moving.⁹⁷ Using neighborhood residency as a proxy for a community also does not necessarily mean that its citizens are connected (at the very least, in any major or mid-sized city, individuals are not normally familiar with many of their neighbors), which is inconsistent with the “deep” account’s requirement of a linked fate between community

⁹¹ See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (holding that defendant police officers violated plaintiffs’ constitutional rights by subjecting them to New York City’s stop-and-frisk policy, which depended on express racial classifications).

⁹² See Schragger, *supra* note 24, at 387–403 (articulating the three major accounts of community).

⁹³ *Id.* at 387–93.

⁹⁴ *Id.* at 393–97.

⁹⁵ *Id.* at 401.

⁹⁶ *Id.*

⁹⁷ See, e.g., Derek Thompson, *The Go-Nowhere Generation Speaks: ‘I’d Love to Move, but I Can’t,’* ATLANTIC (Mar. 15, 2012), <https://www.theatlantic.com/business/archive/2012/03/the-go-nowhere-generation-speaks-id-love-to-move-but-i-cant/254579> (articulating the reasons why people think it is too costly to move).

members.⁹⁸ And finally, a residency-based notion of community contradicts the “dualist” theory because there is no guarantee that any reform implemented at the community level was a result of citizen initiative and discussion.⁹⁹

It follows then that if localizers care about the community’s voice being heard, and specifically about the voices of individuals from *marginalized* populations being heard, there may be better options for determining who gets a say in local decisionmaking than residency. Localizers, therefore, may want to reassess how exactly they define who is entitled voice in community decisionmaking.

B. Assessing Representational Inequities

Once decisions about the unit of analysis and who is entitled a voice in that unit are made, localizers must next confront representational concerns. Most obvious is the question of whether there are the requisite governance structures in place to carry out these reforms. Many neighborhoods (especially in big cities), for instance, do not have any political institutions governing them.¹⁰⁰ While there are examples of sub-local governance structures that have gained traction in recent years, their capacities do not map neatly with what would be needed to carry out many of the localizers’ reforms.¹⁰¹ For instance, business improvement districts (BIDs) are defined areas within a city, created by that city, to improve the business climate within the area.¹⁰² Because their purpose is strictly economic,¹⁰³ it would be difficult to see how they could be helpful in the criminal justice context.

⁹⁸ Schragger, *supra* note 24, at 416 (“Community implies an association of like minds, but the fact is that a residential neighborhood is generally an aggregate of strangers who happen to live next door to one another.”).

⁹⁹ See, e.g., Zusha Elinson & Joe Palazzolo, *Billionaire Soros Funds Local Prosecutor Races*, WALL ST. J. (Nov. 3, 2016, 1:28 PM), <http://www.wsj.com/articles/billionaire-soros-funds-local-prosecutor-races-1478194109> (detailing how donations from billionaire George Soros can be a deciding factor in county-level district attorney races).

¹⁰⁰ See Ponomarenko, *supra* note 23, at 57–60 (arguing that it might not be possible for small municipalities to develop the requisite governance structures needed to carry out administrative reforms in the policing realm). On the other hand, some cities, including Los Angeles, have created neighborhood councils with some success. See Erwin Chemerinsky & Sam Kleiner, *Federalism from the Neighborhood Up: Los Angeles’s Neighborhood Councils, Minority Representation, and Democratic Legitimacy*, 32 YALE L. & POL’Y REV. 569, 577–79 (2014) (describing how the city’s council system increased minority participation).

¹⁰¹ See, e.g., Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 509–21 (1997) (describing four types of sub-local structures that mainly help economic development).

¹⁰² *Id.* at 517.

¹⁰³ See *id.* at 519.

Even if there are the requisite governance structures, the more difficult question is whether these institutions adequately represent the voices of the community generally, and the voices of marginalized populations (which the community localizers most care about) specifically. Minority communities are likely not evenly represented at every level of government. It might be, for instance, that neighborhood councils are most responsive to the needs of minority citizens, and would provide more support for ensuring minority participation in developing sentencing policy.¹⁰⁴ On the other hand, Professor Schulhofer has argued, “[There is] no reason to assume that affluent voters and powerful economic interests are less likely to dominate politics in cities and counties than at the federal or state level.”¹⁰⁵ Though it is beyond the scope of this Note to fully disentangle why minority representation in criminal justice decisionmaking processes may fluctuate depending on the level of government, there appears to be two factors affecting this dynamic.

First, interest group power may vary across different levels of government. The most powerful voices in the criminal justice process are those who control the law enforcement apparatus, including police officers and prosecutors, and the weakest voices are often those most impacted by the system.¹⁰⁶ It might be that this inequity will fluctuate depending on the chosen local unit. Prosecutor lobbying groups and police unions tend to be more organized at the local level than their civil rights/civil liberties counterparts.¹⁰⁷ Many often have local chapters (at the city or district level), are organized into unions, and care deeply about criminal justice policies decided at the local level—after all, their jobs and salaries depend on it. Organizations like the American Civil Liberties Union or the Innocence Project, on the other hand, usually only have state or national presence and have very little presence at the local level.¹⁰⁸

Such a disparity in interest group power might decrease the ability for minority communities to effectively voice their opinions at

¹⁰⁴ See, e.g., Chemerinsky & Kleiner, *supra* note 100, at 577–81 (discussing how Los Angeles’s neighborhood councils encouraged minority participation).

¹⁰⁵ Schulhofer, *supra* note 81, at 1082.

¹⁰⁶ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 726–28 (2005) (evaluating how agencies could best administer sentencing).

¹⁰⁷ See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1091–92 (1993) (arguing that legislatures undervalue the rights of incarcerated and accused persons in the criminal process).

¹⁰⁸ See *Affiliates*, ACLU, <https://www.aclu.org/about/affiliates> (last visited Aug. 12, 2019); *Innocence Network Member Organizations*, THE INNOCENCE NETWORK, <https://innocencenetwork.org/members> (last visited Aug. 28, 2019).

the local level. In fact, according to one study, the average political activity of police unions at the city level was significantly higher than the average political activity of minority organizations.¹⁰⁹ On the other hand, there is evidence that because barriers to entry are lower in local politics than in national politics, it might be easier for interest groups who can protect minority participation to enter and influence local decisionmaking.¹¹⁰

And second, low turnout rates may impact how representative elected officials are of minority views. While Americans overall have a poor record of engagement in civic activities, voting rates decline rapidly the lower the level of government holding the elections.¹¹¹ It is also well known that black people and people of lower socioeconomic status participate at a lower rate than white people and people of higher socioeconomic status, respectively.¹¹² And there is some evidence to indicate that elected officials are more likely to be responsive to constituents who actually vote.¹¹³

On the one hand, these facts paint a picture in which local governance institutions—whether administrative units, community bail funds, or local elected officials—may not be highly representative of minority voices. On the other hand, political scientists have also shown that when individuals care about an issue, they become much more invested in the outcome, thereby significantly increasing participation and, perhaps, responsiveness of elected officials.¹¹⁴ Further, though still far behind the number of white elected officials, minority

¹⁰⁹ See Sarah F. Anzia, *City Policies, City Interests: An Alternative Theory of Interest Group Systems* 25 (Aug. 2015) (working paper), https://gspp.berkeley.edu/assets/uploads/research/pdf/Anzia_CityInterestGroups_Aug2015.pdf (advocating for a policy-focused approach to understanding which interest groups are active in politics).

¹¹⁰ See generally Jeffrey M. Berry, *Urban Interest Groups*, in *THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS* (L. Sandy Maisel & Jeffrey M. Berry eds., 2010) (finding low barriers to entry for interest groups at the local level).

¹¹¹ See Charles S. Bullock, III, *Turnout in Municipal Elections*, 9 *POL. STUD. REV.* 539, 539 (1990) (analyzing municipal elections and declining voter turnout). See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (surveying the decline of civic participation in America).

¹¹² Kay Lehman Schlozman et al., *Inequalities of Political Voice*, in *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* 34, 38 (Lawrence R. Jacobs & Theda Skocpol eds., 2007).

¹¹³ See Ryan D. Enos et al., *Increasing Inequality: The Effect of GOTV Mobilization on the Composition of the Electorate*, 76 *J. POL.* 273, 274 (2013) (describing how increased turnout has improved democratic outcomes).

¹¹⁴ See generally, e.g., ANDREA LOUISE CAMPBELL, *HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE* (2005) (detailing how senior citizens are quite involved in the Medicare and Social Security policymaking process, because these programs significantly impact their lives).

politicians are increasing in number, particularly at the local level.¹¹⁵ For instance, in Los Angeles, minorities make up over fifty percent of the City Council.¹¹⁶ While the presence of minority elected officials does not ensure substantive representation—that minority communities' preferences will be represented in government—there is some evidence to suggest that minority officials are more responsive to minority constituents.¹¹⁷

Put together, it is clear that localizing the criminal justice system does not automatically mean that minority communities' voices will be heard. There are structural and representational issues that may prevent effective minority participation. Localizers, therefore, should consider how to overcome these barriers to ensure full enfranchisement of minority communities.

C. *Controlling Spillover Effects*

If the second Amazon headquarters had been built in Long Island City (LIC),¹¹⁸ Queens, LIC residents would have been impacted in a variety of ways. LIC housing prices likely would have increased, the 7 train, which goes to LIC, would have become much more crowded, and traffic in the neighborhood would have likely grown. But LIC residents would not have been the only affected individuals. Indeed, the development of the Amazon headquarters would have had a rippling impact across all of the tri-state area. Traffic, pollution, and job growth would have changed because of Amazon's arrival, and everyone living or working in the nearby communities would have felt its presence in one way or another. This is a classic example of the spillover problem.

¹¹⁵ See Matthew J. Parlow, *Revolutions in Local Democracy? Neighborhood Councils and Broadening Inclusion in the Local Political Process*, 16 MICH. J. RACE & L. 81, 83 (2010) (“[M]inorities have made advances in their representation and influence in local government.”). Still, African Americans are greatly underrepresented at all levels of government. See Karen Shanton, *The Problem of African American Underrepresentation on Local Councils*, DEMOS (Oct. 30, 2014), <https://www.demos.org/publication/problem-african-american-underrepresentation-city-councils> (“Of the 438 municipalities in which a descriptively representative council would have at least one African American member, 175 have councils that underrepresent their African American populations . . .”).

¹¹⁶ See *Council Directory*, LOS ANGELES, <https://www.lacity.org/your-government/elected-officials/city-council/council-directory> (last visited Feb. 9, 2019).

¹¹⁷ See Kenneth Lowande et al., *Descriptive and Substantive Representation in Congress: Evidence from 80,000 Congressional Inquiries*, 63 AM. J. POL. SCI. 644 (2019) (finding that women, racial/ethnic minorities, and veterans are more likely to pursue policies that benefit those who share their identities).

¹¹⁸ Amazon ended up pulling out of their plan to develop a second headquarters in New York City. See J. David Goodman, *Amazon Pulls Out of Planned New York City Headquarters*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/nyregion/amazon-hq2-queens.html>.

The final question is how localizers' reforms should be implemented when each jurisdiction will inevitably be impacted by the reforms made by every other jurisdiction. Though spillover effects have been thoroughly discussed within several disciplines, there are three distinct issues in the criminal justice system that localizers should consider for each of their reforms. Indeed, "[t]he key here is that the geographically exclusive conception of local government obscures the effects of local decisions on 'outsiders' primarily by defining them as such."¹¹⁹ Localities have difficulty internalizing the costs of their decisionmaking: When it comes to public safety, the consequences of this inability are especially important.¹²⁰

First, and perhaps most importantly, the possibility for displacement of crime, especially violent crime, raises serious concerns. Suppose, for instance, Neighborhood X adopts a hot-spot policing system for its local precinct. Hot-spot policing is a technique in which police officers focus their efforts on small areas in which there is a significant clustering of crime.¹²¹ Though there is research that shows that hot spot policing reduces crime in the area, and has crime control benefits for the immediate surrounding areas, there is also empirical research that finds that hot spot policing simply displaces criminal activity from one place to another.¹²² If Neighborhood X only cares about public safety in its own neighborhood, how do we prevent localities from simply pushing crime into other areas for the others (i.e., the non-community members of Neighborhood X) to tackle? Local government scholars have grappled with this issue time and time again, arguing that if localities are able to act like independent sovereigns, they will evade responsibility for a host of problems, including *overall* public safety.¹²³

Second, managing the spillover effects may be particularly difficult in a localized criminal justice system. While certain aspects of the criminal justice system are local, many are not, and as Professor Stuntz notes, the American criminal justice system is more centralized

¹¹⁹ Schragger, *supra* note 24, at 422.

¹²⁰ *See id.* at 423–24 (detailing how local governments often do not confront spillover effects and listing some possible legal and structural solutions).

¹²¹ Anthony A. Braga et al., *The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta-Analysis*, 31 JUST. Q. 633, 634 (2014) (describing the theory behind hot-spot policing).

¹²² *See, e.g.*, Natalia Lazzati & Amilcar A. Menichini, *Hot Spot Policing: A Study of Place-Based Strategies for Crime Prevention*, 82 S. ECON. J. 893, 901 (2016) (modeling situations in which displacement will or will not occur).

¹²³ Indeed, this fear is quite old in American history, dating back to the Constitutional Era. *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1496 (1987) (discussing this phenomenon in the federal spending and environmental contexts).

than it might first appear.¹²⁴ This centralization is perhaps best evidenced by the way police actually police. They increasingly take advantage of mass surveillance techniques, including close-circuit television cameras, license plate readers, facial recognition technology, and social media monitoring software.¹²⁵ These technologies inevitably cross local jurisdictional boundaries and the data they collect is often shared among local, state, and national law enforcement authorities.¹²⁶

Consider the recent advent of drone use by law enforcement, which also raises problems for localizers' ideal criminal justice system. How would drone use work if it were regulated at the local level? Would a police department using drones to follow someone in hot pursuit have to discontinue the pursuit if the individual crossed the local boundary lines? Would they have to change the way they are flying the non-manned aircraft systems depending on the rules its neighbors implemented?

Finally, localizing criminal justice decisionmaking might make it more difficult to internalize the effects of legal standards. Some localizers advocate for allowing localities to adopt different constitutional norms. For instance, Professors Meares and Kahan support the construction of a "*new* criminal procedure,"¹²⁷ urging the judiciary to "connect the constitutional doctrine to the values and insights of the communities in which such policing is taking place."¹²⁸ Similarly, Professor Taslitz encourages variation of Fourth Amendment law based on geographic voice for fear of "silenc[ing] the political voice of poor urban racial minorities."¹²⁹ These localizers attempt to resolve the spillover effect issue by asking for judicial deference only when "the community has internalized the burden that a particular law

¹²⁴ STUNTZ, *supra* note 1, at 130.

¹²⁵ See, e.g., Slobogin, *Panvasive Surveillance*, *supra* note 54, at 1774 (arguing that we are turning into a society of "panvasive surveillance").

¹²⁶ See, e.g., Tanvi Misra, *Who's Tracking Your License Plate?*, CITYLAB (Dec. 6, 2018), <https://www.citylab.com/equity/2018/12/automated-license-plate-readers-privacy-data-security-police/576904> (noting that on average, each law enforcement agency shared the information it collected from license plate readers with 160 other jurisdictions).

¹²⁷ Kahan & Meares, *supra* note 9, at 1154 (emphasis added).

¹²⁸ *Id.* at 1184.

¹²⁹ Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 279–80 (2010); see also Andrew Dammann, Note, *Categorical and Vague Claims that Criminal Activity Is Afoot: Solving the High-Crime Area Dilemma Through Legislative Action*, 2 TEX. A&M L. REV. 559, 574 (2015) (arguing that city councils designate certain areas "high crime areas" per the Supreme Court's decision in *Wardlow*).

imposes on individual freedom. If it has, the court should presume that the law does not violate individual rights.”¹³⁰

This approach, however, misses a different type of spillover effect, one that cannot be as easily internalized by localities—the cross-jurisdictional leakage of legal standards. Professor Neuman discusses this type of spillover problem in his article, *Anomalous Zones*.¹³¹ Exploring territorially limited areas—including the Guantanamo Bay Naval Base and the formalized toleration of prostitution in legal red light districts—where governments have suspended fundamental norms because of alleged necessity, he ultimately concludes that such “anomalous zones” threaten “a broader subversion of fundamental norms.”¹³² That is, the government’s allowance or creation of zones that are governed by different constitutional norms can leak beyond the boundaries of the restricted territory and into the broader legal society.¹³³

The heightened spillover effects in the criminal justice system pose practical and ethical problems for localizers’ reforms. They are, therefore, vital considerations for the localization movement to grapple with before implementing any of their solutions.

III

LOCALIZATION IN OPERATION: AN ANALYSIS OF LOCALIZERS’ REFORMS THROUGH THREE CASE STUDIES

As Part II demonstrated, localizing the criminal justice system takes more thought and effort than simply calling for pushing decisionmaking down into the hands of the local community. Indeed, there are definitional issues, representational concerns, and spillover effects that must be addressed in order to implement each reform that the localizers propose. This Part puts some of these reforms to the test by answering the questions raised in Part II. First, Section III.A examines a local representation reform: allowing local governments to craft criminal codes. Section III.B analyzes how notice-and-comment rulemaking, a local administrative reform, would work in practice. Finally, Section III.C discusses an additional local democratization reform—the creation of bail juries. This Part illustrates that there are challenges to implementing localized reforms, some of which may be

¹³⁰ Meares & Kahan, *supra* note 34, at 209.

¹³¹ Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197 (1996).

¹³² *Id.* at 1201.

¹³³ *Id.* at 1224–28 (detailing the “subversive force of an anomalous zone” because it can “remove structures that ordinarily enforce or respect other values,” and can be used to justify further anomalies).

insurmountable, and it takes the first step toward exploring how both localizers and practitioners can begin figuring out how to make their reforms a reality.

A. *Local Criminal Codes*

Several localizers have supported the idea of allowing smaller-than-state governments to craft their own criminal codes. Professor Bierschbach, for instance, has argued that local governments could be “given real power to craft their own substantive criminal codes in response to community concerns—such as stricter gun control laws or more humane punishments for locally focused crimes—even if far-flung state legislators disagree.”¹³⁴ Similarly, Professor Ouziel supports the “more robust use of local laws” and the empowerment of localities to legislate urban crime issues.¹³⁵

Defining the unit of analysis for this type of reform is relatively easy, because outside of the state and federal government, municipalities (which include cities and large towns) are the only jurisdictions that have the authority to create substantive criminal ordinances.¹³⁶ Government structures like neighborhood councils do not have this type of power, and there are no county or regional government structures that are set up to draft criminal laws and enforce any violations. Of course, localizers may prefer the creation of even more localized criminal laws that could truly be responsive to the most impacted communities, but they would run into representational concerns, given the lack of adequate governance structures at the neighborhood level.

Under the “home rule” theory, local governments’ powers are limited to matters considered “local.”¹³⁷ Local governments are also restricted from enacting criminal laws when the matter of law is preempted by a state legislative provision, or the substance of the local law is in conflict with existing state law.¹³⁸ In general, however, municipalities have the ability to craft a wide variety of criminal laws,

¹³⁴ Bierschbach, *supra* note 6, at 1452.

¹³⁵ Ouziel, *supra* note 9, at 2323.

¹³⁶ See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1413 n.22 (2001) (defining local governments with the power to enact criminal laws).

¹³⁷ Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. REV. 177, 181 (explaining that municipalities are restricted from “acting on issues that may have impacts outside their borders or impede regulatory uniformity throughout the state”).

¹³⁸ Logan, *supra* note 136, at 1424 (explaining the doctrine of state preemption).

including pick-pocketing,¹³⁹ vandalism,¹⁴⁰ sleeping or camping in public places,¹⁴¹ and public drinking.¹⁴²

Determining who should have a voice in the laws enacted by the municipal government is a much trickier question. Currently, voice is limited by residency restrictions, but as noted in Section II.A, this might not be the most logical approach. Indeed, local government scholars have challenged the residency-based system as a both under- and over-inclusive mechanism for determining who should get a voice in community decisionmaking. In order to address this issue, Professor Frug has proposed a radical plan in which every individual is given five votes that they can cast in whatever local elections they feel are most important to them.¹⁴³ In such a system, “mayors, city council members, and neighborhood representatives . . . would have a constituency made up not only of residents but of workers, shoppers, property owners in neighboring jurisdictions, the homeless, and so forth.”¹⁴⁴ Professor Ford has also suggested that local elections be held on the same day and be open to all residents of a metropolitan area or even a state.¹⁴⁵ Voters, having a number of votes equal to the number of open seats, could cast ballots in any local election they wish.¹⁴⁶ These proposals, they argue, would allow individuals to vote in communities in which they most strongly affiliate, regardless of where their actual residency is located, and for issues for which they are most passionate.

Further, even if a residency-based restriction applies, it is not clear whose “voice” should matter most. Though many “cities” are small, with one half of urban Americans living in cities of fewer than 50,000 people,¹⁴⁷ even some of the tiniest municipalities have distinct communities with diverse ideological and policy preferences. This diversity is only exacerbated as a city grows in size.

Take, for instance, Chicago’s anti-loitering ordinance lauded by Professors Meares and Kahan as an example of local action

¹³⁹ See, e.g., *Kansas City v. Henderson*, 468 S.W.2d 48 (Mo. 1971).

¹⁴⁰ See, e.g., *State v. Lewis*, 439 S.W.2d 541 (Mo. Ct. App. 1969).

¹⁴¹ See, e.g., *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000).

¹⁴² See, e.g., *Goldstein v. City of Atlanta*, 234 S.E.2d 344 (Ga. Ct. App. 1977).

¹⁴³ Frug, *supra* note 87, at 329.

¹⁴⁴ *Id.*

¹⁴⁵ Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1909 (1994).

¹⁴⁶ *Id.* (“Hence voters would effectively draw their own jurisdictional boundaries, decide which local governments were most important to them, and allocate their votes accordingly.”).

¹⁴⁷ Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 348 (1990).

responding to the local community's needs.¹⁴⁸ They argued that the ordinance had “critical support of the leaders of the highest crime (and mostly minority) wards.”¹⁴⁹ But, as Professors Alschuler and Schulhofer note in their response, community groups actually did not support the ordinance across the board.¹⁵⁰ Given this, they asked, “[w]hich community counts—the minority community or the residents of the highest crime wards? And what procedures should be used to sort through the conflicting preferences held by members of either one of these groups?”¹⁵¹ Indeed, an obvious, though almost always overlooked, point is that the views of the black community, or any minority community, are nowhere near monolithic.¹⁵²

Finally, the spillover effects of this proposal could be relatively contained, as long as the criminal laws enacted only require the payment of a fine or short jail sentences.¹⁵³ If, on the other hand, the violation of criminal laws could result in prison sentences, there might be a serious monetary problem, given that prison systems are funded by the state.¹⁵⁴ Professor Ball has suggested reassessing the current fiscal structure of the prison system so that states could refuse to imprison people unconditionally; rather, the costs of incarceration would be borne by those who use them—local jurisdictions.¹⁵⁵ While this proposal internalizes some of the costs that localities currently disregard, and may make local governments think twice before creating draconian criminal laws that they eventually will have to pay for when violated, the effects of such a practice are unclear. For instance, if a city goes bankrupt, will it have to release dangerous offenders so that it can afford to pay for other services, like education and public safety?¹⁵⁶

¹⁴⁸ Meares & Kahan, *supra* note 34, at 199–200.

¹⁴⁹ *Id.* at 199.

¹⁵⁰ Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 217–20.

¹⁵¹ *Id.* at 241.

¹⁵² See generally JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017) (explaining that it is a common misperception that the black community is monolithic when it comes to criminal justice reforms).

¹⁵³ See W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 82 (2014) (explaining that jails are funded by municipalities primarily).

¹⁵⁴ *Id.*

¹⁵⁵ Though he does not define local, I understand him to be suggesting making counties pay for these costs. *Id.* at 109.

¹⁵⁶ See Schulhofer, *supra* note 81, at 1082 n.183 (raising these concerns in response to the cost-sharing proposal).

B. Notice-and-Comment Rulemaking

Another popular reform promoted by localizers is the development of notice-and-comment rulemaking for local law enforcement. Borrowing from the administrative law context, Professors Bibas and Bierschbach, for instance, envision a “notice-and-comment sentencing” procedure, in which a “range of actors and decisions that influence sentencing . . . [such as] prosecutors’ decisions to charge and plea bargain, sentencing commissions’ guidelines, and possibly police decisions to arrest” would be subject to public input.¹⁵⁷

Again, defining the unit of analysis is straightforward—prosecutor’s offices and police departments would be the obvious units for implementing procedures that invite public input. Practically speaking, however, it might be difficult for many law enforcement offices to do this due to both a lack of financial resources and to a lack of understanding about how to implement and carry out notice-and-comment processes. Further, for the public to weigh in, there must first be rules and policies for the public to consider. And as Professor Ponomarenko notes, at least in the policing context, “the primary obstacle is that policing agencies have few incentives to adopt guidelines and rules, and it may not be possible to adopt a workable standard that requires them to do so.”¹⁵⁸

Another option would be to create “regulatory intermediaries” that would function as a conduit between the public and police and prosecutor agencies.¹⁵⁹ The obvious problem with this proposal is that these structures do not currently exist, and it would be a large undertaking to create intermediaries for the 18,000 police departments and thousands of prosecutors’ offices across the country.¹⁶⁰ Instead, regulatory bodies could be created at the regional or county level, which would both ease the practical and financial problems and would likely reduce any potential spillover concerns that follow from hyper-localized administrative units.

Perhaps the biggest obstacle facing local administrative reforms is ensuring that minority communities’ voices are actually heard in these processes. Of course, for localizers, any increase in public participa-

¹⁵⁷ Bierschbach & Bibas, *supra* note 10, at 5.

¹⁵⁸ Ponomarenko, *supra* note 23, at 42.

¹⁵⁹ See, e.g., *id.* at 50–56 (laying out a framework for the creation of regulatory intermediaries that would oversee police departments).

¹⁶⁰ See DUREN BANKS ET AL., BUREAU OF JUSTICE STATISTICS, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 3 (2016), <https://www.bjs.gov/content/pub/pdf/nslead.pdf> (noting that over 18,000 agencies report statistics to the FBI); *Prosecutors Offices*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=27> (last visited May 8, 2019) (noting that there are over 2300 prosecutor offices in the United States).

tion would be an improvement to the status quo. And perhaps by formalizing these processes, they might result in a more balanced representation of interests.¹⁶¹ But, as Professor Simonson notes, while reforms like notice-and-comment rulemaking increase public participation in the criminal justice system overall and often explicitly ask for input by members of marginalized communities, they do not remedy *internal exclusion*, a “third layer of democratic exclusion.”¹⁶² Internal exclusion refers to situations where individuals are invited to formally participate but their participation yields no power.¹⁶³ Ensuring that members of marginalized groups participate in the first instance, and that their opinions are actually taken into account in these administrative processes, is a major dilemma that localizers must confront.

C. *Bail Juries*

The final type of reform considered is the creation of bail juries, which Professor Appleman has proposed would “allow[] a cross-section of the community to make decisions on questions of ‘dangerousness’” of a pre-trial detainee.¹⁶⁴ She argues that a bail jury would be able to make decisions “informed by their own knowledge of the community”¹⁶⁵ and would allow marginalized communities to “determine whether one of their own is ‘safe’ enough to release pretrial.”¹⁶⁶

While Professor Appleman suggests that these bail juries would be relatively easy to create, because jurors could be drawn from the county jury rolls,¹⁶⁷ there is an immediate disconnect between her discussion of the benefits of bail juries and her unit of analysis. Indeed, counties often encompass huge populations and numerous “communi-

¹⁶¹ See, e.g., POLICING PROJECT, NYU SCHOOL OF LAW, REPORT TO THE LOS ANGELES COMMISSION SUMMARIZING PUBLIC FEEDBACK ON LAPD VIDEO RELEASE POLICIES 7–8, <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59cc0d5459cc682dca066575/1506544982924/Report+to+the+Los+Angeles+Police+Commission+Summarizing+Public+Feedback+on+LAPD+Video+Release+Policies.pdf> (reporting the demographics of those who responded to a survey on body-worn camera use by the LAPD); POLICING PROJECT, NYU SCHOOL OF LAW, REPORT TO THE NYPD SUMMARIZING PUBLIC FEEDBACK ON ITS PROPOSED BODY-WORN CAMERA POLICY 7–8 (2017), <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59ce7edfb0786914ba448d82/1506705121578/Report+to+the+NYPD+Summarizing+Public+Feedback+on+BWC+Policy.pdf> (same for the NYPD survey on video release policies).

¹⁶² Simonson, *supra* note 6, at 1611.

¹⁶³ IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 55 (2000).

¹⁶⁴ Appleman, *Justice in the Shadowlands*, *supra* note 11, at 1363–66 (describing the framework of a bail jury).

¹⁶⁵ *Id.* at 1365.

¹⁶⁶ *Id.* at 1364.

¹⁶⁷ *Id.* at 1366.

ties.”¹⁶⁸ A jury comprised of county residents, therefore, would not serve as a good proxy for “community knowledge.” Further, in jurisdictions with large felony conviction rates, like Bridgeport and Pilsen (both located in Chicago’s west side),¹⁶⁹ the pool of applicable jurors for bail juries could be quite small and their pre-trial detention preferences may not adequately reflect the preferences of the marginalized community overall.¹⁷⁰

Finally, the potential spillover problems could be enormous. Assume, for example, that Neighborhood X is particularly scared of crime and violence (maybe they have heard that there was an uptick in violent crime in the United States), so their bail juries tend to recommend pre-trial detention. Pre-trial detention significantly increases the probability of conviction, mostly through an increase in guilty pleas, which then increases the number of individuals serving their sentences in prison.¹⁷¹ Because prison systems are funded at the state level,¹⁷² the decisions made by Neighborhood X’s bail juries would not only impact their community but would also extend across the entire state.

CONCLUSION

The recent movement among some criminal justice scholars to democratize the criminal justice system is a worthwhile effort. Overly punitive practices—like significant bail for minor offenses or severely harsh sentences for every criminal offense imaginable—that waste tax dollars and destroy entire communities need to be addressed, and perhaps the democratization of the criminal justice system is the solution.

This Note serves two purposes in response to the democratizers’ movement. First, it demonstrates why the reforms advocated by democratizers should not be conflated with the reforms suggested by localizers, both in motivation and in substance. Though democratizers

¹⁶⁸ See Schulhofer, *supra* note 81, at 1081 (making the same point regarding Stuntz’s solutions).

¹⁶⁹ See, e.g., Carol Marin & Don Moseley, *Tracking Illinois’ Released Prison Inmate Population*, NBC CHI. (May 7, 2014, 10:16 PM), <https://www.nbcchicago.com/investigations/Released-Inmates-Face-Roadblocks-Adjusting-to-Society-258402151.html> (describing neighborhood concentration patterns of Illinois’ released inmates).

¹⁷⁰ Many people refer to high-incarceration neighborhoods as “million dollar blocks,” or single city blocks that have so many incarcerated residents that the state is spending over one million dollars a year to imprison them. See, e.g., John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 *FORDHAM URB. L.J.* 571, 572 (2018).

¹⁷¹ See Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 *AM. ECON. REV.* 201, 234 (2018) (finding that individuals released pretrial are much less likely to be convicted of any offense because they are less likely to plead guilty).

¹⁷² See *supra* notes 153–56 and accompanying text.

and localizers are often lumped under the same label, they are actually encouraging distinct approaches to reforming the criminal justice system. Second, it highlights how these differences raise unique questions for localizers' suggestions, including how they define "local community," who has a voice in this community, how to ensure minority voices are actually heard, and how to handle inevitable spillover problems. Until these questions are answered and the consequences of each reform are fully considered, it is premature to implement any of the localizers' reforms.